

THE UNIVERSITY OF HULL

A COMPARATIVE STUDY ON ANTI-DUMPING LAWS

IN THE EU AND KOREA

IN THE CONTEXT OF INTERNATIONAL RULES

BEING A THESIS SUBMITTED FOR THE DEGREE OF

Ph.D

IN THE UNIVERSITY OF HULL

by

Cheong-Ghi Chun, B.A.(Yeong-Nam),
Master of Law(Korea), LL.M(Hull)

January, 1996

ABSTRACT

Despite the fact that the Commission of the European Community has made Korea one of three main target countries of anti-dumping measures, because Korea is pressing to export more of the electronics products which the Community is struggling to protect, study of the Community Anti-dumping Law in Korea has barely begun. Therefore, in this thesis, the measures that may be imposed by Community authorities with respect to trade with countries not members of the European Community, especially with Korea, under the Community Anti-dumping Regulation, in the context of the GATT Anti-dumping system are explained and analysed.

With regard to the Community's anti-dumping rules, protectionist bias in their application is examined, in particular the determination of normal value and export price, constructed normal value and constructed export price, the comparison of normal value and export price, the calculation of dumping margin, and the determination of injury, and proposals are made as to the extent to which the Community anti-dumping rules need to be revised to diminish the bias in their range that explicitly favours Community producers and a finding of dumping, in the context of the GATT rules.

With regard to the Korean Anti-dumping rules, on the other hand, they are introduced, generally. Anti-dumping measures in Korea have not been applied properly in favour of Korean producers, mainly because of the lack of transparency and institutional inertia. Therefore, enactment of a special Act governing anti-dumping complaints, modelled on a unitary system rather than a bifurcated system, should be considered for the transparent and speedy investigations. Institutional inertia must be

rectified, i.e., more precise definition is required in some terminologies, and provisions on cumulation and anti-circumvention should have been prescribed before their application.

Through a comparative study of the anti-dumping laws in the Community and Korea, it becomes clear that various aspects of the technical methodology applied by the authorities in anti-dumping determinations have a tendency to make findings of dumping largely automatic and inevitable. Therefore, it must always be borne in mind that anti-dumping measures can be imposed only where dumping and resulting injury is actually established, not artificially.

This study has looked at anti-dumping laws in the Community and Korea comparatively, in the context of the GATT Anti-dumping rules. The Community refers to GATT and the Code in the preamble of its anti-dumping regulation, which has no binding effect in Court, and adopts the regulation in accordance with existing international obligations, in particular those arising from Article VI of the GATT and from the GATT Anti-dumping Code. However, this does not ensure an interpretation in conformity with GATT rules and its spirit, because the wording of the GATT anti-dumping rules taken literally is very ambiguous and can be interpreted very differently. Therefore, a comparative study with the Community's anti-dumping rules and its practice as a legislative model should be very helpful, in order to improve the current Korean anti-dumping system, because the GATT anti-dumping rules can play a very limited role only as a guideline.

TABLE OF CONTENTS

Detailed Table of Contents	i
Table of Cases	viii
Table of Determinations	x
Table of Documents	xiii
Table of Abbreviations	xvii

Chapter 1: INTRODUCTION

1. BACKGROUND	1
2. AIMS AND SCOPE OF THE STUDY	3

Chapter 2: THE COMMON COMMERCIAL POLICY AND ITS IMPACTS ON TRADE RELATIONS WITH KOREA

I. COMMON COMMERCIAL POLICY

1. INTRODUCTION	12
2. TRADE DECISION-MAKING PROCESS IN GENERAL	14
2.1. Background	14
2.2. The Institutional Process	19
3. MAJOR TRADE INSTRUMENTS OF THE EC	20
3.1. Tariff Measures	21
3.2. Quantitative Restriction Through National Quotas and Free Circulation	22
3.2.1. Protective Quotas and Free Circulation	24
3.2.2. The Commission and Article 115 Measures	25
3.3. Measures Against Unfair Trade	27

II. KOREAN TRADE POLICY IN ITS EUROPEAN DIMENSION

1. INTRODUCTION	30
2. KOREAN TRADE POLICY	39

2.1. Diversification in Trade	39
2.2. Liberalisation	40
2.3. Localisation	43
2.4. Korean Direct Investment in Foreign Countries	47
2.5. Korean Trade Policy in the Next Decade	51
3. Legislation Related to Trade in Korea	53
3.1. General	53
3.2. Antidumping Law in Korea	57

**Chapter 3:
PROCEDURAL ASPECTS OF THE ANTIDUMPING LAWS**

1. INTRODUCTION	59
2. ROLE OF THE COMMUNITY AUTHORITIES	60
2.1. The Commission	62
2.2. The Council	64
2.3. The Member States : The Advisory Committee	65
3. ANTIDUMPING PROCEDURES IN THE EC	67
3.1. Complaint	68
3.2. Initiation of Proceedings	70
3.3. Role of the Commission in Investigation	71
3.3.1. Searching for Information and Requesting Co-operation	71
3.3.2. Executing Investigation	75
3.4. Legal Status of Interested Parties	76
3.4.1. The Right to Inspect Information	77
3.4.2. The Right to be Informed of Essential Facts and Considerations	79
3.4.3. The Right to be Heard	81
3.5. Termination of Proceedings Without Measures	82
4. ANTIDUMPING PROCEDURE IN KOREA	84
4.1. Antidumping Procedure	84
4.2. Confidentiality of Materials Concerned and Legal Status of Interested Persons	86
4.3. Termination of Proceedings Without Measures	88

**Chapter 4:
SUBSTANTIVE ELEMENTS OF THE ANTIDUMPING
SYSTEM - DETERMINATION OF DUMPING**

1. INTRODUCTION	89
2. NORMAL VALUE	90
2.1. Domestic Market Price	90
2.2. Alternative to Domestic Market Price	92
2.3. Constructed Value	94
2.3.1. Reasonableness of Domestic SGA Expenses	95
2.3.2. Reasonableness of the Use of Other Producer's Domestic Expenses	97
2.3.3. The Determination of Profit	100
2.3.4. Compatibility of the EC Antidumping Law with GATT Rules	102
2.4. Sales at a Loss	103
3. EXPORT PRICE	104
3.1. Background	104
3.2. Alternatives to Export Price	106
3.2.1. Categories of Customers	106
3.2.2. Constructed Export Price	107
4. COMPARISON	109
4.1. Levels of Trade and Quantities	113
4.2. Import Charges and Indirect Taxes	114
4.3. Conditions and Terms of Sales	115
4.4. Insignificant Adjustments	117
5. DUMPING MARGIN	118
6. DETERMINATION OF DUMPING IN KOREA	120
6.1. Normal Price	120
6.2. Dumping Price	122
6.3. Comparison of Normal Price and Dumping Price	123

**Chapter 5:
SUBSTANTIVE ELEMENTS OF THE ANTIDUMPING
LAWS - DETERMINATION OF INJURY**

I. DETERMINATION OF INJURY

1. INTRODUCTION	125
-----------------------	-----

2. LIKE PRODUCTS AND COMMERCIAL REALITY	126
3. COMMUNITY INDUSTRY	130
3.1. Related Parties	131
3.2. Regional Industry and Product Lines	134
4. MATERIAL INJURY	136
4.1. Actual Material Injury	137
4.1.1. The Volume of Dumped Imports	138
4.1.2. The Prices of Dumped Imports	140
4.1.3. The Consequent Impact on the Industry Concerned	142
4.2. Threat of Material Injury	143
4.3. Material Retardation	145
5. CAUSATION	145
5.1. Margin Analysis	148
5.1.1. Introduction	148
5.1.2. Calculation of Injury Margin	149
5.1.3. Recent Developments in the Calculation of Injury Margin	153
5.2. Cumulation	156
5.3. Technical Dumping	159
6. DETERMINATION OF INJURY IN KOREA	161
6.1. Similar Goods and Domestic Industry	161
6.2. Material Injury etc.	164
6.3. Causation	166
II. THE INTERESTS OF THE COMMUNITY	
1. INTRODUCTION	169
2. THE CONCEPT OF COMMUNITY INTERESTS	170
3. THE APPLICATION OF INTERESTS REQUIREMENT	172
4. CONFLICT OF INTERESTS	173
 Chapter 6: ANTI-CIRCUMVENTION SYSTEMS	
1. BACKGROUND AND SITUATION IN KOREA	176
1.1. Foreign Investment in the EC	180
1.2. Input and Sub-Assembly Circumvention	181
1.3. New Generation Productions	183

2. THE EC'S APPROACH TOWARD CIRCUMVENTION	184
2.1. Background	184
2.2. Conditions for Anti-Circumvention Duty	187
2.2.1. The Assembly Carried Out by Related Party to an Exporter Subject to Antidumping Duties	187
2.2.2. Starting Up or Substantial Increase	189
2.2.3. More Than 60% of the Value of Parts Originating in the Exporting Country	191
2.2.4. Other Relevant Circumstances	194
3. PRODUCTION IN THIRD COUNTRIES	196
3.1. Introduction	196
3.2. Third Country Production	196
3.3. Origin in the Context of Antidumping Law	198
4. COMPATIBILITY OF THE EC ANTI-CIRCUMVENTION RULES WITH GATT PROVISIONS	201
4.1. General Development	201
4.2. The Imposition of Anti-circumvention Duties	202
4.2.1. Are Anti-circumvention Duties Customs Duties?	202
4.2.2. If not, could the Anti-circumvention Duties be justifiable under Article XX(d)?	204
4.3. Acceptance of Undertakings	206
4.4. Article 13(10) itself	207
5. CONCLUSION	208

**Chapter 7:
RELIEF AND REVIEW SYSTEMS**

I. RELIEF

1. UNDERTAKINGS	210
1.1. The Procedural Aspects of an Undertaking	211
1.2. Withdrawal or Violation of Undertaking	214
1.3. Merit and Demerit of Undertaking	214
2. IMPOSITION OF ANTIDUMPING DUTIES	216
2.1. General Principles	216
2.1.1. Injury Margins	216
2.1.2. Retroactive Duties	217
2.1.3. Prospective Exporters	218
2.2. Provisional Duties	219
2.3. Definitive Duties	222

2.4. Anti-absorption Duties	224
2.4.1. Conditions for Bearing the Antidumping Duty	225
2.4.2. Retroactivity of the Additional Duty	227
2.4.3. Anti-absorption and Anti-circumvention Duties	228
3. RELIEF SYSTEMS IN KOREA	229
3.1. Undertakings	229
3.2. Imposition of Antidumping Duties	231
3.2.1. Provisional Antidumping Duties	231
3.2.2. Definitive Antidumping Duties	232

II. REVIEW SYSTEMS

1. INTRODUCTION	233
2. ADMINISTRATIVE REVIEW (ARTICLE 14 REVIEW)	234
2.1. Conditions for the Initiation of an Administrative Review	235
3. SUNSET REVIEW (ARTICLE 15 REVIEW)	238
4. JUDICIAL REVIEW	239
4.1. Introduction	239
4.2. The Problems of Admissibility	241
4.2.1. The Requirement of Decision	242
4.2.2. Direct Concern	244
4.2.3. Individual Concern	244
4.2.4. Remedies before the National Courts	251
4.2.5. Conclusion	253
4.3. Court of First Instance (CFI)	255
5. REIMBURSEMENT OF EXCESSIVE DUTY COLLECTED	258
5.1. Introduction	258
5.2. Procedure for the Refund of Duties	259
5.2.1. Standing and Addressee of Application	259
5.2.2. Content of Application	260
5.2.3. Refund and Administrative Review	260
5.3. Substantial Commission Policy on Refunds	262
5.3.1. The Commission and Actual Dumping Margin	262
5.3.2. Associated Importer (Double Counting Problem)	264
5.4. Conclusion	267
6. REVIEW SYSTEMS IN KOREA	270

**Chapter 8:
FUTURE PROSPECTS FOR ANTIDUMPING LAWS**

1. INTRODUCTION	273
2. FUTURE PROSPECTS FOR THE DECISION-MAKING PROCEDURE OF THE COMMUNITY	276
3. CHANGES AT MULTILATERAL LEVEL	279
3.1. Changes in the Procedure	281
3.2. Changes in Substantive Rules	286
3.2.1. The Determination of Dumping	286
3.2.2. The Determination of Injury	291

Chapter 9: CONCLUSION	293
--	------------

BIBLIOGRAPHY

A. BOOKS	306
B. ARTICLES	310
C. MISCELLANEOUS.....	333

ANNEXES

ANNEX I: EXCERPTS FROM THE GENERAL AGREEMENT ON TARIFFS AND TRADE	1
ANNEX II: AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994	3
ANNEX III: COUNCIL REGULATION (EC) NO 3283/94, ON PROTECTION AGAINST DUMPED IMPORTS FROM COUNTRIES NOT MEMBERS OF THE EUROPEAN COMMUNITY, OJ (1994) L 349/1	28
ANNEX IV: EXCERPTS FROM THE KOREAN CUSTOMS ACT	49
ANNEX V: EXCERPTS FROM THE ENFORCEMENT DECREE OF THE KOREAN CUSTOMS ACT	51

TABLE OF CASES

- Cases 16 & 17/62, *Producteurs de Fruits v Council*, [1962] ECR 471.
Case 25/62, *Plaumann v Commission*, [1963] ECR 95.
Cases 56 & 58/64, *Consten and Grundig v Commission*, [1964] ECR 299.
Case 6/68, *Zuckerfabrik Watenstedt v Council*, [1968] ECR 409.
Cases 10 & 18/68, *Eridania v Council*, [1969] ECR 459.
Case 148/73, *Raymond Louwage v Commission*, [1974] ECR 81.
Opinion 1/75, on the compatibility with the EEC Treaty of a draft 'understanding on a local cost standard', [1975] ECR 1355.
Case 41/76, *Donckerwolcke v Procureur de la Republique de Lille*, [1976] ECR 1921.
Case 113/77, *NTN Toyo Bearing Co. v Council*, [1979] ECR 1185.
Case 118/77, *Import Standard Office v Council*, [1979] ECR 1277.
Case 119/77, *Nippon Seiko K.K. v Council*, [1979] ECR 1303.
Case 120/77, *Koyo Seiko Co. v Council*, [1979] ECR 1337.
Case 121/77, *Nachi Fujikoshi Corp. v Council*, [1979] ECR 1363.
Case 138/79, *Roquette Freres v Council*, [1980] ECR 3333.
Case 139/79, *Maizena GmbH v Council*, [1980] ECR 3393.
Cases 239 and 257/82, *Allied Corporation v Commission*, [1982] ECR 1005.
Case 307/81, *Alusuisse v Council and Commission*, [1982] ECR 3463.
Case 135/81, *Groupement des Agenes des Voyages v Council*, [1982] ECR 3799.
Case 191/82, *Fediol v Commission*, [1983] ECR 2913.
Case 218/82, *Commission v Council*, [1983] ECR 4063.
Cases 239 & 275/82, *Allied Corporation v Commission*, [1984] 1005.
Case 264/82, *Timex v Council & Commission*, [1985] ECR 849.
Case 53/83, *Allied Corporation v Council*, [1985] ECR 1621.
Case 288/83, *Commission v Ireland*, [1985] ECR 1761.
Case 59/84, *Tezi BV v Commission*, [1986] ECR 887 (Tezi I).
Case 242/84, *Tezi BV v Minister for Economic Affairs*, [1986] ECR 933 (Tezi II).
Case 312/84, *Continentalen Produkten Gesellschaft v Commission*, [1987] ECR 841.
Case 240/84, *NTN Toyo Bearing and Others v Council*, [1987] ECR 1809.
Case 255/84, *Nachi Fujikoshi v Council*, [1987] ECR 1861.
Case 256/84, *Koyo Seiko v Council*, [1987] ECR 1899.
Case 258/84, *Nippon Seiko v Council*, [1987] ECR 1923.
Case 260/84, *Minebea Co. Ltd. v Council*, [1987] ECR 1975.
Case 42/84, *Remia v Commission*, [1987] ECR 2545.
Case 279/86, *Sermes v Commission*, [1987] ECR 3109.
Case 301/86, *Frimodt Pedersen v Commission*, [1987] ECR 3123.
Case 314/85, *Foto-Frost v Hauptzollamt Lubeck-Ost*, [1987] ECR 4199.
Case 205/87, *Nuova Ceam v Commission*, [1987] ECR 4427.
Case 229/86, *Brother Industries Ltd and Others v Commission*, [1987] ECR 3757.
Case 51/87, *Commission v Council*, [1988] ECR 5459

Case 56/85, Brother Industries Ltd v Commission, [1988] ECR 5655.
Case 250/85, Brother Industries Ltd v Council, [1988] ECR 5683.
Cases 277 and 300/85, Cannon Inc. and Others v Council,
[1988] ECR 5731.
Case 301/85, Sharp Corporation v Council, [1988] ECR 5813.
Cases 260/85 and 106/86, Toyo Electronic Company Ltd. v Council,
[1988] ECR 5855.
Cases 237/85 and 107/86, Silver Seiko v Council, [1988] ECR 5927.
Cases 294/86 & 77/87, Technointorg v Commission and Council,
[1988] ECR 6077.
Case C-26/88, Brother Int'l GmbH v Hauptzollamt Giessen,
[1989] ECR 4253.
Cases C-133 and C-156/87, Nashua Cooperation v Commission & Council,
[1990] ECR I-719.
Case C-156/87, Gestetner Holdings v Council & Commission,
[1990] ECR I-781.
Case C-152/88, Sofrimpoet v Commission, [1990] ECR I-2477.
Cases C-304/86 & C-185/87, Enital v Council and Commission,
[1990] ECR I-2939.
Cases C-305/86 & C-160/87, Neotype Techmashexport v Council and
Commission, [1990] ECR I-2945.
Cases C-320/86 & C-188/87, Stanko France v Commission and Council,
[1990] ECR I-3013.
Case C-157/87, Electroimpex v Council, [1990] ECR I-3201.
Cases C-143/88 & C-92/89, Zuckerfabrik Suderdithmarschen v Haupt-
zollamt and Paderbone, [1991] ECR I-415.
Case C-69/89, Nakajima All Precision v Council, [1991] ECR I-2069.
Case C-358/89, Extramet v Council, [1991] ECR I-2501.
Case C-315/90, Gimelec and Others v Commission, [1991] I-5589.
Case C-105/90, Goldstar Co. Ltd v Council, [1992] ECR I-677.
Case 188/88, NMB GmbH and Others v Commission, [1992] ECR I-1689.
Case C-171/87, Canon Inc. v Council, [1992] ECR I-1237.
Case C-172/87, Mita Industrial Co. Ltd v Council, [1992] ECR I-1301.
Case C-174/87, Ricoh Co. Ltd v Council, [1992] ECR I-1335.
Case C-175/87, Matsushita Electric Co. Ltd v Council,
[1992] ECR I-1409.
Case C-176/87, Konishiroku Photo Industry Co. Ltd v Council,
[1992] ECR I-1493.
Case C-177/87, Sanyo Electric Co. Ltd v Council, [1992] ECR I-1535.
Case C-178/87, Minolta Camera Co. Ltd v Council, [1992] ECR I-1577.
Case C-179/87, Sharp Corporation v Council, [1992] ECR I-1635.

TABLE OF DETERMINATIONS

A. Determinations Decided by Community Authorities

Studded-welded Link Chain, Com.Dec.80/783/EEC, OJ (1980) L 231/10.
Sodium Carbonate, Coun.Reg.(EEC) No 407/80, OJ (1980) L 48/1.
Mounted Piezo-Electric Quartz Crystal Units, Com.Dec.80/603/EEC, OJ (1980) L 162/62.
Chemical Fertiliser, Coun.Reg.(EEC) No 349/81, OJ (1981) L 39/4.
Styrenes Monomer, Coun.Reg.(EEC) No 1570/81, OJ (1981) L 132/17.
Textured Polyester Fabrics, OJ (1981) L 133/17.
Louvre Doors, Com.Dec.81/336/EEC, OJ (1981) L 135/33.
Orthoxylen, Com.Reg.(EEC) No 1411/81, OJ (1981) L 141/29.
Cotton Yarn, Com.Reg.(EEC) No 3453/81, OJ (1981) L 347/19.
Monochrome Portable TV Sets, Com.Dec.81/1012/EEC, OJ (1981) L 364/49.
Fibre Building Board, Com.Reg.(EEC) No 1633/82, OJ (1982) L 181/19.
Sodium Carbonate, Com.Reg.(EEC) No 3018/82, OJ (1982) L 317/5.
Natural Magnesite, Com.Reg.(EEC) No 3531/82, OJ (1982) L 371/25.
Codeine, Coun.Dec.83/9/EEC, OJ (1983) L 16/30.
Iron or Steel Coil for Re-coiling, Com.Dec. 83/218/EEC, OJ (1983) L 210/5.
Caravans for Camping, Com.Dec.83/428/EEC, OJ (1983) L 240/12.
American Xanthan Gum, Com.Dec.83/493/EEC, OJ (1983) L 268/60.
Unwrought Nickel, Coun.Reg.(EEC) No 2907/83, OJ (1983) L 286/29.
Saccharin and its Salts, Com.Dec.83/626/EEC, OJ (1983) L 352/49.
Louvre Doors, Com.Reg.(EEC) No 88/84, OJ (1984) L 11/13.
Aluminium, Com.Dec.84/103/EEC, OJ (1984) L 57/19.
Synthetic Fibre Hand-knitting, Com.Reg.(EEC) No /84, OJ (1984) No 67/60.
Ballbearings, Com.Reg.(EEC) No 744/84, OJ (1984) L 79/8.
Electronic Scales, Com.Reg.(EEC) No 757/84, OJ (1984) L 80/9.
Propan-I-ol, Com.Dec.84/229/EEC, OJ (1984) L 106/55.
Ballbearings, Coun.Reg.(EEC) No 2089/84, OJ (1984) L 193/1.
Acrylic Fibres, Coun.Reg.(EEC) No 2275/84, OJ (1984) L 209/1.
Sodium Carbonate, Coun.Reg.(EEC) No 3337/84, OJ (1984) L 311/26.
Shovels, Com.Dec.84/632/EEC, OJ (1984) L 330/28.
Electronic Typewriters, Com.Reg.(EEC) No 3643/84, OJ (1984) L 335/43.
Cotton Yarn, Com.Dec.85/19/EEC, OJ (1985) L 11/34.
Certain Ballbearings, Com.Dec.85/158/EEC, OJ (1985) L 59/30.
Hydraulic Excavators, Com.Reg.(EEC) No 595/85, OJ (1985) L 68/13.
Plasterboard, Com.Dec.85/209/EEC, OJ (1985) L 89/65.
Electronic Typewriters, Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1.
Hydraulic Excavators, Com.Reg.(EEC) No 1877/85, OJ (1985) L 176/1.
Glycin, Coun.Reg.(EEC) No 2322/85, OJ (1985) L 218/1.
Certain Categories of Glass, Com.Dec.86/36/EEC, OJ (1986) L 51/73.
Dead-burned Natural Magnetic, Coun.Dec.86/59/EEC, OJ (1986) L 70/41.

Electronic Scales, Coun.Reg.(EEC) No 1058/86, OJ (1986) L 97/1.
Electronic Typewriters, Com.Dec.86/193/EEC, OJ (1986) L 140/52.
Housed Bearing Unit, Com.Reg.(EEC) No 2516/86, OJ (1986) L 221/16.
Plain Paper Photocopiers, Com.Reg.(EEC) No 2640/86,
OJ (1986) L 239/5.
Standardised Multiphase Electronic Motors, Com.Reg.(EEC) No 3019/86,
OJ (1986) L 280/68.
Deep Freezers, Coun.Reg.(EEC) No 29/87, OJ (1987) L 6/1.
Housed Bearing Units, Coun.Reg.(EEC) No 374/87, OJ (1987) L 35/37.
Plain Paper Photocopiers, Coun.Reg.(EEC) No 535/87,
OJ (1987) L 54/12.
Outboard Motors, Coun.Reg.(EEC) No 1305/87, OJ (1987) L 124/1.
Mechanical Wrist-watches, Coun.Reg.(EEC) No 2347/87,
OJ (1987) L 213/5.
Urea, Coun.Reg.(EEC) No 3339/87, OJ (1987) L 317/1.
Ballbearings, Coun.Reg.(EEC) No 3528/87, OJ (1987) L 336/1.
Kraftliner, Com.Dec.88/125/EEC, OJ (1988) L 62/39.
Oxalic Acid, Com.Reg.(EEC) No 699/88, OJ (1988) L 72/12.
Electronic Scales, Coun.Reg.(EEC) No 1021/88, OJ (1988) L 101/1.
Electronic Typewriters, Coun.Reg.(EEC) No 1022/88,
OJ (1988) L 101/4.
Hydraulic Excavators, Com.Dec.88/225/EEC, OJ (1988) L 101/24.
Certain Electronic Typewriters, Coun.Reg.(EEC) No 1329/88,
OJ (1988) L 123/31.
Serial-Impact Dot-Matrix, Com.Reg.(EEC) No 1418/88,
OJ (1988) L 130/12.
Oxalic Acid, Com.Dec.88/353/EEC, OJ (1988) L 160/63.
Daisy Wheel Printers, Com.Reg.(EEC) No 2005/88, OJ (1988) L 177/1.
Certain Electronic Typewriters, Coun.Reg.(EEC) No 2076/88,
OJ (1988) L 183/1.
Oxalic Acid, Coun.Reg.(EEC) No 2089/88, OJ (1988) L 184/1.
Certain Electronic Typewriters, Coun.Reg.(EEC) No 2329/88,
OJ (1988) L 203/1.
Copper Sulphate, Com.Reg.(EEC) No 2386/88, OJ (1988) L 205/68.
Video Cassette Recorders, Com.Reg.(EEC) No 2684/88,
OJ (1988) L 240/5.
Plain Paper Photocopiers, Coun.Reg.(EEC) No 3205/88,
OJ (1988) L 284/36.
Serial-Impact Dot-matrix Printers, Coun.Reg.(EEC) No 3651/88,
OJ (1988) L 317/33.
Polyester Yarn, Coun.Reg.(EEC) No 3905/88, OJ (1988) L 347/10.
Synthetic Fibres of Polyester, Coun.Reg.(EEC) No 3946/88,
OJ (1988) L 348/49.
Video Cassette Tapes, Com.Reg.(EEC) No 4062/88, OJ (1988) L 356/47.
Daisy Wheel Printers, Coun.Reg.(EEC) No 34/89, OJ (1989) L 5/23.
Ballbearings, Com.Dec.89/57/EEC, OJ (1989) L 25/90.
Wheeled Loaders, Com.Dec. 89/111/EEC, OJ (1989) L 39/35.
Video Cassette Recorders, Coun.Reg.(EEC) No 501/89,
OJ (1989) L 57/55.
Video Cassettes and Video Tape Reels, Coun.Reg.(EEC) No 1768/89,
OJ (1989) L 174/1.
Hardboard, Com.Dec.89/377/EEC, OJ (1989) L 176/51.
Compact Disc Players, Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5.

Dot-Matrix Printers, Coun.Reg.(EEC) No 3042/89, OJ (1989) L 291/52.
Polyester Yarn, Com.Dec.89/560/EEC, OJ (1989) L 305/31.
Small Screen Colour TV Receivers, Com.Reg.(EEC) No 3232/89,
OJ (1989) L 314/1.
Dot-Matrix Printers, Com.Dec.89/596/EEC, OJ (1989) L 340/25.
Compact Disc Players, Coun.Reg.(EEC) No 112/90, OJ (1990) L 13/21.
Silicon Metal, Com.Reg.(EEC) No 720/90, OJ (1990) L 80/9.
DRAMs, Coun.Reg.(EEC) No 2112/90, OJ (1990) L 193/1.
Audio Tapes in Cassettes, Com.Reg.(EEC) No 3262/90,
OJ (1990) L 313/5.
Video Tapes in Cassettes, Coun.Reg.(EEC) No 3522/90,
OJ (1990) L 343/1.
Potassium Permanganate, Com.Dec.91/24/EEC, OJ (1991) L 14/56.
EPROMs, Coun.Reg.(EEC) No 577/91, OJ (1991) L 65/1.
Audio Tapes in Cassettes, Coun.Reg.(EEC) No 1251/91,
OJ (1991) L 119/35.
Pocket Flint Lighters, Com.Reg.(EEC) No 1386/91, OJ (1991) L 133/20.
Aspartame, Coun.Reg.(EEC) No 1391/91, OJ (1991) L 134/1.
Thin Polyester Film, Com.Dec.91/303/EEC, OJ (1991) L 151/89.
SCTVs, Coun.Reg.(EEC) No 2900/91, OJ (1991) L 275/24.
Pocket Flint Lighters, Coun.Reg.(EEC) No 3433/91, OJ (1991) L 326/1.
Audio Tapes on Reels, Com.Dec.92/62/EEC, OJ (1992) L 28/25.
Radio-broadcast Receivers, Com.Reg.(EEC) No 313/92,
OJ (1992) L 34/8.
Thermal Paper, Coun.Reg.(EEC) No 729/92, OJ (1992) L 81/1.
Cotton Yarn, Com.Dec.92/179/EEC, OJ (1992) L 82/70
Video Cassette Tapes, Coun.Reg.(EEC) No 1292/92, OJ (1992) L 139/1.
Silicon Metal, Coun.Reg.(EEC) No 1607/92, OJ (1992) L 170/1.
Video Cassette Tapes, Coun.Reg.(EEC) No 1769/92, OJ (1992) L 182/6.
Synthetic Fibres of Polyesters, Com.Reg.(EEC) No 1956/92,
OJ (1992) L 197/25.
Radio-broadcast Receivers, Coun.Reg.(EEC) No 2306/92,
OJ (1992) L 222/8.
Haematite Pig Iron, Com.Dec.423/ECSC, OJ (1992) L 230/30.
DRAMs, Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13.
Monosodium Glutamate, Com.Dec.92/493/EEC, OJ (1992) L 299/40.
Video Cassette Tapes, Coun.Reg.(EEC) No 3498/92, OJ (1992) L 354/1.
Ferro-silicon, Coun.Reg.(EEC) No 3642/92, OJ (1992) L 369/1.
DRAMs, Coun.Reg.(EEC) No 611/93, OJ (1993) L 66/1.
REWS, OJ (1993) L 104/4.
REWS, Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20.
Manganese Steel Wearparts, Com.Dec.93/318/EEC, OJ (1993) L 122/46.
Seamless Steel Tubes, Com.Dec.93/526/EEC, OJ (1993) L 252/39.
REWS, Coun.Reg.(EEC) No 2887/93, OJ (1993) L 263/1.
LAECs, Com.Reg.(EC) No 371/94, OJ (1994) L 48/10.
Microdisks, Com.Reg.(EC) No 534/94, OJ (1994) L 68/5.
LAECs, Coun.Reg.(EC) No 1384/94, OJ (1994) L 152/1.
Microdisks, Coun.Reg.(EC) No 2199/94, OJ (1994) L 236/1.
Colour TV Receivers, Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50.
Colour TV Receivers, Coun.Reg.(EC) No 710/95, OJ (1995) L 73/3.

B. Determinations Decided by Korean Authorities

Polyacetal Resin, FMA No 1991-61, OG (1991) No 11276.
Phosphoric Acid, FMA No 1993-6, OG (1993) No 12350/21.
Ballbearings, FMA No 1993-10, OG (1993) No 12379/136.
Soda Ash, FMA No 1993-75, OG (1993) No 12606/182.
Printing Plate, FMA No 1993-76, OG (1993) No 12606/190.
Sodium Hydroxide, FMA No 1994-35, OG (1994) No 12713/55.
Glass Fiber, FMA No 1994-57, OG (1994) No 12786/26.
Zinc Ingots, FMA No 1995-43, OG (1995) No 13058/73.

TABLE OF DOCUMENTS

Treaty establishing European Economic Community as amended by the Treaty amending Certain Financial Provisions, the Single European Act, the Merger Treaty, the Greenland Treaty, and the Acts of Accession.

Act concerning the accession of the Kingdom of Spain and the Portuguese Republic and the adjustment to the Treaties, OJ (1985) L 302/1
Single European Act, OJ (1987) L 169/1.

Treaty on European Union, Council of the European Communities, Office for Official Publications of the European Communities, 1992.
GATT, General Agreement on Tariffs and Trade, BISD, Ninth Supp. Geneva, February, 1961.

GATT, Agreement on Implementation of Article VI of the GATT, BISD, 26th Supp, 171, 1980.

The GATT Panel Report, EEC-Japan; Regulation on imports of parts and components, 1990.

Coun.Reg.(EEC) No 459/68, *on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community*, OJ (1968) L 93/1.

Coun.Reg.(EEC) No 950/68, *the common customs tariff*, OJ (1968) L 171/1.

Coun.Reg.(EEC) No 802/68, *on the Common Definition of the Concept of the Origin of Goods*, OJ (1968) L 148/1.

Coun.Reg.(EEC) No 2603/69, *on common rules for exports*, OJ (1969) L 324/25.

Coun.Reg.(EEC) No 109/70, *on common rules for imports from state-trading countries*, OJ (1970) L 19/1.

Coun.Reg.(EEC) No 1025/75, *on common rules for imports*, OJ (1975) L 124/6.

Coun.Reg.(EEC) No 1224/80, *on the valuation of goods for customs purposes*, OJ (1980) L 134/1.

Coun.Reg.(EEC) No 288/82, *on common rules for imports*, OJ (1982) L 35/1.

Coun.Reg.(EEC) No 2176/84, on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ (1984) L 201/1.

Coun.Reg.(EEC) No 2641/84, on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJ (1984) L 252/1.

Coun.Reg.(EEC) No 1243/86, amending Regulation (EEC) No 288/82, (EEC) No 1765/82 and (EEC) No 1766/82 on common rules for imports, OJ (1986) L 113/1.

Coun.Reg.(EEC) No 1761/87 amending Regulation (EEC) No 2176/84 on protection against dumped or subsidised imports from countries not members of the European Economic Community, OJ (1987) L 167/9.

Coun.Dec.87/373/EEC, laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ (1987) L 197/33.

Coun.Reg.(EEC) No 2423/88, on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ (1988) L 209/1.

Coun.Reg.(EC) No 521/94, on the introduction of time-limits for investigation procedures carried out against dumped or subsidised imports from countries not members of the European Economic Community and amending Regulation (EEC) No 2423/88, OJ (1994) L 66/7.

Coun.Reg.(EC) No 522/94, on the streamlining of decision-making procedures for certain Community instruments of commercial defence and amending Regulation (EEC) No 2641/84 and No 2423/88, OJ (1994) L 66/10.

Coun.Reg.(EC) No 518/94, on common rules for imports, OJ (1994) L 67/1.

Coun.Reg.(EC) No 3283/94, on protection against dumped imports from countries not members of the European Community, OJ (1994) L 349/1.

Coun.Dec.74/393/EEC, establishing a consultation procedure for cooperation agreements between Member States and third countries, OJ (1974) L 208/23.

Coun.Dec.80/271/EEC, Council Decision concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations, OJ (1980) L 71/1.

Coun.Dec.87/229/EEC authorising extension or tacit renewal of certain trade agreements concluded between Member States and third countries, OJ (1987) L 95/25.

Coun. and Com., Decision for the Council and Commission of 25 February 1991 on the conclusion of the Fourth ACP-EEC convention, OJ (1991) L 229/1.

Coun.Dec.94/149/ECSC, EC amending Dec.93/350/Euratom, ECSC, EEC amending Dec.88/591/ECSC, EEC, EURATOM, establishing a Court of First Instance, OJ (1994) L 66/1.

Com.Reg.(EEC) No 37/70, concerning the determination of the spare parts, OJ (1970) L 7/6.

Com.Reg.(EEC) No 1836/78, concerning the determination of the origin of ball, roller or needle roller bearings, OJ (1978) L 210/49.

Com.Dec.80/47/EEC, on surveillance and protective measures which member states may be authorised to take in respect of imports of certain products originating in third countries and put into free circulation in another member state, OJ (1980) L 16/14.

Com.Reg.(EEC) No 235/86, introducing Community surveillance of imports of video tape records originating in South Korea, OJ (1986) L 29/12.

Com.Dec.87/229/EEC, authorising extension or tacit renewal of certain trade agreements concluded between Member States and third countries, OJ (1987) L 95/25.

Com.Dec.87/433/EEC, on surveillance and protective measures which Member States may be authorised to take pursuant to Article 115 of the EEC Treaty, OJ (1987) L 238/26.

Com.Dec.2424/88/ECSC, on protection against dumped or subsidised imports from countries not members of the European Economic Community, OJ (1988) L 209/18.

Com.Reg.(EEC) No 288/89, concerning the determination of integrated circuits, OJ (1989) L 33/23.

Com.Reg.(EEC) No 2886/89, the common customs tariff, OJ (1989) L 282/1.

Com.Dec.88/519/Euratom, ECSC, EEC, establishing a Court of First Instance of European Communities, OJ (1989) L 319/1.

Commission, Notice concerning the reimbursement of antidumping duties, 86/c 266/02, OJ (1986) C 266/2.

Commission, Notice regarding the antidumping proceeding concerning synthetic fibres of polyesters, OJ (1989) No C 119/15.

Commission, 1st Annual Report of the Commission of the European Communities on the Community's Anti-dumping and Anti-subsidy Activities COM(83) 519 final.

Commission, 2nd Annual Report of the Commission of the European Communities to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities, COM(84) 721 final.

Commission, Completing the Internal Market: White Paper, COM(85) 310 final.

Commission, 4th Annual Report of the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities, COM(87) 178 final.

Commission, 5th Annual Report of the Commission on the Community's Anti-dumping and Anti-subsidy Activities, COM(88) 92 final.

Commission, Proposal for a Coun.Reg.(EEC) amending Regulation (EEC) No 2176/84 on protection against dumped or subsidised imports from countries not members of the European Economic Community, COM(88) 112 final.

Commission, 6th Annual Report of the Commission on the Community's Anti-dumping and Anti-subsidy Activities, COM(89) 106 final.

Commission, 7th Annual Report of the Commission on the Community's Anti-dumping and Anti-subsidy Activities, COM(90) 229 final.

Commission, Industrial policy in an open and competitive environment, COM(90) 556 final.

Commission, 8th Annual Report of the Commission on the Community's Anti-dumping and Anti-subsidy Activities, SEC(91) 92 final.

Commission, *The European Electronic and Information Technology Industry: State of Play, Issues at Stake and Proposals for Action: Communication from the Commission to the Council and to the European Parliament*, SEC(91) 565 final.

Commission, *9th Annual Report of the Commission on the Community's Anti-dumping and Anti-subsidy Activities* (1990), SEC(91) 974 final.

Commission, *10th Annual Report from the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities* (1991), SEC(92) 716 final.

Commission, *Proposal for a Council Decision on the conclusion of the agreement on the European Economic Area*, SEC(92) 814 final.

Commission, *Proposal concerns definitive measures of commercial defence which were provided under Council Regulation (EEC) No 2423/88, Council Regulation (EEC) No 2641/84, and Council Regulation (EEC) No 288/82*, SEC(92) 1079 final.

Commission, *11th Annual Report from the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities* (1992), COM(93) 516 final.

Commission, *Proposal for a Council Regulation on the introduction of time-limits for investigations carried out under the Community instruments of commercial defence and modification of the relevant Council Regulations*, COM.(93) 541 final.

Commission, *Proposal for a Council Decision concerning the conclusion of the result of the Uruguay Round of Multilateral Trade Negotiation (1986-94)*, COM(94) 143 final.

Commission, *12th Annual Report from the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities* (1993), COM(95) 16 final.

Commission, *13th Annual Report From the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities* (1994), COM(95) 309 final.

Commission, *24th General Report on the Activities of the European Communities-1990*.

Commission, *27th General Report on the Activities of the European Communities-1993*.

Commission, *General Report on the Activities of the European Union-1994*.

European Parliament, *Resolution on the Community's antidumping activities*, OJ (1982) No C 11/37.

Table of Abbreviations

Am.Soc'y.Int'l L.Procs.	American Society of International Law Proceedings
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South-East Asian Nations
BISD	GATT, Basic Instruments and Selected Documents
Can.US.L.J.	Canada - United States Law Journal
Case W.Res.J.Int'l L.	Case Western Reserve Journal of International Law
CCT	Common Customs Tariff
CML Rev.	Common Market Law Review
Columbia J.Transnat'l L.	Columbia Journal of Transnational Law
Com.Reg.	Commission Regulation
Com.Dec.	Commission Decision
COREPER	Committee of Permanent Representatives
Cornell L.Rev.	Cornell Law Review
Coun.Reg.	Council Regulation
EC	European Community
EC Bull.	Bulletin of the European Communities
ECR	Reports of the European Court of Justice
ECLR	European Competition Law Review
ECSC	European Community for Coal and Steel
EDCA	Enforcement Decree of Customs Act
EEC	European Economic Community
EFTA	European Free Trade Area
EFTA	European Free Trade Association
e.g.	<i>exempli gratia</i>
EJIL	European Journal of International Law
EL Rev.	European Law Review
EP	European Parliament
Euratom	European Atomic Energy Community
Euro.Acc.	European Access
FMA	Finance Ministry Announcement
Ford.Corp.L.Inst.	Fordham Corporate Law Institute
Fordham Int'l L.J.	Fordham International Law Journal
FTTA	Foreign Trade Transaction Act
GATT	General Agreement on Tariffs and Trade
Geo.Wash.J.Int'l L. & Eco.	George Washington Journal of International Law and Economics
Havard L.Rev.	Havard Law Review
IBRD	International Bank for Reconstruction and Development
ICLQ	International and Comparative Law Quarterly
i.e.	<i>id est</i>
IMF	International Monetary Fund
Int'l Bus.Law.	International Business Lawyer
Int'l Law.	International Lawyer

ITO	International Trade Organisation
JCMS	Journal of Common Market Studies
J.Int'l Affairs	Journal of International Affairs
J. Int'l Man.	Journal of International Management
JWT(L)	Journal of World Trade (Law)
KDI	Korea Development Institute
KFTA	Korea Foreign Trade Association
KIEP	Korea Institute for International Economic Policy
KTC	Korea Trade Commission
Law & Pol'y Int'l Bus.	Law and Policy in International Business
LIEI	Legal Issues of European Integration
LQR	Law Quarterly Review
Mich.J.Int'l L.	Michigan Journal of International Law
Mich.L.Rev.	Michigan Law Review
MLR	Modern Law Review
MOF	Ministry of Finance
NAFTA	North American Free Trade Agreement
Notre Dame L.Rev.	Notre Dame Law Review
Nw.J.Int'l L.	North West Journal of International Law
N.W.J.Int'l L. & Bus.	North West Journal of International Law and Business
OCA	Office of Customs Administration
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal
OG	Official Gazette
Pacific Rev.	Pacific Review
Rutgers Com.&Tech.L.J.	Rutgers Computers and Technology Law Journal
SEA	Single European Act
Solic.J.	Solicitor Journal
Suffolk Transnat'l L.J.	Suffolk Transnational Law Journal
Sw.Rev.Int'l Comp.Law.	Swiss Review of International Comparative Law
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation
YEL	Yearbook of European Law

Chapter 1 : INTRODUCTION

1. BACKGROUND

Despite the fact that the Commission of the European Community has made Korea one of three main target countries of anti-dumping measures, study of the Community Anti-dumping Law in Korea has barely begun.¹ At the end of 1994, the Community had 151 anti-dumping measures in force, of which 124 were original measures and 27 were measures maintained after a review in accordance with Article 15 of the Community Anti-dumping Regulation;² 128 were in the form of duties and 23 in the form of undertakings. Of these 151 measures in force, 26 measures, 16 measures, and 12 measures were imposed against China, Japan and Korea respectively.³ The sectors most involved in the investigations initiated by the Commission over the period 1988 to 1993 were those of chemicals and electronics. The largest number of investigations took place in the electronics sector in 1992 and 1993.⁴ From this viewpoint, there are obvious conflicts of interest between Korea and the Community because Korea is ranked as the world's 6th largest electronics producer and, in the consumer electronics field, it is

1. The three main target countries are Korea, Japan and China. See, Commission, *10th annual report from the Commission to the European Parliament on the Community's anti-dumping and anti-subsidy activities*, SEC(92) 716 final, p7, (hereinafter referred to as "*10th anti-dumping report*").

2. Coun.Reg.(EEC) No 2423/88, *on protection against dumped or subsidized imports from countries not members of the European Economic Community*, OJ (1988) L 209/1 (hereinafter referred to as the "*Community Antidumping Regulation*").

3. Commission, *13th anti-dumping report* COM(95) 309 final, p1, p80-87. These 151 anti-dumping measures were imposed upon 64 products, of which 12 were from Korea.

4. The number of investigations in the electronics sector in 1992 was 13 and in 1993, 7. Furthermore, the biggest trade values are generated by high-technology, high added value products, such as electronics. See, Commission, *12th anti-dumping report*, COM(95) 16 final, p7.

third only to Japan and USA.⁵ As a result, most of the Community anti-dumping measures against Korean products were concentrated on electronics.⁶ Given that the volume of trade between Korea and the European Community has been increasing⁷ and that in 1994 electronics occupied about 25% of Korea's whole exports,⁸ anti-dumping proceedings are more frequently resorted to by the Community,⁹ because Korea is pressing to export more of the products which the Community is struggling to protect through anti-dumping measures. Therefore, the object of this thesis is to

5. M.C. McDermott, "The Internationalisation of the South Korean and Taiwanese Electronics Industries: The European Dimension", *Europe and the Multinationals*, 1992, New Horizon in Int'l Business, p213. Seoul Shinmun, Aug. 14, 1995, p17. Korea has emerged as the world's second largest maker in such areas as VCR, facsimile, colour TV picture tubes and computer monitors. It ranks third in colour TVs, integrated circuits, including memory chips, and recording media such as tapes and discs. See, Korea Newsreview, May 20, 1995, p26. The Community has imposed antidumping duties against all the above-mentioned products except facsimile and computer monitors.

6. *SCTVs*, Coun.Reg.(EEC) No 2900/91, OJ (1991) L 275/24; *Audio tapes in cassettes*, Coun.Reg.(EEC) No 1251/91, OJ (1991) L 119/35; *Car Radios*, Coun.Reg.(EEC) No 2306/92, OJ (1992) L 222/8; *DRAMs*, Coun.Reg.(EEC) No 611/93, OJ (1993) L 66/1; *REWS*, Coun.Reg.(EEC) No 2887/93, OJ (1993) L 263/1; *LAECs*, Coun.Reg.(EC) No 1384/94, OJ (1994) L 152/1; *Microdisks*, Coun.Reg.(EC) No 2199/94, OJ (1994) L 236/2; *CTVs*, Coun.Reg.(EC) No 710/95, OJ (1995) L 73/3.

7. Korean exports to the EC grew to 10.6 billion US dollars in 1994 from 2.8 billion US dollars in 1982, while the EC exports to Korea during the period rose to 13.2 billion from 1.5 billion. As a result, Korea suffered 2.64 billion US dollars trade deficit with the EC in 1994. See, *Seoul Shinmun* (one of the main daily newspapers in Korea), Apr.1, 1995, p5.

8. OECD, *OECD Economic Survey - Korea*, OECD Publication, 1994 May, p56. Korea Foreign Trade Association, *Trade Annual 1993*, Dong-A Publication Co., 1993, p137 (hereinafter referred to as "KFTA"). The share of electronics in exports expanded to 31.4% in 1994. See, *Seoul Shinmun*, May 26, 1995, p18.

9. Compared to the fact that no safeguard measure nor any measure based on Article 1115 of the EEC Treaty was adopted in 1993 and in 1994, antidumping proceedings could be regarded as the most important Community instrument of commercial defence. See, Commission, *General Report on the Activities of the European Union - 1994*, p350, and Commission, *27th General Report on the Activities on the European Communities - 1993* (hereinafter referred to as "General Report"), p312.

introduce and explain the Community anti-dumping law in the context of the international rules.

2. AIMS AND SCOPE OF THE STUDY

The Commercial Policy Chapter of the EEC Treaty¹⁰ declared that the common commercial policy was to be established by the end of the transitional period (by 1970).¹¹ In order to achieve this common commercial policy, two important pieces of legislation (Regulation 2603/69¹² providing common rules for exports and Regulation 1025/75¹³ stipulating common rules for imports which was succeeded by Regulation 288/82¹⁴) were introduced and are still in force. In relation to external economic relations, Regulation 288/82 sets out general common rules for imports from all other countries excluding imports from state trading countries.¹⁵ Although any imports governed by other more specific legislation such as Regulation

10. Treaty establishing The European Economic Community as amended by the Treaty amending Certain Financial Provisions, the Single European Act, the Merger Treaty, the Greenland Treaty, and the Acts of Accession (hereinafter EEC Treaty), Mar. 25, 1957, reproduced in N. Foster, *Blackstone's EEC Legislation*, Blackstone Press Ltd, 1990. It entered into force on January 1, 1958.

11. Article 111 and Article 113 of the EEC Treaty. It was not until 1975 that the European Court of Justice (hereinafter referred to as the ECJ or the Court) decided that the Community's competence in matters of commercial policy was exclusive. See, Opinion 1/75, *on the compatibility with the EEC Treaty of a draft 'understanding on a local cost standard'*, [1975] ECR 1355.

12. Coun.Reg.(EEC) No 2603/69, *on common rules for exports*, OJ (1969) L 324/25.

13. Coun.Reg.(EEC) No 1025/75, OJ (1975) L 124/6.

14. Coun.Reg.(EEC) No 288/82, *on common rules for imports*, OJ(1982) L 35/1. This regulation was repealed by Coun.Reg.(EC) No 518/94, OJ (1994) L 67/1.

15. Article 1 of the Coun.Reg.(EEC) No 288/82. This Regulation applies to imports of products originating in third countries, except for textile products, products originating in state-trading countries, China and Cuba.

109/70,¹⁶ which provides common rules for imports from state-trading countries, are not covered by this regulation, Regulation 288/82 sets out Community surveillance where there is a threat of injury to Community producers.¹⁷

In addition to the Community's measure concerning 'normal trade', the Community has some measures for protection of its industries against so-called "unfair trade practices".¹⁸ With regard to unfair international trading practices, Regulation 2324/88¹⁹ and Regulation 2641/84²⁰ play very important roles in protecting the Community's industry. Since most of the existing trade rules dealing with third countries are concerned with the effect of imports on Community industry, Regulation 2641/84 was primarily designed to protect the export markets of Community industry,²¹ and to defend the legitimate interests of the Community within GATT.²²

The purpose of this thesis is, however, to analyse the measures that may be imposed by Community authorities with respect to trade with third countries under the Community Anti-dumping Regulation²³ and to analyse anti-dumping law and practice in the European Community and Korea

16. Coun.Reg.(EEC) No 109/70, OJ(1970) L 19/1.

17. Articles 10 and 14 of the Coun.Reg.(EEC) No 288/82, OJ (1982) L 35/1. In general, see Chapter 2 in this thesis.

18. In general, see Chapter 2 of this thesis.

19. Coun.Reg.(EEC) No 2324/88, OJ(1988) L 209/1. As a result of the adoption of the Uruguay Round Agreement on the Implementation of Article VI, the Council adopted the new Anti-dumping Regulation in Dec. 1994. Coun.Reg.(EC) No 3283/94, *on protection against dumped imports from countries not members of the European Community*, OJ (1994) L 349/1.

20. Coun.Reg.(EEC) No 2641/84, *on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices*, OJ (1984) L 252/1.

21. F, Schoneveld, 'The European Community Reaction to the 'Illicit' Commercial Trade Practices of Other Countries', (1992) 26 *JWT* 2, P21.

22. The preamble of Coun.Reg.(EEC) No 2641/84, OJ (1984) L 252/1.

23. This thesis is mainly based on Regulation 2423/88, even though a new Anti-dumping Regulation 3283/94 has been adopted.

comparatively, in the context of the international rules, i.e., Article VI of GATT and its Anti-dumping Code.²⁴ On January 1, 1980, the 1979 GATT Anti-dumping Code entered into force for governments which had accepted or acceded to it by that date.²⁵ Acceptance by the European Community led it to bring its anti-dumping law in conformity with the international rules.²⁶

On the other hand, Korea joined the 1979 GATT Anti-dumping Code in February 1986.²⁷ As a result, both parties had to implement the Code provisions and the international obligations into domestic law, and both parties have their own anti-dumping laws which are required to be in accordance with the Code.

Korea exported 96.3 billion US dollars and imported 102.3 billion US dollars in 1994. In 1995, the volume of trade is growing faster than ever. On the one hand, the Korean economy is growing in scale and it is

24. Since the WTO Agreement entered into force on 1 Jan. 1995, the WTO Anti-dumping Agreement (hereinafter referred to as "the 1994 GATT Antidumping Code") succeeds the 1979 GATT Anti-dumping Code, and all WTO members will be bound by the 1994 GATT Anti-dumping Code. Article II(2) of Agreement Establishing The World Trade Organization provides that the agreements and associated legal instruments included in Annexes 1,2 and 3 are integral parts of this Agreement, binding on all Members. This thesis, however, is mainly based on the 1979 GATT Anti-dumping Code.

25. Article 16 (4) of the 1979 GATT Anti-dumping Code. The term "government" is deemed to include the competent authorities of the European Economic Community.

26. Coun.Dec. 80/271/EEC, *Council Decision of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations*, OJ (1980) L 71/1.

27. Korea Institute for International Economic Policy (hereinafter referred to as 'KIEP'), *The Present Situation and Its Improvement Direction on the Policies and Systems related to Trade in Korea* (hereinafter referred to as "*Policies Related to Trade in Korea*"), KIEP, 1992, p201. From 1986 to 1993, only 15 investigations were initiated involving imports from 11 countries. Of these 15 investigations, only 7 investigations were concluded by imposition of definitive duties.

accompanied by an increased volume of imports as a result of the increased purchasing ability of national economy. On the other hand, the fact that the average normal tariff was reduced to 8.9%, and the so-called "import liberalisation ratio" reached 98.1% in 1993²⁸ means that trade liberalisation is complete and unlimited competition from overseas is waiting. Furthermore, in 1989, Korea moved under the terms of Article 18(2)(b) of the GATT, out of the developing country status which enabled it to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by its programmes of economic development²⁹ in 1989.³⁰

Summing up the situation, it is inevitable that imports are increasing rapidly and some imports cause difficulties to the domestic industries. Furthermore, dumping from overseas, mainly in the field of the precision chemistry industry, hinders Korea's national aim of establishing itself as a developed country as complaints have been mainly filed upon newly localised, high value added products.³¹ In spite of the fact that dumped imports cause a lot of difficulties to domestic industries, anti-dumping measures have not been applied properly in favour of domestic producers in Korea, mainly because of institutional inertia. In order to achieve proper anti-dumping practice, anti-dumping law should be put in good order. In order to adopt proper anti-dumping rules in accordance with

28. KFTA, *Trade Annual 1993*, p427 and 429.

29. Article 18(2)(b) of the GATT.

30. KIEP, '*Policies Related to Trade in Koorea*', p18. As a result, in accordance with Article 11 of the GATT, Korea should not prohibit or restrict the importation of any product of the territory of any other contracting party through quotas, import licences or other measures other than duties, taxes or other charges.

31. Dumpings by foreign companies are in part aimed at discouraging the efforts of domestic producers to localise high, capital and information intensive technology.

existing international obligations, in particular those arising from Article VI of the GATT and its Anti-dumping Code, a kind of legislative model is needed and the Community Anti-dumping Regulation itself and its practice could be a model. Therefore, this comparative study with the Community's anti-dumping rules should be very helpful in improving the current Korean anti-dumping system.

The current Korean anti-dumping law was amended in 1993³² to comply with GATT guidelines and it was designed to model the US law and procedures. Therefore, Korea has a bifurcated anti-dumping system under which the Korean Trade Commission (hereinafter referred to as "KTC") is to conduct the primary material injury investigation while the Office of Customs Administration (hereinafter referred to as "OCA") is to investigate the existence of dumping. The Ministry of Finance co-ordinates the entire investigation and calculates the dumping margins. However, there is a proposal for amendment which is designed to model the European Community anti-dumping system.³³

Then, through the analysis of the Community's anti-dumping regulation, its own characteristics in anti-dumping regulation, for instance its original provisions, judicial review system,³⁴ and the protectionist tendency in its practice and application, are explained.

The Community's anti-dumping legislation, which is allegedly based

32. Cho Sang-Won, *Tax Law Codification '94*, Hyun-Am Publication Co. Ltd., 1994. The interpretation of Korean Customs Act which follows is based on this *Tax Law Codification*, and when there is contradictory understanding of the legal text, the Korean version shall take precedence over the author's interpretation.

33. This means that the bifurcate system is going to be switched to a unitary system, with the KTC in charge of the entire investigation into the existence of dumping and injury to the domestic industries. See, *Seoul Shinmun*, May 8, 1995, p17, and June 3, 1995, p17.

34. Article 173 (by direct action to the ECJ) and Article 177 (by references to it by national courts) of the EEC Treaty. On the judicial review, see Chapter 7 in this thesis.

on and in full accordance with GATT rules,³⁵ spells out the criteria and rules for taking effective action against dumping. The most important of these provisions, which are not compulsory under the GATT³⁶ and which are not applied, or only partially applied,³⁷ by other contracting parties, are "the lesser duty rule"³⁸, "the community interest test"³⁹ and "the sunset provision".⁴⁰ The Community applies its original provisions because the Community regards anti-dumping measures as a part of its common commercial policy⁴¹ and is trying to take broader policy considerations into account before applying protective measures.⁴²

Anti-dumping law can be divided into two parts, procedural and substantive anti-dumping law. Procedural anti-dumping laws in the Community and Korea are compared and analysed, respectively, in Chapter 3 of this thesis.

The anti-dumping policies have been criticised by exporting countries for being protectionist, primarily because they are biased in favour of finding dumping. In many respects, Community anti-dumping regulations

35. Preamble of Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1, p1.

36. As a result of the Uruguay Multilateral Trade Negotiations, "the lesser duty rule" and "the sunset provision" were stipulated in the 1994 GATT Anti-dumping Code (hereinafter referred to as "the 1994 Code"). See, subparagraph 1 of Article 9 and subparagraph 3 of Article 11 of the 1994 Code. Commission, *Proposal for a Council Decision concerning the conclusion of the result of the Uruguay Round of Multilateral Trade Negotiation (1986-94)*, COM(94) 143 final. The text of the 1994 Code which follows is based on this publication.

37. Commission, *11th anti-dumping report*, COM(93) 516 final, p4.

38. Article 13(3) of the Community Anti-dumping Regulation.

39. Article 11(1) and 12(1) of the Community Anti-dumping Regulation. See Chapter 5 in this thesis.

40. Article 15 of the Community Anti-dumping Regulation.

41. See Chapter 2, title 1 in this thesis.

42. Article 113 of the EEC Treaty provides that the common commercial policy shall be based on uniform principles, particularly in regard to ... the achievement of uniformity in ... measures to protect trade such as those to be taken in case of dumping or subsidies.

reproduce the bland generalities of the GATT Anti-dumping Code, thereby conferring substantial discretionary room for action. Even though anti-dumping rules are often ambivalent, they are intransigently interpreted to provide textual justification for some very harsh determinations.

Various aspects of the technical methodology applied by the Community authorities in anti-dumping determinations have a tendency to make findings of dumping largely automatic and inevitable. Therefore, the analysis is primarily concerned with the practical application of the Community Anti-dumping Regulation against dumped imports mainly from Korea. Furthermore, the protectionist tendency in the application of the Community's anti-dumping rules, in particular the determination of normal value and export price, normal value and export price based on constructed value, the comparison of normal value and export price, the calculation of dumping margin, and the determination of injury, are examined, and proposals are made as to the extent to which the Community anti-dumping rules need to be revised to diminish the "tilt" in its range that explicitly favours domestic producers. Therefore, two components of substantive anti-dumping laws, dumping and injury therefrom, are discussed in Chapters 4 and 5.

When an anti-dumping duty is imposed on imports of a finished product, the duty may be avoided by all or the majority of the parts not subject to the duty being imported separately and subsequently assembled by a subsidiary of the producer/exporter in the Community. On the other hand, as a result of trade liberalisation policy, one of the main issues is to protect the domestic industry concerned in Korea, because imports are increasing rapidly. Anti-dumping measures have been regarded as the

most efficient measure for the protection of the domestic industry,⁴³ and they will be applied more frequently than before. Therefore, it could be predicted that foreign producers or exporters will try to avoid or circumvent the anti-dumping duties. That is why anti-circumvention measures need to be prescribed in the Korean rules.⁴⁴ However, such assembly operation is considered not to lead but to be likely to lead to circumvention of the anti-dumping duty.⁴⁵ Therefore, in Chapter 6, anti-circumvention is discussed, as Korean direct investment in the Community has increased recently.

The anti-dumping measures, including anti-dumping duties and price undertakings may be subject to administrative and judicial review. The imposition of anti-dumping measures by the Community authorities in the field of commercial defence may be subject to review by the European Court of Justice,⁴⁶ in spite of the fact that there is no special provision for judicial review in the Community anti-dumping regulation.⁴⁷ Any

43. In case of *Phosphoric Acid* (Chian) FMA No 1993-6, OG (1993) No 12350, 89.3% of the total quantity of imports was from China, in 1992. However, it decreased to 68.1% in 1993, after investigation started, and to 46.8% in 1994. In case of *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, 12.5% of the total imports were from China, in 1993. However, this was reduced to 4.6% in 1994 because of anti-dumping measure. See, *Seoul Shinmun*, 'Imports restraint effect of anti-dumping duties', Jan. 25, 1995, p18.

44. There is no anti-circumvention provision in the Korean antidumping system, and no anti-circumvention determination, either.

45. Preamble of Coun.Reg.(EEC) No 1761/87 amending Regulation (EEC) No 2176 84 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ (1987) L 167/9.

46. Jurisdiction in respect of measures to protect trade was transferred from the ECJ to the Court of First Instance (hereinafter referred to as the "CFI" . Coun.Dec.94 149/ECSC, EC amending Dec.93/350/Euratom, ECSC, EEC amending Dec.88/591/ECSC, EEC, Euratom establishing a Court of First Instance, OJ (1994) L66/1.

47. There is no special provision for judicial review in the Korean Customs Act or its Enforcement Decree, either.

natural or legal person may institute proceedings against a decision which is of direct and individual concern.⁴⁸ If the action is well founded, the ECJ will declare the act concerned to be void, either wholly or in part.⁴⁹ Therefore, appeal to the ECJ is the only way to make anti-dumping measures void. For Korean exporters to the Community, who are one of main targets of Community anti-dumping measures, it would be worthwhile using the judicial review system in the Community more frequently than at present.⁵⁰ Therefore, the anti-dumping measures, the system for administrative review of the anti-dumping measures, and the extent to which the ECJ could review the Community's anti-dumping determinations are scrutinised in Chapter 7.

In Chapter 8, based on the Community's experiences during the last 15 years,⁵¹ and major changes of anti-dumping rules in the Community and the GATT Code, future prospects on the anti-dumping laws are offered.

This study analyses anti-dumping law and practice in the European Community and Korea from August 1988 to approximately December 1994. During this period, the 1988 Community anti-dumping regulation was in force; and Korea started to impose definitive anti-dumping duties in 1991.⁵²

48. Article 173, para. 2 of the EEC Treaty.

49. Article 174 of the EEC Treaty. Article 174, para. 2 provides that in the case of regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

50. There has been only one Court case concerned with a Korean exporter. Case C-105/90, *Goldstar Co. Ltd v Council*, [1992] ECR I-677.

51. Since 1983, the Commission has submitted its antidumping reports and its first anti-dumping report (COM(83) 519 final) covered the period since the entry into force of the 1979 Community anti-dumping regulation, Coun.Reg.(EEC) No 3017/79, OJ (1979) L 399/1.

52. *Polyacetal resin* (Japan, USA), Finance Ministry Announcement No 1991-61, Official Gazette (1991) No 11276, p135, (hereinafter referred to as "FMA" and "OG").

**Chapter 2 : THE EXTERNAL TRADE POLICY OF
THE EC AND THE KOREAN TRADE POLICY
IN THE EUROPEAN DIMENSION**

I. COMMON COMMERCIAL POLICY

1. INTRODUCTION

The main task of the European Community is to improve the economic situation and standard of living of the states belonging to it by establishing a common market¹ and progressively approximating the economic policies of Member States.² In order to achieve this task, the activities of the Community are defined in Article 3 of the Treaty of Rome as including the elimination of customs duties and of quantitative restrictions and of all other measures having equivalent effect, the abolition of obstacles to freedom of movement for goods, capital, persons and services, and the establishment of a common customs tariffs and of a common commercial policy toward third countries.

In addition, the internal market was to be completed by the end of 1992 according to a new Article 8A of the EEC Treaty.³ From the view point of the concept of a customs union through the establishment of the common customs tariff, products originating from third countries should not be treated differently from products produced within the Community, and products both originating in the Community and imported from third countries are to be in free circulation in Member States⁴ without any obstacles including customs duties, quantitative restrictions and any

1. Article 2 of the Treaty of Rome.

2. The concept of a common market used in Treaty provisions is not defined by the Treaty itself.

3. Article added by Article 13 of the SEA.

4. Article 9 of the EEC Treaty.

charges or measures having equivalent effect,⁵ and any internal taxation.⁶

In order to be regarded as a single trade unit in the world, the Community should establish not only a common customs tariff but also a common commercial policy. Even though Article 113 of the EEC Treaty which expressly required the completion of the common commercial policy over the transitional period by 1970, it had to wait until 1975 when the Court decided⁷ that the Community had exclusive competence on the field of commercial policy.⁸

Besides the political motive for a common commercial policy, the Community desperately needs a common commercial policy because, without it, a product originating in a third country may reap the benefit of the rules on free circulation within the common market.⁹

5. Article 12 and 30 of the EEC Treaty.

6. Article 95 of the EEC Treaty.

7. Opinion 1/75 *on the compatibility with the EEC Treaty of a draft 'understanding on a local cost standard'*, [1975] ECR 1355.

8. It should be noted that the 1969 Council Decision 69/494 (OJ 1969, L 326/39) on the renewal or extension of agreements entered into by member states empowers member states to continue to negotiate their own agreement and this legislation is still in force, although the Council's authorisation of such measures is given only where the agreements in question are not contrary to existing Community commercial policy and with regard to areas not covered by agreements between the Community and the third countries concerned. See, Article 1 of Com.Dec.87/229/EEC, *authorising extension or tacit renewal of certain trade agreements concluded between member states and third countries*, OJ (1987) L 95/25.

9. Without common commercial policy, so-called 'trade deflection' is likely to be caused, because exporters in third countries would export their products to a member country where the customs tariff is lower and then enjoy free circulation in the Community.

2. TRADE DECISION-MAKING PROCESS IN GENERAL

2.1 Background

The Treaty of Rome (hereinafter EEC Treaty) was signed by the six original Member States in 1957.¹⁰ The Community's aim based on EEC Treaty was to create a custom union in which goods, persons, capitals and services could move from one Member state to another without any obstacles. However, this aim was not completed as originally planned. The original deadline to establish a common market by the end of 1969 could not be met due to economic and institutional causes.¹¹

In the 1980s, the European Community economy was characterised by economic stagnation, increasing unemployment, and loss of competitiveness mainly because of a fragmented Community market. In order to reverse this tide and renew a sense of purpose and dynamism, an ambitious and fundamental approach was launched to revitalise the integration process by completion of the internal market, establishment of concrete institutional reforms, and creation of a European Union.

In 1985, the Commission presented its White Paper on completing the internal market which proposed the removal of the remaining obstacles to the establishment of the internal market, dividing them into physical, technical and fiscal barriers. With regard to the common commercial policy, the Commission took the view that abolition of national protection measures and regional quotas by 1992 was 'not an unreasonable aim'. The Commission insisted that 'after the completion of the internal market it will no longer be possible to use border controls at internal frontiers to

10. The six original member states were Belgium, France, West Germany, Italy, Luxembourg and the Netherlands.

11. Jones, "Putting 1992 in perspective", (1989) 9 *N.W.J.Int'l L. & Bus.*, p469.

apply such restrictions'.¹²

While the White Paper invigorated the drive toward economic integration and ensured its realisation, institutional reforms were brought about by the Single European Act (SEA)¹³ which came into force on 1 July 1987. In general, the SEA amended specific provisions of the EEC Treaty relating to the Internal Market programme¹⁴ to 'ensure smoother functioning of the Communities'.¹⁵ The SEA is being implemented on two levels. On an economic level, it has had a revitalising effect on employment, economic growth and investment. On an institutional level, it provides for qualified majority voting where the EEC Treaty required unanimity.¹⁶ Furthermore, the SEA amended the EEC Treaty to give a bigger say to the European Par-

12. Commission, *Industrial policy in an open and competitive environment*, COM(90) 556 final, p14. In this communication, the Commission insisted that member states continue to apply over 2000 national quotas on imports from third countries, in particular in execution of Article 115 of the EEC Treaty, and a variety of bilateral "voluntary export restrictions".

13. *Single European Act* (hereinafter SEA), OJ (1987) L 169/1.

14. According to Article 13 of the SEA, the Community was to establish the internal market over a period expiring on 31 December 1992.

15. Preamble of the SEA.

16. See, Article 16 of the SEA amending Articles 28, 57(2), 59, 70(1) and 84(2). Article 100a of the EEC Treaty was added by Article 18 of the SEA which established qualified majority voting for Council decisions on the internal market. Unanimity has been, however, preserved for provisions on the internal market relating to fiscal matters and to the free movement of persons or the rights and interests of employed persons (Article 100a(2) of the EEC Treaty). See also, Campbell, "The Single European Act and the Implications", (1986) 35 *Int'l & Comp. L.Q.*, p 934.

liament through the cooperation procedure¹⁷ and the assent procedure.¹⁸ The SEA also provides for institutional reforms to confer on the Commission powers for the implementation of the rules which the Council lays down.¹⁹ However, there is still a reluctance to give clear and full executive power to the European Commission.²⁰ It should be noted that the major concern of the SEA is establishing an internal market through elimination of the physical, technical and fiscal barriers to the free movement of goods, persons, capital and services.²¹

Since the Dublin European Council meeting of 28 April 1990²² which decided that amendments to the EEC Treaty "with the aim of strengthening the democratic legitimacy and efficiency of the Union and of ensuring unity and coherence in the Community's international action"²³ were necessary, there has been a series of several drafts and proposals on commercial policy or external economic policy throughout the Rome,²⁴ Luxem-

17. This cooperation procedure provides the European Parliament with the power to reject, accept or propose amendments to the Commission's proposal. It make little difference, however, because the final decision still rest with the Commission. See, Article 149(2)(c) & (d) of the EEC Treaty.

18. Only in the matters dealing with enlargement of the Community and association agreements is the European Parliament given the true power of co-decision. See, Articles 237 & 238 of the EEC Treaty (Articles 8 & 9 of the SEA).

19. Article 145 of the EEC Treaty (Article 10 of the SEA).

20. Commission, *'The European Single Act: countdown to 31 December 1992'*, (1990) European File 13/90, p3.

21. See, Section II Provisions relating to the foundations and the policy of the Community of the SEA.

22. The special meeting of the European Council, Dublin, Bull. EC 4-1990, point I, p7.

23. Commission, *'Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union* (hereinafter referred to as "Commission opinion in 1990"), EC, Bull., supplement 2/91, p69.

24. Rome Presidency, 1/7/90 - 31/12/90.

bourg²⁵ and Dutch Presidencies.²⁶ In the Commission's contribution to the intergovernmental conference,²⁷ the Commission expressed its view on external economic policy under the Title of 'Common External Policy'. In its contribution, the Commission proposed this new title including provisions on common foreign and security policy (Articles Y1-Y15), external economic policy (Articles Y16-Y19), development cooperation policy (Y20-Y24) and the conclusion of international agreements (Y25-Y32). This proposal aimed at "ensuring unity and consistency in the Community's action on the world scene by including among the powers of the union aspects of external relations"²⁸ and avoiding possible conflicts between policies involved. The Commission, in Article Y16a of its contribution, proposed that "external relations in the areas covered by economic and monetary union shall be governed by Article Y17". Article Y17 which was proposed as a amendment to Articles 110-116 of the EEC Treaty on Commercial Policy, defined a common policy on external economic relations to cover not only trade but also economic and commercial measures.²⁹ Based on this definition, the Commission stipulated the power of Union in this field, providing that "the Union shall have sole power to take measures, autonomous and conventional, in the field of economic and commercial policy, and it may authorise the Member States to take some measures within limits and subject to conditions which it shall lay down".³⁰ Therefore, there was no room for Article 115 in the Treaty according to the Commission's contribution. Furthermore, it expressed the representa-

25. Luxembourg Presidency, 1/1/91 - 30/6/91.

26. Dutch Presidency, 1/7/91 - 31/12/91.

27. EC, Bull., Supplement 2/91 (hereinafter referred to as "Commission's contribution"), p83.

28. Commission's opinion in 1990, EC, Bull., supplement 2/91, p70.

29. Article Y17(1) of Commission's contribution, EC, Bull., supplement 2/91, p92.

30. Ibid, Article Y17(2) and (3).

tive character of the Commission very clearly, stipulating that in exercising these powers the Union shall be represented by the Commission in relations with non-member states and in international organisations and conferences.³¹ Therefore, the exclusive competence of the Union in external economic policy was confirmed because only the Commission is responsible for representing the Union on the external scene, where non-Member countries and international organisations are involved.

Common commercial policy in the Maastricht Treaty was virtually based on the second Dutch draft for political union of 8 November, 1991.³² The sections of the EEC Treaty regulating the commercial policy (Articles 110 to 116) were modified very little under the Treaty on European Union signed in Maastricht on 7 February 1992. Three Articles were repealed³³ while Articles 110 and 112 remained untouched. Articles 113 and 115 were partly redrafted. From the viewpoint of the Commission, therefore, the final provisions on "common commercial policy" in the Maastricht Treaty are very disappointing. Contrary to the position of the Commission in the White Paper which insisted that "it is not an unreasonable aim to achieve this abolition of national and regional quotas by 1992",³⁴ Article 115 with a slightly modified version was survived in the Treaty.

The main area of controversy with regard to Article 115 was the provision stipulated that "failing this, the Commission *shall* authorise Member States to take necessary protective measures, the conditions and details of which it shall determine". The new version inserted in the Maa-

31. Ibid, Article Y17(6).

32. Agence Europe, Europe Documents, No 1746/1747 of 20 November 1991.

33. Articles 111 and 114 on the transition period, and Article 116 on common action in international economic organisations were repealed.

34. Commission, *Completing the Internal Market : White Paper*, COM(85) 310 final, p11, and 24th General Report on the Activities of the European Communities (1990), p67.

strict Treaty changed the word "shall" to "may" which allows much more discretionary power to the Commission. As a result, the Commission can grasp real power of authorisation over Member States' protection measures. In order to establish the Internal Market completely, the Commission should not authorise Article 115 measures, in as far as such measures would not be compatible with the completion of the Internal Market. It was merely hoped that the Commission would not authorise Article 115 measures. According to the wording of Article 115, the Commission has the capability to authorise national protective measures. This means that whether an authorisation is granted or not, depends not on Member States but on the Commission. Therefore, from the point of view of Member States, they can avoid the blame for not applying Article 115 measures.

2.2 The Institutional Process

The Rome Treaty provides that the Council has power to take decisions and confer on the Commission powers for the implementation of the rules which the Council lays down.³⁵ Therefore, the Commission is the executive arm and the Council is the legislative arm of the Community.

Once a policy proposal has been drawn up by the Commission and the draft proposal has been submitted to the Council, the Council consults the Economic and Social Committee where appropriate³⁶ and the European Parlia-

35. Articles 145 and 155 of the Treaty of Rome.

36. Article 198 of the Treaty of Rome provides that 'the Committee must be consulted by the Council or the Commission where this Treaty so provides. The Committee may be consulted by these institutions in all cases in which they consider it appropriate'.

ment.³⁷ Commission proposals undergo a decision-making process with Member States, coordinated by working parties and Committee of Permanent Representatives (COREPER).³⁸

Council decisions are taken by three voting procedures; a simple majority, a qualified majority and unanimity. Except for certain cases where unanimity is required,³⁹ a simple or a qualified majority is needed. As a result of a series of Commission proposals on the streamlining of the decision-making procedures in certain instruments of commercial defence,⁴⁰ the Council' voting rules were changed to require only a simple majority vote to impose dumping duties, instead of a qualified majority vote.⁴¹

3. MAJOR TRADE INSTRUMENTS OF THE EUROPEAN COMMUNITY

When taking account of trade instruments governing the Community's trading relation with its partners, measures concerned with the volume of trade are paid more attention than measures designed to control quality. From this viewpoint, the EEC Treaty embraces several measures in order to

37. With respect to the consultation to the European Parliament, there is no provision like Article 198. The Court, in the *Isoglucose*, ruled that 'consultation is the means which allows the Parliament to play an actual part in the legislative process of the Community'. See, Case 138, *Roquette Freres v Council*, [1980] ECR 3333, and Case 139/79, *Maizena GmbH v Council*, [1980] ECR 3393.

38. Unlike the working parties, COREPER was recognised by Article 4 of the Merger Treaty (1965). It provides for a committee consisting of the permanent Representative of the member states, carrying out the tasks assigned to it by the Council. See further on decision-making in general, DAC Freestone & JS Davison, *The Institutional Framework of the European Communities*, Routledge, 1990, pp90-114.

39. See, Article 99, 100, 149(1), 157(1), and 161 of the Treaty of Rome.

40. See, Chapter 8 of this thesis.

41. Coun.Reg. (EC) NO 522/94 *on the streamlining of decision-making procedures for certain Community instruments of commercial defence and amending Regulation (EEC) No 2641/84 and No 2423/88*, OJ (1994) L 66/10.

establish the commercial policy. According to Article 113, the common commercial policy shall be based on uniform principles, particularly in regard to a common tariff, the conclusion of trade agreements with non-member countries, and the achievement of uniformity in measures to protect trade, such as those to be taken in case of dumping or subsidies.

The main Community trade policies can be divided into these areas: measures for normal trade (tariff measures,⁴² quantitative restrictions)⁴³ and measures against unfair trade.⁴⁴

3.1 Tariff Measures

Based on Article 9 of the EEC Treaty, the Common Customs Tariff (hereinafter CCT) which requires harmonisation of the different tariff levels of the Member States,⁴⁵ was achieved through the Council Regulation 950/68. Current Regulation 2886/89 is made up of two short articles and an Annex which contains the actual duties as well as the nomenclature (classification of goods). Therefore all imports into the Community are subject to duty or duty free entry based either on their classification in the EC Harmonised Tariff Schedule or on some other arrangement such as the Free Trade Agreement between the individual EFTA countries and the Commun-

42. Coun.Reg.(EEC) No 950/68, *The Common Customs Tariff*, OJ (1968) L 172/1, as amended by Com.Reg.(EEC) No 2886/89, OJ (1989) L 282/1.

43. Coun.Reg.(EEC) No 288/82, *The Common Rules for Imports*, OJ (1982) L 35/1.

44. Coun.Reg.(EEC) No 2423/88 *on protection against dumped or subsidized imports from countries not members of the European Economic Community*, OJ (1988) L 209/1. Coun.Reg.(EEC) No 2641/84 *on the strengthening of the common commercial policy with regard to protection against illicit commercial practice*, OJ (1984) L 252/1.

45. The country which joins the Community as a member is required to adjust its own tariff to the CCT over a transitional period.

ity.⁴⁶ In addition, developing countries are the main beneficiaries of the Community's generalised system of preferences (GSP)⁴⁷ or of the Lome Convention.⁴⁸

3.2 Quantitative Restrictions Through National Quotas And Free Circulation

The common commercial policy is applicable not only to trade policies which can cover the whole Community, for example, tariffs, anti-dumping and antisubsidy measures, and most quantitative restrictions; but also to trade-related policies which individual Member States have applied. Certain quantitative restrictions which individual Member States have applied against imports from non-member states are likely to be circumvented by indirected imports through the free circulation rule. To close this loophole, the necessary protective measures may be authorised, including temporary border control between Member States and suspension of Community treatment to certain products.

The exclusive power of the Community in the field of commercial policy has been well established through a series of Court rulings, for

46. Commission, *Proposal for a Council Decision on the conclusion of the agreement on the European Economic Area*, SEC(92) 814 final.

47. Com.Reg. (EEC) No 3831/90 *applying generalised tariff preference for 1991 in respect of certain industrial products originating in developing countries*, OJ (1990) L 370/1. Com.Reg. (EEC) No 3832/90 *applying generalised tariff preference for 1991 to textile products originating in developing countries*, OJ (1990) L 370/126. Com.Reg. (EEC) No 3833/90 *applying generalised tariff preference for 1991 in respect of certain agricultural products originating in developing countries*, OJ (1990) L 370/86, as amended by OJ (1993) L 338/22.

48. Council and Commission, *Decision of the Council and the Commission of 25 February 1991 on the conclusion of the Fourth ACP-EEC convention*, OJ (1991) L 229/1.

example, Opinion 1/75⁴⁹ and the *Donckerwolcke* case,⁵⁰ in spite of a Council Decision 74/393⁵¹ that so-called cooperation agreements are not covered by the exclusive Community power. The principal aim of the internal market through the establishment of a common customs tariff is, according to Articles 9 and 10 of the EEC Treaty, that goods imported from third countries should enjoy the Community treatment and benefit from the principle of free circulation as long as Member States' individual quotas are created by Community instruments. Through a series of cases,⁵² the Court has made it clear that goods imported into a particular Member state under a Community tariff quota are to be considered as products in free circulation which can be imported into other Member States without any obstacles.

In addition, the Court, in *Commission v. Council*,⁵³ held that it was inappropriate to allocate Community quotas into national quotas unless there were compelling circumstances which made it impossible to do otherwise.

The remainder of Article 115, with only slight modification in the Maastricht Treaty, therefore, is not compatible with the aim of the single market to eliminate all border controls and enhance free circulation in the internal market, because it means that the Member States may be per-

49. Opinion of the Court 1/75 on *the compatibility with the EEC Treaty of a draft 'Understanding on a Local Cost Standard'*, [1975] ECR 1355, at 1363.

50. Case 41/76, *Donckerwolcke v Procureur de la Republique de Lille*, [1976] ECR 1921.

51. Coun.Dec.74/393/EEC *establishing a consultation procedure for cooperation agreements between Member States and third countries*, OJ (1974) L 208/23. It requires a consultation procedure for cooperation agreements negotiated between Member States and third countries.

52. Case 218/82, *Commission v Council*, [1983] ECR 4063, and Case 288/83, *Commission v Ireland*, [1985] ECR 1761.

53. Case 51/87, *Commission v Council*, [1988] ECR 5459, at 5481. The Court held that until the overall Community quota is exhausted, goods may be imported into a Member State which has exhausted its share without having to bear customs duties at the full rate or to be rerouted via another Member State whose share has not been exhausted.

mitted to impede free circulation of certain imported goods.⁵⁴

3.2.1. Protective Quotas and Free Circulation

There is another way to tackle the import of goods in free circulation in another Member state under Article 115 of the EEC Treaty. Based on Article 113, the Commission has been given the power to conclude trade agreements and at the time of the Tezi decision,⁵⁵ the Community was a party to the Multi Fibre Arrangement⁵⁶ (hereinafter MFA) which was to control international textile trade under the auspices of the GATT. Contrary to the Court ruling in case 51/87, however, the Court in this case held that the Commission has power to authorise national-type protective commercial measures under Article 115. As a result, the Netherlands is able to protect the quota allocated to the Benelux countries within the context of the Community quota. In this case, the Court made a definition on a common commercial policy. According to the Court ruling, the common commercial policy should be based on uniform import rules which are not subject to alteration between Member States once imported to the Community from third countries.⁵⁷ Therefore, only when the Member States are not treated differently by all instruments of the common commercial policy, is the idea of a single internal market or of a common commercial policy

54. Member States have protected the automobile, textile, consumer electronics and banana industries against imports from non-member countries. See, Commission, *Industrial policy in an open and competitive environment*, COM(90) 556 final.

55. Case 59/84, *Tezi Textiel BV v Commission*, [1986] ECR 887 (hereinafter "Tezi I"); Case 242/84, *Tezi BV v Minister for Economic Affairs*, [1986] ECR 933 (hereinafter "Tezi II").

56. The Multi Fibre Arrangement establishes a framework of voluntary restraint agreements covering trade with approximately 30 low cost exporting countries. Coun.Reg.(EEC) No 3589/82, OJ (1982) L.

57. *Tezi I*, [1986] ECR 924-25. In this case, the Court ruled that the MFA did not constitute a common commercial policy because it covered only the textile sector through the Commission's intervention. See, *Ibid* at 930.

completed. In the *Tezi II* case, the Court reaffirmed the priority of establishing a single internal market by ruling that the Commission restricts its Article 115 authorisations in the light of the impending single internal market.⁵⁸

3.2.2. The Commission and Article 115 Measures

In 1987, the Commission issued a decision⁵⁹ on the conditions and details of measures under Article 115 with a view to tightening the general criteria for authorisation. This replaced the prior decision.⁶⁰

The 1987 Decision applies to "imports into a Member state of products originating in a third country and put into free circulation in the Community which are not subject to uniform conditions of import in the Member States".⁶¹ According to the 1987 Decision, therefore, the Commission can authorise the issuance of an import document for surveillance purposes,⁶² and in the case of actual difficulties, Member States may apply for protective measures.⁶³

In the 1987 Decision, the Commission argues that Article 9(2) of the EEC Treaty preclude any administrative procedure designed to establish

58. *Tezi II*, [1986] ECR 945.

59. Com.Dec.87/433/EEC (hereinafter referred to as the "1987 Decision") *on surveillance and protective measures which Member States may be authorised to take pursuant to Article 115 of the EEC Treaty*, OJ (1987) L 238/26.

60. Com.Dec.80/47/EEC *on surveillance and protective measures which Member States may be authorised to take in respect of imports of certain products originating in third countries and put into free circulation in another Member State*, OJ (1980) L 16/14.

61. Article 1 of the 1987 Decision.

62. *Ibid*, Article 2.

63. *Ibid*, Article 3.



different rules for the movement of goods regardless of origin.⁶⁴ However, the Commission also recognises that the full application of free circulation presupposes the effective establishment of a common commercial policy.⁶⁵ Therefore, Article 115 continues to be necessary because not only have Article 115 measures not yet been replaced by uniform common rule but also, disparities among the Member States' commercial policy can cause deflections of trade.⁶⁶ Referring to the establishment of a common commercial policy and to the objectives laid down by the Single European Act, the Commission emphasised that the measures adopted pursuant to Article 115 should be interpreted strictly and applied only for a limited period and where the gravity of the situation so warrants.⁶⁷ As a result, Member States can interfere with the movement of goods in the Single Market through national protectionist trade policies unless a common commercial policy which eliminates the application of national trade policies based on Article 115.⁶⁸

Therefore, two prerequisites should be satisfied in order to establish a large unified market without internal frontiers. First, the

64. Ibid, the 1987 Decision, p26. Article 9(2) of the EEC Treaty provides that the provisions of Chapter 1, Section 1, and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

65. The 1987 Decision, p26.

66. Ibid.

67. Ibid, p27.

68. Article 115 authorisations have been successfully restricted. In 1985, 1,800, in 1988, 800, and in 1989 522 surveillance measures were in place in Member States respectively. By July 1992, however, only 3 measures remained. The number of authorisations for actual protective measures are even lower. In 1988, 128 and in 1990, 79 Article 115 protective measures were authorised respectively. In mid-1992, however, only 3 measures were authorised. See, Commission, '*The European Community as a World Trade Partner; The Second Trade Report*', (1993) 52 European Economy, Annex I - *A concise overview of the EC Trade Policy* (hereinafter referred to as "Overview of Trade Policy"), p195.

Commission should reduce use of Article 115 and eventually eliminate its use. It must be noted, however, that elimination of Article 115 measures will not result in common import rules. Second, therefore, a complete common commercial policy with uniform import formalities should be established.⁶⁹ In order for the common commercial policy to be completed, however, the Community is relying on more protection rather than free trade principles and liberalisation of the Community market, mainly through the selective use of unfair trade measures such as anti-dumping laws to protect its domestic industries against foreign competition.⁷⁰

3.3. Measures Against Unfair Trade (Anti-dumping Action)

Alongside the regulations for 'normal trade', which has been mentioned above, the Community has had measures to protect its industry against so called unfair international trading practices. As a main instrument, the Community has had its own anti-dumping regulation.⁷¹

Anti-dumping action, which is expressly provided for in Article 113 of the EEC Treaty under the Title of commercial policy, against imports from third countries which cause injury to domestic industries, is one of the main instruments of the Community's trade policy. The Community's

69. Starla Henrich-Cohen, "EEC Treaty Article 115 - The Surviving Safeguard: Ridding Residual Member State Protection in the Single Market", (1993) 24 *Law Pol'y Int'l Business*,.

70. It is worth noting that methods for the elimination of the various "ill-matched" protection measures, including voluntary restriction agreements (VRAs), and replacement of current restrictions with other Community measures such as anti-dumping measures, were suggested by the Commission's Directorate-General for External Relations. See, Commission, '*Trade Policy: EEC Commission Modifies Application of Article 115*', Eur.Rep. (Eur. Info. Service, Brussels), July 22, 1987, at 14.

71. The original antidumping regulation was enacted by the regulation 459/68 which came into force on 1 July 1968, the same day as the common customs tariffs entered into force.

anti-dumping rules were adopted in accordance with Article VI of the GATT and the 1979 Anti-dumping Code which condemns dumping where it causes material injury to the industry in the importing country because it stems from a contrived rather than a true comparative advantage.⁷² The current Community legislation governing anti-dumping practice against imports from third countries is Council Regulation 2423/88.⁷³ This basic regulation provides some changes including rules on the normal value,⁷⁴ dumping margin and export prices, and on the circumvention of anti-dumping duties by assembly operation.

In addition to the Commission's report⁷⁵ urging the replacement of current restrictions with other Community measures such as anti-dumping measures, the Commission pursued increased use of its anti-dumping and antitrust laws, in its electronics report,⁷⁶ to protect its domestic industries against imports from non-member countries, especially in its electronics market. Furthermore, it should be noted that the Commission has three main target countries of anti-dumping action; they are Japan, China, and Korea.⁷⁷ The GATT has complained that the Community's excessive use

72. See, Chapter 4 of this thesis.

73. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

74. It should be noted that the concept of a normal value may not be compatible with the concept of a transaction value for the purpose of customs valuation. See, N. Green, T.C. Hartley and J.A. Usher, *The Legal Foundation of the Single European Market*, Oxford University Press, 1991, p8.

75. Commission, *Trade policy: EEC Commission Modifies Application of Article 115*, Eur.Rep. (Eur. Info. Service, Brussels) July 22 1987, at 14.

76. Commission, *The European Electronics and Information Technology Industry: State of Play, Issues at Stake and Proposals for Action: Communication from the Commission to the Council and to the European Parliament*, SEC(91) 565 final (hereinafter Electronics Report), reprinted in *Commission in the European Communities, European Industrial Policy for the 1990s*, EC Bull., supplement, March 1991, 3/91, p38-39.

77. Commission, *10th anti-dumping report (1991)*, SEC(92) 716 final, p7.

of anti-dumping measures has caused some foreign producers to refrain from exporting to the Community.⁷⁸

At the end of 1992, the Community had 158 anti-dumping measures in force, 108 of which were original anti-dumping measures and 50 of which were measures maintained after a full review. 114 were in the form of duties and 44 in the form of price undertakings.⁷⁹ Of 158 measures in force, 21 measures, 20 measures, and 13 measures were imposed against Japan, China, and Korea respectively.⁸⁰

78. William Dullforce, "Anti-dumping Duty under Scrutiny", *Financial Times*, Apr. 17, 1991, p6.

79. Commission, *11th anti-dumping report (1992)*, COM(93) 516 final, p10.

80. *Ibid.*

II. KOREAN TRADE POLICY IN ITS EUROPEAN DIMENSION

1. INTRODUCTION

The European Community aims at economic as well as political unity.⁸¹ Furthermore, with the reunification of Germany, the creation of the European Economic Area with possible dismemberment of the European Free Trade Association (hereinafter EFTA),⁸² and countries of eastern and central Europe aiming at eventual EC membership, it will certainly witness an enlargement of its borderline.

In spite of the fact that market integration would restore the Community's economic vitality and create trade, non-member countries have been concerned about the possible creation of a "Fortress Europe". From this viewpoint, attempt at realisation of economic integration in other regions⁸³ and increasing foreign direct investment in the Community can be explained as a counter-plot on the part of non-member countries. Among non-member countries, Korea which is one of the Newly Industrialised Economies of Asia (hereinafter ANIEs) has closely watched and has had special concern regarding market integration in Europe. Diversification of the export market away from the American market which has hitherto been

81. See generally, Commission, *Intergovernmental Conference: Contribution by the Commission*, EC Bull., Supplement 2/91, p69-117.

82. Referendum schedule of the Nordic nations on EC membership was as follows; Finland-October 16, '94, Sweden-November 13, '94, and Norway-November 28, '94. Among these Nordic nations, Sweden and Finland decided to join the EC as a result of their referenda, while Austria will join the EC in 1995. EFTA will be reduced to four nations which are Norway, one small nation (Switzerland, population 7m) and two dwarfs (Iceland and Lichtenstein with population 260,000 and 28,000 respectively).

83. For example, the North American Free Trade Agreement (NAFTA) and the Asian-Pacific Economic Co-operation (APEC).

the biggest market for Korean exports, is desperately needed because of increasing protectionism, rising labour costs as a result of labour strife, and the appreciation of the currency against the US dollar under pressure from the American administration, which wants to reduce its trade deficit with Korea. In addition, the World trade environment has great influence on Korea's national target to join the developed world because it has been undertaking export-oriented growth strategies.

During the past 40 years, Korea has transformed from an impoverished agricultural subsistence economy into a newly industrialised economy. In 1962, when Korea introduced its first five-year economic development plan, its gross national product (GNP) was a mere 2 billion U.S dollars, per capita GNP stood at just 87 U.S dollars and the value of Korea's export was 55 million U.S dollars. By 1994, they had grown to 376.9 billion dollars, to 8,438 dollars and to 96.3 billion dollars respectively.⁸⁴ As a result, by 1994, Korea emerged as the world's thirteenth largest exporting nation. This impressive growth based on export-oriented economic development strategy was achieved since 1962, despite unfavourable initial conditions for development, such as limited natural resources, negligible domestic savings, a lack of technology and a narrow domestic market. The Korean government has played a major role in the country's economic development. In order to meet its raw material and capital goods needs during this expansion, Korea increased its imports dramatically, from nearly 0.4 billion U.S dollars in 1962 to 102.3 billion

84. *Seoul Shinmun*, 16 Mar., 1995, p1, (Bank of Korea). The presentation from the Ministry of Trade , Industry and Energy (now, the Ministry of Trade and Industry) on the occasion of the 31st Korean Trade Day, reprinted in the *Korea Newsreview*, Dec. 3 1994, p14. *Financial Times*, 17 October 1994, p29. In 1993, GNP was 328.7 billion US dollars, per capita GNP was 7,466 US dollars, and the value of Korea's export was 82.2 billion US dollars.

U.S dollars in 1994.⁸⁵

Although Korea formed its own government after annihilation of Japanese colonialism in 1945, it had neither an obvious trade policy, because Korea had relied heavily on aid from USA, mainly in the form consumption goods based on the necessities of life, nor a stabilised government which could have provided direction in internal and/or external affairs. Furthermore, its economy was devastated by the war between the relatively industrialised communist North and the agrarian capitalist South.

In the 1960s, however, the Korean government launched a series of five-year plans for economic development and adopted an export-oriented economic growth policy. Because of its cheap, hard-working and relatively skilled labour, Korea increased its exports of labour-intensive low-tech products quickly. This was possible partly because of the liberal world trading environment in the 1960s⁸⁶ and partly because of the Korean protectionism in government's policy and an exporting-oriented policy.

Korea's export strategy, which in the 1960s prioritised light industry moved to a policy of modernisation of exporting structure with priority attached to the heavy petrochemical industry. Despite the oil shock in the early 1970s, exports continuously increased throughout the 1970s.⁸⁷ From the early 1970s, the Korean government mobilised a series of legisla-

85. *Seoul Shinmun*, Jan. 4. 1995, p9 (source: the Ministry of Trade and Industry, hereinafter the MTI). Korean Overseas Information Service, *A Handbook of Korea* (9th ed.), Samhwa Printing Co. Ltd., 1993, p370, (hereinafter referred to as "*A Handbook of Korea (9th ed.)*").

86. Throughout the 1960s, the volume of world trade was expanding by nearly 8 per cent annually, accompanied by relatively low trade protectionism and low oil and raw materials' price. See, *A Handbook of Korea* (9th ed.), p370.

87. The average export increase rates during the five-year economic development plans were 43,9% (1962-1966), 33.8% (1967-1971), and 50.9% (1972-1976).

tions⁸⁸ and announced a Heavy and Chemical Industry Development Plan in 1973, in order to develop the heavy petrochemical industry.

In order to expedite financing and to expand the productivity of exporting industries, a National Investment Fund (INF) was established in 1974 to support strategic industries, for example electronics and shipbuilding industries. A series of supporting measures⁸⁹ for exporting industries played an important role in increasing exports continuously. In addition, the building of the export industrial complex, a general trading company, establishment of the export-import bank (1976) and the setting up of a Free Export Area, all supported export-oriented industries in Korea.

Because of all-round difficulties which resulted from its export-led economic growth strategy, development of the heavy petrochemical industry relying on foreign capital, the second oil shock⁹⁰ and internal political chaos,⁹¹ Korea, in the 1980s, started to establish a private sector-led

88. The Machine Industry Promotion Law (1967), The Petrochemical Industry Upbringing Law (1969), The Electronics Industry Promotion Law (1969), The Car Industry Upbringing Plan (1969), and The Basic Plan for Promotion of the Shipbuilding Industry (1970).

89. Customs tariff restoration on imported raw materials for export (1975), moratorium of customs tariff (1977), introduction of customs tariff on imported capital goods for export (1974) and exemption from the special consumption tax (1976).

90. Oil prices in 1973-73 quadrupled and in 1979-80 doubled again. This oil price increase hit the Korean economy very hard because of Korea's lack of natural resources. In 1992, for instance, Korea imported 8.1 billion U.S dollar of oil and 35.2 billion U.S dollars of other raw materials, out of a total import figure of 81.5 billion U.S dollars. Korea Foreign Trade Association (hereinafter "KFTA"), *Trade Annual 1993*, Dong-A Publication Ltd., 1993, p272.

91. President Park who had held power for the last 18 years was assassinated on 26 October 1979, and following violent student demonstrations that culminated in a major insurrection in Kwangju in southern Cholla province, general Chun Doo Hwan took power through a coup d'etat-like military incident 12 December 1979 and bloody suppression of the Kwangju insurrection, in May, 1980. As a result of political turmoil, Korea's economic performance in 1980 was the worst for more than 20 years.

economic development system instead of a government-led policy centring around large conglomerate enterprises (so-called chaebols), in order to ensure industrial concentration. Privatisation of banks, introduction of an autonomous monetary system, internationalisation of capital market and protection of small-medium size enterprises (SMEs) can be enumerated as examples. Korea established two guides for basic economic policy; a policy of self-control, free from government intervention and open-door policy in trade, in the belief that an advanced economy could be achieved only through liberalisation based on market economic mechanism. Therefore, in the early 1980s, the Korean government introduced a retrenchment policy in order to achieve price stability and continued economic growth based on the trade liberalisation policy. As a result, price stability was achieved⁹² and Korean products became more competitive in the international market. Thanks to a favourable international exchange rate (weak Korean currency), international interest rate and low oil and raw materials prices - the so-called "three low phenomena" - Korea enjoyed its first merchandise trade surplus (3.5 billion dollars) and its first current account surplus (4.65 billion dollars) in 1986 and witnessed surplus in the balance of payment for the next three years.

Through import expansion, rather than export reduction, the Korean government tried to avoid trade conflict resulting from trade surplus for 4 years. As a result, the so-called import liberalisation ratio increased each year from 68.6% in 1980 to 98.1% at the end of 1993.⁹³ Various supporting measures for promoting export, such as the Science and Techno-

92. Since 1983, inflation has been suppressed under 5%, compared to 20-30% in the 1970s. Wholesale price rises accelerated to nearly 18% each year from 1972 to 1979. See, KIEP, *Policies Related to Trade in Korea*, KIEP, 1992, p17.

93. KFTA, *Trade Annual 1993*, 1993, p427.

logy Development Law (STDL, 1986) were either abolished or relaxed.⁹⁴ Prior to these measures, furthermore, the Korean government announced long-term plan for internationalisation of the capital market (1981) and the introduction of an import liberalisation indication system (1984).⁹⁵ In order to expand foreign direct investment and introduce foreign technology which is indispensable to development, the Foreign Capital Inducement Law (FCIL) was passed in 1983 and entered into force in 1984. As a result, Korea switched from a positive list system (i.e., only those activities specially permitted could have foreign direct investment) to a negative list system (unless specifically restricted, an activity is open to foreign investment) in the field of foreign investment.⁹⁶ A similar policy for imports was adopted in 1968. As part of its import substitution policy, Korea had formerly relied upon a positive list system on import authorisation, but it was converted to a negative list system which permits imports unless specifically restricted.⁹⁷ In addition, the ratio of items authorised for Automatic approval status in Korea's import licensing system was increased each year by the Ministry of Trade and Industry (MIT).⁹⁸

Korea's first trade surplus, in 1986, was mainly because of the so-

94. For example, the abolition of the import surveillance system (1988), the alleviation of substantial import restriction by special laws (1988), the total abolition of export financing to large conglomerate enterprises (Chaebols) and a drastic curtailment of trading financing (1988), and abolition of the deferment system on customs tariff collection and its conversion to the customs tariff restoration system (1988).

95. KIEP, *Policies Related to Trade in Korea*, p18.

96. Ibid, p330. Article 7 of the Foreign Exchange Control Act.

97. Ibid, p48. Article 18 of the Foreign Trade Transactions Act.

98. Peter F. Allgeier, "Korean Trade Policy in the Next Decade: Dealing with Reciprocity", (1988) 16 *World Development* (No. 1), p89-90. Products listed for automatic approval receive import licenses automatically; a recommendation from the concerned Ministry or industrial association is not necessary.

called "three low phenomena" - low oil price, low interest rates and the rapid depreciation of the U.S dollar against the Japanese yen. Among them, the strong yen especially made Korean products popular. However, they did not maintain this popularity when the Japanese currency was stabilised because corporate Korea poured profit into the stock market and real estate instead of investing in Research and Development and factory automation. As a result, Korea started once again to suffer trade deficit in the 1990s.

In the beginning of 1994, the yen strengthened more than 20 per cent - from 111 yen to around 92 yen - against the U.S dollar.⁹⁹ Korean companies, however, faced the so-called "three highs" - high wages, high interest rates and high domestic prices, especially for land. To avoid repeating their past mistake, Korean companies have been urged to take advantage of their price competitiveness by promoting overseas marketing, developing high-tech and more value added products and localising the production of parts and machinery that they import from Japan. Expanding markets in Southeast Asia and China, and the strong yen offer the best chance to Korean companies' international presence through direct investment in foreign countries. Setting up plants overseas will increase margins for Korean companies and help them hold on to their market share once yen appreciation is no longer a factor. Furthermore, a strong yen offers a good opportunity for localising parts and machinery because it makes imports more expensive.

Korea has kept opening its economy to the world, as mentioned above, in order to escape trade conflicts, upgrade industrial structure through competition, and increase people's welfare. As a result, liberalisation is almost completed in the commodity market except for part of the

99. *Financial Times*, Mar. 13, 1995, p28, and Mar. 20, 1995, p28.

agricultural market,¹⁰⁰ and the import liberalisation ratio in manufacturing products reached 99.8% in 1990.¹⁰¹ Although Korea has tried to avoid trade conflicts with its major trade partners through the alleviation of restrictions on foreign direct investment and partial liberalisation of the service market, e.g. insurance, its major trade partners including USA and EC are forcing it to open its markets completely including agricultural products, financing and insurance, and demanding protection of their intellectual property rights.¹⁰²

Up to the middle of the 1980s, the United States was the only market in which Korea could achieve economies of scale necessary to become competitive in more sophisticated manufactured goods. As a result of European Economic Integration, however, the European Community has emerged as another market in which Korea can become competitive. In order to expand Korea's export to the Community, it is important to convince the political and business leadership in the Community that Korea is providing the Community with fair access to the Korean economy, because lopsided export expansion without reciprocity in market access could be a short-cut to trade conflict and cause protectionism from the trade partner.

Korea's major export sectors, ironically, have been major import sectors as well. Korea has relied heavily not only on foreign raw material and inputs for major export goods where Korea adds value or assembles components, but also on equipment necessary for manufacturing

100. The import liberalisation ratio in agriculture products has reached 89.9 per cent in 1993. See, KFTA, *Trade Annual 1993*, p427.

101. KIEP, *Policies Related to Trade in Korea*, KIEP, 1992, p22.

102. This was one of the chief irritations between Korea and EC. When Korea introduced a system of protection that benefited only US companies, the EC tried unsuccessfully to negotiate equal treatment, and then in December 1987, the EC Commission suspended benefits under the Generalised System of Preferences in protest at Korean disregard for European intellectual property rights.

processes.¹⁰³ The principal sources of such machinery and capital goods to Korea have been Japan and the United States.¹⁰⁴

Europe, however, offers what Japan and the United States are reluctant to offer - some of the latest technologies in industries where Europe is strongest, such as chemicals, pharmaceuticals, and transport equipment.¹⁰⁵ But the Europeans are wary of transferring technologies to Korea, possibly because Korea is regarded as a high-tech player, even though once it was one of the Community's main suppliers of labour intensive goods. Korean exports to the European Community grew to 10.6 billion U.S dollars in 1994 from 2.8 billion U.S dollars in 1982, while the Community's exports to Korea during the period rose to 13.2 billion U.S dollars from 1.5 billion U.S dollars.¹⁰⁶

Up to the middle of the 1980s, Korea's trade policy pursued export promotion and import restriction aimed at selective localisation, combined

103. For instance, machine tools, heating and cooling machines, and manufacturing equipment for semiconductors. This is why inducement of foreign direct investment in Korea and localisation of higher technology, information-intensive industries are critical to the Korean economy.

104. Korea's trade deficit with Japan is 12.0 billion U.S dollars (estimates) of 6.05 billion U.S dollars of its total trade deficit in 1994. Among them, trade deficit with Japan in manufacturing equipments, parts and components expanded to 11.3 billion U.S dollars until October, 1994, compared to 10.5 billion in 1993.

105. TGV of France won the two-year-long race for the Korean supertrain project. The French bidder beat its German and Japanese competitors mainly because of the terms and conditions of technology transfer & localisation and cost. See, *Korea Newsreview*, Aug. 28, 1993, p8 and p9.

106. KFTA, *Trade Annual 1993*, p 183, and p274. Korea's trade deficit with the EC was 2.64 billion U.S dollars in 1994. Therefore, Japan was followed by the EC in terms of trade deficit of Korea. See, *Seoul Shinmun*, Nov. 29, 1994, p6, and Dec.27, 1994, p6, and Apr.1, 1995, p5, the presentation from the EC Ambassador in Korea on '*The Future of Korea-EU Relations*'.

with protecting the agricultural sector.¹⁰⁷ Since 1980, however, there has been a trend toward a more liberalised trade policy which pursued diversification in trade, liberalisation of imports, and localisation of selected products.

2. KOREAN TRADE POLICY

2.1 Diversification in Trade

Under any circumstance, it would be risky for an exporting country to be so dependent upon a single market, the United States, and it would be even more risky for Korea to rely heavily upon a single country, Japan, as a source of capital goods for its exporting industries. Korea, therefore, has to diversify its export market, and open its economy, both imports and investment, to foreigners. In fact, Korea is already seeking to diversify its export outlets. The number of Korea's export markets has increased due to the rapid expansion of its export and the normalisation of diplomatic ties with the former communist countries. Korea's export markets which were only 33 countries in 1962 have increased to 201 countries including Russia and the Eastern European countries.¹⁰⁸ Thanks to the diversification of export markets, the imbalance in the export market has gradually decreased. In 1970, 75.6 per cent of the country's whole exportation was destined for the United States and Japan. In 1992, however, only 38.7 per cent was exported to the abovementioned two

107. General reading on Korean trade policy prior to 1984 appeared in Koo Bohn-Young, "A review of the industrial incentive system in Korea", Mimeo (Seoul: Korea Development Institute, Aug. 1984).

108. KFTA, *Trade Annual 1993*, p181.

countries.¹⁰⁹ The rest of Asia and the Pacific gave Korea an opportunity for export diversification. Korea's export to those regions grew from 9.9 per cent of its total exports in 1975 to 27.8 per cent in 1992.¹¹⁰ As a result, Asia emerged as the biggest export market for Korea.

Export to the Community continued to grow as well. As a proportion of Korean exports, export to the Community increased from 10.8 per cent in 1985 to 12.0 per cent in 1992.¹¹¹

In Contrast to this successful export diversification, however, imports continued to rely heavily on Japan and the United States.¹¹² Nevertheless, imports from the Community have grown rapidly and emerged as an alternative source of manufactured goods for Korea's exporting industries.

2.2 Liberalisation

Import liberalisation is continuously being carried out in pursuit of the country's open-door and internationalisation policy, as indicated by systematic tariff reduction, fewer items subject to restricted import licensing, less frequent application of higher emergency or adjustment tariffs, and more activities open to foreign investment.

109. Ibid.

110. Ibid, p182.

111. Korea exported to the Community 9.41 billion U.S dollars in 1993, and more than 10 billion U.S dollars in 1994. See, *Seoul Shinmun*, Jan. 4, 1995, p9.

112. Imports from Japan and the United States occupied 46.2 per cent of the country's total import. KFTA, *Trade Annual 1993*, p275.

First of all, the average normal tariff was reduced from 25 per cent *ad valorem* equivalent in 1982 to 8.9 per cent by 1993.¹¹³ The so-called "liberalisation ratio" (percentage of 10,220 ten-digit HS numbers¹¹⁴ in Korea's tariff schedule with AA status) increased each year from 1980 (when it was 68.6 per cent), to reached 98.1 per cent in 1993.¹¹⁵ As a result, only 197 out of 10,417 articles are subject to the list of restricted import licensing. Of these, a further 47 was liberalised in 1994, and the remaining import restricted articles will be converted to Automatic Approval status in Korea's import licensing system up to 1997.¹¹⁶

Since the Foreign Capital Inducement Law (FCIL),¹¹⁷ foreign investment is gradually being liberalised by annually removing activities from the FCIL's prohibited or restricted lists. In order to simplify the approval process for foreign investment, Korea switched from a license system to a report system in March, 1993. As a result, Korea liberalised 83.0 per cent or 924 sectors of the 1,148 sectors subject to foreign investment in the Korean economy.¹¹⁸ Among various broad categories of

113. KFTA, *Trade Annual 1993*, p429. This average tariff will be reduced to 7.9 per cent according to the five-year tariff reform scheme announced in 1983 by the Korean government. This reduction pursuant to the tariff scheme has been maintained unilaterally in order to improve the competitiveness of the country's economy. The schedule of reductions is announced in advance so that both the affected local sectors and the overseas exporters to Korea would have time to adapt to the lower tariff.

114. Korea used CCCN method, as an article classification method, up to 1987. Since Korea joined the HS agreement, a 10-digit HS method based on the original 6-digit HS method has been applied. Ten-digit HS numbers in Korean tariff schedule numbered 10,417 items in 1993.

115. KFTA, *Trade Annual 1993*, p427. The import liberalisation ratio in agricultural products has reached 80.3 per cent in 1990. The liberalisation trend in this field would be kept expanding throughout the 1990s. See, KIEP, '*Trade Related Policies in Korea*', p22.

116. KFTA, *Trade Annual 1993*, p428.

117. It was passed in 1983 and entered into force in July 1984.

118. KFTA, *Trade Annual 1993*, p442.

sectors, however, the liberalisation ratios vary enormously. For example, by 1991, agriculture, for example, had a liberalisation ratio of 20 per cent, services were 61.8 per cent, and manufacturing industries were 97.7 per cent liberalised.¹¹⁹

In spite of the fact that liberalisation has been carried on, it could be argued that Korea's trade policy concentrates on targeted import substitution and aggressive export promotion. Through special laws and regulations, and administrative guidance as substantial leeway from the economic ministries, the Korean government can restrict imports in priority areas for development of indigenous capabilities, and influence on the final parameters of an approved investment.

Recently, in order to attract more foreign capital and technology, Korea unveiled measures to attract foreign investment. The measures included permission for foreign business operations in Korea to purchase land for plant construction and housing for their staff without obtaining government approval; permission for foreign business investing high-tech industries to finance plant construction with loans from abroad; and permission for foreign business to import from Japan certain machines which the government had put on the import ban list.¹²⁰

The first two measures are very important, as they would improve the approach to the financial market in Korea as well as abroad. In Korea, neither credit loan nor low interest rates are well established, compared to those of the advanced countries. Permission to purchase land, therefore, would enable foreign business to take loans on the security of land. In addition, the establishment of free investment zones which would

119. KIEP, *Trade Related Policies in Korea*, p332. Korea had a liberalisation ratio of 83 per cent which was subject to the foreign investment by 1993, compared to 80.3 per cent by 1992, and 79.4 per cent by 1991.

120. *Korea Newsreview*, Nov. 13, 1993, p14.

be relieved of a variety of red tape, regarding such matters as investment approval from government to acquisition of plant sites exclusively for high-tech foreign businesses could attract foreign direct investment.

Korea aims to open an additional 132 industrial sectors by 1997, and increase investment liberalisation ratio to 93.6 per cent by the target year.¹²¹

As a result of a variety of measures to attract foreign investment, the approved foreign direct investment sharply increased and represented 1.11 billion U.S dollars during the January to September period in 1994.¹²² During this period, foreign direct investment in non-manufacturing sectors almost tripled to 0.83 billion, while investment in manufacturing sectors declined 26.8 per cent to 0.28 billion.¹²³

2.3 Localisation

As we have seen above, export-led economic growth based on substantial imports of technologies, machinery and components, and mainly under OEM (Original Equipment Manufacture) deals,¹²⁴ provides a method of rapid industrial development.

121. *Korea Newsreview*, July, 3, 1993, p14. This additional foreign investment liberalisation was decided at a meeting of the Foreign Capital Introduction Deliberation Committee which was held at the end of June, 1993.

122. *Korea Newsreview*, Oct. 22, 1994, p23.

123. *Ibid.* This meant that foreign investors started to regard Korea as a market rather than a manufacturing centre.

124. Korea had 49.1 per cent of the proportion of own-brand sales out of the nation's total export. As a result, indigenous producers relied on OEM business for more than half of total sales. Therefore, more than half of the Korean economic sectors were exposed as being vulnerable. The solution was to increase the proportion of own brand sales based on localisation of higher technology and information-intensive industries. See, KFTA, *Trade Annual 1993*, p168.

Unlike Japan which had already been ranked as an advanced country even before World War II and has penetrated into export markets with well-experienced industries, Korea has exploited export markets with little experience at home, relying on imported capital goods. Furthermore, Korean export performance has tended to rely heavily on technology inflows and imported machinery. It is a very risky strategy, therefore, especially where there is no large domestic market or strong technological base.

Since the mid-1980s, lower cost countries in South-east Asia started to win OEM contracts at the expense of Korea where production costs rose as a result of rising international interest rates, prices of raw materials and wages due to unionisation of the labour. Even though international interest rates will affect all companies, wherever they are located, rising wages¹²⁵ and raw material prices¹²⁶ have been the main reasons that led to Korea being regarded as a less attractive location for sub-contracting. Therefore, localisation, designed to decrease the import of capital goods (mainly from Japan),¹²⁷ increase international marketing presence, and establish technological independence, is a consistent policy

125. According to the Korea Productivity Centre, the rate of a normal increase in wages minus the rate of productivity gains during the period from 1980 to 1992 was 8.51 per cent for Korea, 4.54 per cent for Singapore and 5.2 per cent for Taiwan.

126. Korea imports all the oil which it needs. Imports of raw material occupied 52.0 per cent of Korea's whole import in 1992. See, KFTA, *Trade Annual 1993*, p272.

127. Trade with Japan has been the major cause of Korea's trade deficit. Korea suffered a trade deficit of 9.65 billion U.S dollars in 1991, 5.41 billion dollars in 1992, 1.56 billion dollars in 1993, and 6.05 billion dollars in 1994. Among them, the trade deficit with Japan was 8.76 billion dollars in 1991, 7.85 billion dollars in 1992, 8.4 billion dollars in 1993, and 11.4 billion dollars in 1994. Trade deficit with the EC had been 0.15 billion dollars in 1991, 0.35 billion dollars in 1992, 0.76 billion dollars in 1993, and 2.64 billion dollars in 1994 (as of Nov. 1994). See, KFTA, *Trade Annual 1993*, p137 and p138, *Korea Newsreview*, Feb. 13 1993, p13, and Jan. 14, 1995, p2, and *Seoul Shinmun*, Dec. 27, 1994, p6, and Dec.1, 1994, p8.

regarded as an important measure to improve the country's international competitiveness.

Special laws, such as the Telecommunication Basic Law, the Science and Technology Development Law, Electronics Industry Promotion Law, Computer Network Law and Semiconductor Industry Fostering Plan give ministries the authority to set up or maintain local content requirements, to turn down import applications and to permit public sector procurement of products containing a stipulated level of local content. Recommendations from domestic industry associations are required for import approval.¹²⁸ The difficulty of obtaining recommendations from domestic industry associations which are directly competing against imported products constitute a stumbling block to free trade, in spite of the fact that this system has contributed to localisation or import substitution of strategic parts or products.

It is worth noting, ironically, that the reasons why foreign direct investment and OEM manufacturing in Korea have been decreased could share the same reasons why Korean companies have increased direct investment in foreign countries, where access to cheap labour and raw materials is easy.

The Korean trade deficit widened mainly because of import of capital goods from advanced countries. Furthermore, advanced countries are getting more reluctant to transfer technologies to Korea. Therefore, localisation and import diversification policies are pursued. Import diversification, however, is not compatible with GATT's Most-Favoured-Nation principle. The political repercussions of successful export expansion relying on import restriction in the form of import diversification and localisation could cause trade conflicts.

128. For instance, import licence applications are subject to the recommendation of the Korean Machine Tool Industry Association.

Between 1992 and 1994, the Ministry of Trade and Industry supported 266.4 million U.S dollars for localisation of 2,290 products. As a result, Korea could have enjoyed 3,100 million U.S dollars worth of import substitution and export expansion.¹²⁹ However, machinery, parts, and components for exporting industries still relied heavily on import from Japan.¹³⁰

Technological self-reliance efforts, however, have not been easy. Even though some Korean companies succeeded in localising, large local companies which are major buyers do not choose Korean products in preference to products imported mainly from Japan, because of high price. Even when the prices of Korean and imported products are similar, Korean consumer companies prefer imported products which have proved their quality for years.¹³¹ Another main reason, however, is that the dumping onrush of Japanese products targeting the latest Korean-developed items on the domestic market has driven them out of the market.¹³²

129. *Seoul Shinmun*, Jan. 28, 1995, p10.

130. The reliance on imports for machinery, parts and components from Japan was 39.8 per cent in 1991 and 39.2 per cent in 1994. *Seoul Shinmun*, Jan. 28, 1995, p10.

131. Korean consumer companies give as reasons why they are not eager to use localised products, lack of confidence in quality (63%) and high price (15%). *Seoul Shinmun*, Jan. 28, 1995, p10.

132. KFTA, *Trade Annual 1993*, p228. Dongsung Semiconductor Co., for instance, a small- and medium-sized local computer chip maker, succeeded in localising a pressed diode, a key colour TV and microwave oven component, in March, 1992. A few months later, this promising company was bankrupted because of a 25 per cent price cut in electronics components by Sankei and Fujitsu, the two dominant Japanese suppliers in Korea. See, *Korea Newsreview*, Jun. 27, 1992, p15.

2.4 Korean Direct Investment in Foreign Countries

Overseas investment by Korean companies has risen sharply.¹³³ New investment by Korean companies by overseas subsidiaries was 1,872 million U.S dollars in 1993.¹³⁴ This was 53.6 per cent higher than that of 1992.¹³⁵

Southeast Asia accounted for the largest slice of Korean overseas investment, attracting 519.3 million U.S dollars in 358 projects. North America was second, with 391.6 million U.S dollars and the European Community was third, with 144.2 million U.S dollars (in 37 projects) in 1992. Europe-wide, Korea leads the ripple of non-Japanese Asian investment: its cumulative direct investment in the Community, mostly in electronics, in the four years to 1993, amounted to 560 million U.S dollars.¹³⁶

As mentioned above, the reason for the sharp rise in Korean over-

133. The definition of international direct investment - OECD Paris 1992 - was adopted by the IMF in the 5th edition of its Balance of Payments Manual. According to this definition, a direct investment enterprise is an incorporated enterprise in which a single foreign investor controls 10 per cent or more of the ordinary shares or voting power of an incorporated enterprise - or the equivalent of an unincorporated enterprise - or has an effective voice in the management of the enterprise. See, Commission, *Direct Investment in the EC 1984-1991*, eurostat, 1992, p11.

134. KFTA, *Trade Annual 1994*, p363. *Korea Newsreview*, March 5, 1994, p25. Compared with overseas direct investment by British companies, new investment by Britain in foreign countries was 17 billion pounds (about 27 billion U.S dollars), while Korea invested 1,872 million U.S dollars in 1993. See, *Financial Times*, Feb. 1, 1995, p16.

135. In 1992, Korean investment in foreign countries was 1,218 million U.S dollars. The Korean government approved 2,367 million U.S dollars in 1,369 direct investments in foreign countries during the Jan.-Sep. period in 1994. This represented a 99.9 per cent increase, or 1,183 million U.S dollars, over the corresponding period of last year (Source: the Ministry of Finance), *Korea Newsreview*, Oct. 22, 1994, p23.

136. Korean investment in the European Community was 95.2 million in 1990, 90 million in 1991, 144.2 million in 1992, and 231 million U.S dollars in 1993. See, KFTA, *Trade Annual 1994*, p .

seas investment in advanced countries like America or the European Community is to gain high-technology and/or set up localised production aimed at exploring foreign markets directly and avoiding protectionism, while its investment in the Southeast Asia countries is mainly to employ cheap labour.

In the case of Korean direct investment in the EC, especially, securing market accessibility has been the most important motivation as the EC's protective measures, particularly anti-dumping action, have proved to be relentlessly effective in impeding exports of Korean products. Local-content requirements and rules of origin are other factors that induce forced investment.

Furthermore, there are several reasons for Korea to invest in the EC. First, the EC has emerged as the world's largest single market of 370 million people with 15,828 U.S dollars GDP per head.¹³⁷ This is 40.2 per cent of the total population of the developed market economies and 6.4 per cent of the world population.¹³⁸

Korean foreign direct investments in the Community have coincided with either actual or threatened imposition of anti-dumping duties by the European Commission on products made in Korea. When the Council imposed 21.3 per cent and 20.1 per cent anti-dumping duties on imports of Haitai's and Inkel's compact disc players respectively,¹³⁹ both companies established plants in the Community in 1990.

137. *Financial Times*, Oct. 11, 1994, p3, Commission, "A Community of Twelve: key figures", *European File*, Eurostat, 6-7/1991, p8.

138. U.N., *Handbook of the International Trade and Development Statistics*, New York, 1989, p422.

139. Coun.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, and Coun.Reg.(EEC) No 112/90, OJ (1990) L 13/21. These measures were repealed by Coun.Reg.(EEC) No 2347/93, OJ (1993) L 215/4.

Samsung of Korea announced a plan to invest 700 million U.S dollars to build a manufacturing complex which would cover the production of computer monitors, microwave ovens, facsimile machines, personal computers, monitor tubes, facilities to make 8 inch semiconductor wafers, and colour television. This announcement followed the Commission's determination of anti-dumping on colour television sets from Korea.¹⁴⁰ Furthermore, Samsung Electronics and NEC of Japan will collaborate in producing memory chips for the European market.¹⁴¹ The link-up will enable Samsung to avoid anti-dumping duties of 14.6 per cent on memory chips imported into the European Community,¹⁴² even though the tariff saving is not likely to have been an important element of the deal.

In 1995, when a powerful group of European Excavator manufacturers filed a complaint to the European Commission, Hyundai announced its intention to invest in Belgium and Samsung decided to establish its first foreign excavator manufacturing plant near Harrogate, North Yorkshire,¹⁴³ before the Commission started its anti-dumping investigation.

In order for foreign investment to contribute to Korea's economy, the effect of export substitution and re-importation to Korea should be minimised, and furthermore, exports of parts and components to overseas

140. *Financial Times*, Sept.16, 1994, p1. Coun.Reg. (EC) No 2376/94, OJ (94) L 255/51, at 62. Commission imposed 18.0 per cent and 16.8 per cent provisional antidumping duties on Samsung and Goldstar respectively. Goldstar announced a 10 million pound colour TV plant after this antidumping determination. See, *Financial Times*, Oct. 18, 1994, p12.

141. *Financial Times*, Feb. 7, 1995, p20.

142. Coun.Reg.(EEC) No 611/93, OJ (93) L66/1, p5. Undertakings from the Korean companies have been accepted by Com.Dec. 93/157/EEC, OJ (93) L 66/37.

143. *Financial Times*, Jan.10, 1995, p6, Jan. 11, 1995, p6, Jan. 13, 1995, p4, and Jan. 24, 1995, p10.

subsidiaries from parent companies in Korea should be increased.¹⁴⁴ As long as subsidiaries in foreign countries rely on cost advantage based on the parent companies' relatively cheap parts and components, Korean foreign direct investments in the EC are very vulnerable to the trade-oriented investment policies of the EC because the EC may change the rate of local-content requirements and use this as an arbitrary protectionist instrument. Therefore, they should invest jointly with parts and material suppliers and/or have other sources of supply under better conditions, such as lower labour cost and local raw materials.¹⁴⁵

On the other hand, foreign direct investment in order to escape protectionist measures by manufacturing on the spot, what was formally exported, may cause some difficulties in the EC. The anti-dumping complaints may leave European manufacturers facing a competitor strengthened by producing within the Community, which is the last thing the European producers need. Furthermore, anti-dumping complaints may encourage or force foreign companies to set up more factories in the Community, which might exacerbate the European industry's manufacturing overcapacity.

Ironically, in this respect, the European Community has contributed

144. The result of the Ministry of Trade and Industry's survey of 1,393 Korean manufacturers that operate overseas offshoots showed that 82.3 per cent of the pollees said neither production nor exports of Korean manufacturers at home had declined, despite a considerable volume of overseas investment. Korea's locally incorporated companies in foreign countries exported 40.5 per cent of their total output to enterprises in Korea. They imported from Korea 50 per cent of the raw materials needed to produce finished goods in foreign countries. 55 per cent of the pollees replied that they had succeeded in business and only 3 per cent said that they had failed. *Seoul Shinmun*, Feb. 3, 1995, p9. The MTI jointly conducted the survey for three months starting Sept. 1, 1994 with the Korea Foreign Trade Association in order to analyse the effects of overseas investment on exports, imports, technology improvement and employment.

145. Korea's favourite investment areas are the Southeast Asian countries and China, mainly because of cheap labour and easy access to local raw materials.

to the internationalisation of Korean companies by imposing anti-dumping duties on Korean products, as well as enhancing their competitiveness. At the same time, other localised foreign manufacturers in the Community, for instance the Japanese, which have a significant trade deficit to the Community, may enjoy relief from low-cost competition until Korean manufacturers are localised in the European Community. On top of that, countries in the Community which have usually offered generous grants¹⁴⁶ have continued to bid against each other for inward investments from non-EC companies in their efforts to defeat European Companies they are striving to protect.

2.5 Korean Trade Policy in the Next Decade

Korea needs to achieve successful economic growth continuously in order to join developed and industrialised world. This economic growth can only be sustained by the preservation of a market-based economy and by an international scramble for market through competition. The Korean economy is, however, facing challenge from all sides. It is increasingly handicapped by baggage from its past which desperately requires a radical redefinition of the role of government in its economy and adherence to a stronger market-based economy. The situation is made even worse by challenges from stronger regional competition with cheap labour.¹⁴⁷ Union-

146. The U.K government offered Samsung 58 million pounds (about 92.8 million U.S dollar) in regional grants and loans to secure the company's 700 million U.S dollar project. Together with indirect aid, the support from the U.K government is equivalent to 20 per cent of Samsung's investment. It may be argued that one member country's grant to solve its regional unemployment could threaten jobs in other member countries. See, *Financial Times*, Sept. 16, 1994, p1.

147. Wage levels in China, Malaysia and Thailand are just one tenth of those in Korea. See, *Financial Times*, 17 October 1994, p29.

isation of labour in Korea has caused wage rises, which have outstripped increases in productivity. To stay ahead of regional rivals, the basic requirement is the elevation of productivity corresponding to wage rises. In addition, overall economic performance based on original equipment manufacture (hereinafter OEM) and labour intensive industry should be quickly switched to levels in the industrialised world, with own-brand sales, and capital- and technology-intensive industries.

Some countries which went ahead of Korea in developing their economies have not joined the developed world, but have lost their competitiveness, and suffered high-unemployment, high-inflation and low economic growth because unionised labour have pressed governments to pursue public welfare at the expense of competitiveness. Once they lost their competitive power, they could not but rely upon protectionism. Korea, nowadays, is in similar situation. Trade protectionism has appeared again in Korea as its trade balance is aggravated again and Korea views that liberalisation pressure from its major trading partners as unfair. Furthermore, the so-called "three highs" (rising labour and raw material costs, and appreciation of the currency) at the end of 1980s made matters worse. Korea, however, needs to adopt a more liberalised economic policy and active industrial adjustment policy rather than protectionism in order to enhance its economic performance. Market liberalisation should be carried out not from the viewpoint of alleviation of trade conflicts but from a more positive prospective of elevation of international competitiveness which would certainly guarantee economic growth, although it could result in unemployment and idle facilities in some service industries and agriculture. To overcome the difficulties arising from liberalisation, a timetable for phased liberalisation should be prepared and adumbrated in advance. This could have the effect of clarifying Korea's liberalisation policy toward abroad, and its domestic industries could have rooms to

prepare against liberalisation.

It must be noted that market liberalisation could be constrained by several factors. The "Hermit Kingdom Legacy" which is Korea's historical inwardness has given rise to a widespread view among Korean public that market liberalisation hurts Korean interests. Additionally, in trading policy-making procedure, resistance from the interest groups which exercise influence over politicians can be exerted at the expense of the economic imperative for liberalisation. Strict precautions should be taken against the protectionist forces which may exert additional power in the process of democratisation. Otherwise, Korea may not achieve enough economic growth to join the developed world.

3. LEGISLATION RELATED TO TRADE IN KOREA

3.1. General

The relevant Korean laws concerning trade are composed of the Foreign Trade Transaction Acts, the Foreign Exchange Control Act, and the Customs Act.

The Foreign Trade Transactions Act¹⁴⁸ which is a basic law regulating export-import business contains provisions related to trade

148. In 1946, the Foreign Trade Transactions Rule was enacted based on the laws and ordinance of the American military administration. In 1956, the Presidential Decree on a Grant for Export Promotion was promulgated. In 1957, the abovementioned two systems were combined into a Trade Act. In 1961, the provisional Act on the Export Bounty was enacted. In 1962, the Export Promotion Act was enacted alongside execution of the first five year plan. From 1967 the Trade Transaction Act which integrated the abovementioned three Acts was carried into effect. In 1986, the Foreign Trade Transactions Act was newly formulated; it entered into effect from June, 1987, by Presidential Decree, and its administrative regulation was enacted June, 1987 by the notification from the Ministry of Trade and Industry (the "MTI").

business,¹⁴⁹ trade agency,¹⁵⁰ licensing of export-import business,¹⁵¹ investigation of injury caused by import,¹⁵² and maintenance of orderly export and import.¹⁵³ It aims to: promote external trade; establish fair transactions; keep the balance of payments; expand external commerce and contribute to the development of national economy.¹⁵⁴ Compared to the previous Trade Transactions Act in 1967 which advocated the managed trade system, this new Act is more market-oriented and aims to cope with rapid changes in the internal-external trade environment under full scale liberalisation.

The Foreign Exchange Control Act¹⁵⁵ regulates foreign exchange and its transactions, and credits and debits resulting from external trade. By the fourth amendment of this Act, unnecessary and complicated procedures were simplified in order to establish the institutional background for the liberalisation of the finance and capital market.

The Customs Act¹⁵⁶ which was enacted in 1967 and amended in 1993 regulates all exported and imported products which pass the customs line. In 1993, institutional complement was required as, in the process of internationalisation and liberalisation, products could be imported at a price below normal value and cause injury to competing domestic indu-

149. Articles 7 and 13 of the Foreign Trade Transactions Act (hereinafter the FTTA).

150. Article 14 and Article 17 of the FTTA.

151. Article 18 and Article 31 of the FTTA.

152. Article 31(2) and Article 43 of the FTTA.

153. Article 44 and Article 54 of the FTTA.

154. See, Article 1 (objects) of the FTTA.

155. The Foreign Exchange Control Act was enacted at the end of 1961. Since 1961, this Act has been amended four times, most recently in 1991. Its Enforcement Decree was entered into force in 1962 by a Cabinet Ordinance, and its Administrative Regulation was proclaimed in 1964 by a notification from the MTI.

156. The Enforcement Decree of the Customs Act was promulgated in 1967 by a Presidential Decree and its enforcement regulation was notified in 1979 by a decree from the MOF.

tries. In addition, increasing quantity of exports and imports has made it necessary not only to improve customs formalities but also to accept international standards for customs formalities. The Customs Act aims to ensure tariff revenue through the imposition and collection of customs tariff and appropriate customs clearance.¹⁵⁷ This Act, which could be characterised, like the taxation law, as having the dual nature of a substantive law and an adjective law, stipulates not only a requirement for reduction and exemption, and imposition of customs tariff but also procedures for those provisions. Furthermore, it has customs clearance law character and a criminal law character as well because it makes extensive provisions regarding violations, investigations and punishment.

Customs tariff, which is divided into basic rates and provisional rates, contains an elastic tariff system and an international cooperation tariff system by which the Executive is authorised by the National Assembly to impose customs tariff under special terms and conditions and within a limited scope, in order to cope with changes in the economic environment.

The elastic tariff system is composed of a anti-dumping tariff,¹⁵⁸ a retaliative tariff,¹⁵⁹ and countervailing tariffs¹⁶⁰ against a trade which is regarded as unfair. In case of fair trade, there are three kinds of tariffs; an emergency tariff, an adjustment tariff and an allocated tariffs. The emergency tariff¹⁶¹ is imposed, within the limit of 40/100 of the basic rate, against products being imported in such increased quanti-

157. Article 1 of the Customs Act in 1993.

158. Article 10 of the Customs Act; this will be discussed later in detail.

159. Ibid, Article 11. It would be imposed against imported products from the country which has treated Korean exports, ships and aircraft unfavourably.

160. Ibid, Article 13. It provides relief to domestic industries injured by subsidised imports.

161. Ibid, Article 12

ties as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing a product like or directly competitive with the imported product. The adjustment tariff¹⁶² is imposed, within the limit of 100/100 of the basic rate, for the rectification of imbalanced tariff rates and when an urgent restraint to the import of specified products is requested. The allocated tariff¹⁶³ applies double tariff rates subject to fixed maximum and minimum tariff rates could be imposed.¹⁶⁴

The international cooperation tariff¹⁶⁵ is a concessionary tariff through tariff negotiation with a foreign country or with an international organisation.

In addition to these systems, tariff reduction and exemption, tariff restoration¹⁶⁶ and tariff instalment systems are in force. Tariff reduction and exemption¹⁶⁷ are applied only when expressly stipulated by the Customs Act, the Foreign Capital Inducement Act, and agreements or

162. Ibid, Article 12(2).

163. Ibid, Article 16.

164. In addition, there is a convenience tariff (Article 14) for a non-treaty signatory and a price equalisation tariff (Article 15) for price stabilisation.

165. Ibid, Article 43(8). It provides tariff concessions within the limit of 50/100 of the basic rate when it is authorised. Korea joined GATT in 1967, participated in the Kennedy Round and the Tokyo Round, and has made tariff concessions to products in which major trading countries are interested as counter-presentations because it has benefited as a result of tariff negotiation based on the Most Favoured Nation (MFN) principle. Korea has made 220 tariff concessions in GATT joining negotiation, the Kennedy Round and the Tokyo Round. In the Uruguay Round, Korea planned to make 7,300 tariff concessions. See, KIEP, *Policies Related to Trade in Korea*, p76.

166. A special Act on tariff restoration on imported material for export in 1984, accelerated localisation of components for exporting products and import substitution.

167. Article 28 of the Customs Act. Tariff reduction and exemption rates have been reduced each year; 1991-60%, 1992-50% and 1993-40%. See, KIEP, *Policies Related to Trade in Korea*, p79.

treaties.¹⁶⁸ This is a kind of favour granted to diplomatic pouch, products related to high-tech industries and defence industries, procurement and re-exports. Tariff instalment,¹⁶⁹ within 5 years' time, could be authorised on products notified by the MOF such as machinery, basic equipments, construction materials and equipments, products imported by the government or a self-governing body, and products imported by a nonprofit-making corporation for the public good.

3.2 Anti-dumping Law in Korea

Customs tariff rate in Korea is determined by the National Assembly as a part of the Customs Act. Customs tariff rates determined by law are composed of the basic rate and the provisional rate as mentioned above. The Executive, however, has the authority to determine what tariff rates to apply in practice, in accordance with fluctuation of the internal and external economic environment. A series of elastic tariff systems and international cooperation tariffs (tariff concessions), as mentioned above, fall under the authority of the Executive.

Anti-dumping duty, as a part of the elastic tariff system, may be imposed where imports are sold at a price below normal value or threaten to cause material injury to a domestic industry and if it is deemed necessary to protect the domestic industry.¹⁷⁰ Although the Korean anti-dumping system was enacted in 1963 under the title of "Tariff for Prevention of Unfair Bargain Sale" as a part of the Customs Act, Korea did not apply

168. For examples, Status of Forces Agreement (SOFA). American forces in Korea based on the Korea-America Mutual Defence Agreement have been exempted from customs tariff by the Korea-America Agreement on Status-of-Forces in Korea.

169. Article 36 of the Customs Act.

170. Article 10 of the Customs Act.

this system frequently up to the middle of the 1980s. The new Korean anti-dumping system was amended in 1988 following joining of the GATT Anti-dumping Code in 1986. This system started to be active after its new administrative regulation was enacted.

The relevant Korean law concerning anti-dumping is contained in Article 10 of the Korean Customs Act, Articles 4(2) to 4(15) of the Enforcement Decree of the Customs Act by the Presidential Decree (hereinafter the EDCA), the Administrative Regulation on Anti-dumping and Antisubsidy (the MOF notification 89-6), Article 37 and Article 40(6) of the Foreign Trade Transactions Act, and Article 31 and 32 of the Regulation on the Operation and Procedure for the Investigation on Injury by the Imports.

According to these rules, the MOF coordinates the entire investigation and imposition of duty, while the Korean Trade Commission (hereinafter referred to as the "KTC"), an independent arm of the Ministry of Trade and Industry (hereinafter referred to as the "MTI"), is to investigate the primary material injury to the domestic industry, and the Office of Customs Administration (hereinafter referred to as the "OCA") is to investigate whether the imports are dumped or not, and calculate the dumping margin if dumping has occurred.¹⁷¹

¹⁷¹. Article 4(4)(2) of the EDCA.

**Chapter 3 : PROCEDURAL ASPECTS OF
THE ANTIDUMPING LAWS**

1. INTRODUCTION

Since 1968,¹ the European Community and its authorities have had exclusive competence in the field of anti-dumping law. The principle was repeatedly expressed in ECJ Opinion 1/75,² and in the *Donckerwolcke case*,³ that Member States should not exercise a power simultaneous to that of the Community, embodied in the common commercial policy, to govern trade with non-Member States in the Community dimension and in the international sphere. The original EEC Anti-dumping Regulation has been amended several times⁴ and dumping is currently governed by Council Regulation 2423/88⁵ (hereinafter the Community Anti-dumping Regulation).

The Community Anti-dumping Regulation applies only for protection against dumped imports from countries not members of the European Economic

1. Coun.Reg.(EEC) No. 459/68, *on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community*, OJ (1968) L 93/1.

2. In Opinion 1/75, *Opinion of the Court given pursuant to Article 228 of the EEC Treaty of 11 Nov. 1975* [1975] ECR 1355, at 1364, the Court said that it can not be accepted that, in a field which is covered by the common commercial policy, the Member State should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere.

3. Case 41/76, *Donckerwolcke v Procureur De La Republique* [1976] ECR 1921, at 1937. In this case, the Court held that its full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113(1). Measures of commercial policy of a national character are only permissible after the end of transitional period by virtue of specific authorisation by the Community.

4. Coun.Reg.(EEC) No 2011/73, OJ (1973) L 206/3, Coun.Reg.(EEC) No 1411/77, OJ (1977) L 160/4, Coun.Reg.(EEC) No 1681/79, OJ (1979) L 196/1, Coun.Reg.(EEC) No 1580/82, OJ (1982) L 178/9, Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1, and Coun.Reg.(EEC) No 1761/87, OJ (1987) L 167/9.

5. Coun.Reg. No 2423/88, *on protection against dumped or subsidized imports from countries not members of the European Economic Community*, OJ (1988) L 209/1.

Community.⁶ Although this Regulation applies to products from non-EC Member States in general, it is beyond the limit of this Regulation to apply to coal and steel products which are within the scope of the ECSC Treaty.⁷ Furthermore, as provided for in Article 17(2) of the Anti-dumping Regulation, it also can be applied to agricultural products,⁸ but not to services.⁹

2. ROLE OF THE EUROPEAN COMMUNITY AUTHORITIES

In the European Community, at least three different authorities are significantly involved in anti-dumping proceedings: the Commission, the Council, and the Member States via the Advisory Committee.¹⁰ Besides, if anti-dumping decisions are appealed under certain circumstances, the European Court of Justice (hereinafter ECJ)¹¹ should review the legality of

6. Article 1: Applicability of the Community Anti-dumping Regulation. Only one exception to this provision was trade between the west Germany and the east Germany which was considered to be German internal trade. Nowadays, however, there is no exception at all as a result of reunification between the west and the east Germany.

7. Com.Dec.2424/88/ECSC on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community, OJ (1988) L 209/18.

8. Article 17 of the Community Anti-dumping Regulation provides that 'this Regulation shall not preclude the application of the Community Regulations in the Agricultural sector'.

9. In this thesis, however, applications of anti-dumping measures on agricultural products will not be analysed, because they are largely governed by the Common Agricultural Policy; moreover, there has been no anti-dumping determination on agricultural products from Korea.

10. For the authorities of the Community in general, see Emile Noel, "The Institutions of the European Community", (1992) 15 *Suffolk Transnat'l L.J.*, p 514.

11. The Court is composed of 13 judges and 6 advocates-general. *Act Concerning the Accession of the Kingdom of Spain and the Portugese Republic and the Adjustment to the Treaties*, OJ (1985) L 302/1.

anti-dumping decisions made by the Commission or the Council.¹² This role of the ECJ is discussed later in Chapter 7 *infra* in detail.¹³ In addition, the European Parliament has received annual reports from the Commission on the Community's anti-dumping activities since 1983.¹⁴

Not only the general division of powers under the Treaty¹⁵ which grants exclusive competence on anti-dumping proceedings to the Commission, but also the ambiguity of Article 113¹⁶ of the Treaty, have given rise to concern by Member States regarding independent implementation by the Commission instead of strict application of the Anti-dumping Regulation. The Community authorities, however, have developed cooperation skills rather than antagonism for handling anti-dumping proceedings.¹⁷

12. Case 191/82, *Fediol v Commission* [1983] ECR 2193, Joined Cases 239 and 257/82, *Allied Corporation v Commission* [1982] ECR 1005. Since these cases, the Community anti-dumping measures were subject to judicial review, removing the uncertainty as to the exact circumstances under which foreign exporters are entitled to bring suit left by the 1979 *Ball bearings* judgment. See, Case 113/77, *NTN Toyo Bearing v Council* [1979] ECR 1185, at 1205.

13. On the ECJ's jurisdiction in general, see David Stoelting, "The Jurisdictional Framework of the European Court of Justice", (1991) 29 *Colum.J.Transnat'l L.*, p 193-214., H.-J. Rabe & M. Schutte, "EC Anti-dumping Law: Current Issues in the Light of the Jurisdiction of the Court", (1989) 26 *CML Rev.*, p 643-674.

14. Current report is *13th anti-dumping report*, COM(95) 309 final. Previous reports were given in COM(83) 519 final; COM(84) 721 final; COM(86) 308 final; COM(87) 178 final; COM(88) 92 final; COM(89) 106 final; COM(90) 229 final; SEC(91) 92 final; SEC(91) 974 final; SEC(92) 716 final; COM(93) 516 final and COM(95) 16 final.

15. See Articles 137-192 of Treaty on European Union.

16. Article 113(1) of Treaty on European Union provides that the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such those to be taken in the event of dumping or subsidies.

17. E. Vermulst, Van Bael & Bellis, *Anti-dumping Law and Practice in the United States and the European Communities: A Comparative Analysis*, N.H.P.C., Amsterdam, New York, Oxford, 1987, p194, (hereinafter referred to as Vermulst).

2.1. The Commission

The Commission is the authority to which complaints may be submitted;¹⁸ it holds consultations,¹⁹ notifies the Member States and specifies a period within which they shall be entitled to express their opinions or to request an oral consultation when the consultation may be in writing only.²⁰ The Commission decides whether there is sufficient evidence to justify initiating an anti-dumping proceeding, and then commences and carries out investigations at Community level.²¹ It may terminate anti-dumping proceedings without imposing any protective actions where those measures are unnecessary.²² The Commission can accept undertakings and terminate the investigation even during the course of the investigation, without the imposition of provisional or definitive anti-dumping duties.²³ The Commission takes provisional anti-dumping duties and submits a proposal for extension of provisional measures or for definitive anti-dumping duties to the Council.²⁴ As a leading player in the Community legislative process, the Commission submits proposals not only on amendments to the Community anti-dumping Regulation but also on any new Community trade legislation to the Council, which enacts the Community law based on those proposals. In addition, the Commission has submitted annual reports to the European Parliament on the Community's anti-dumping activities since

18. Article 5(3) of the Community Anti-dumping Regulation.

19. Ibid, Article 6(1)

20. Ibid, Article 6(3).

21. Ibid, Article 7.

22. Ibid, Article 9.

23. Ibid, Article 10.

24. Ibid, Article 11.

1983.²⁵

Within the Commission, enforcement of the EC anti-dumping law is entrusted to a special Directorate (Directorate C) in the Directorate General in charge of External Relations of the Community (DGI). This anti-dumping unit is critically understaffed.²⁶ Therefore the Community is pressing for the Commission's anti-dumping unit to be doubled in size to help improve the speed and efficiency of investigation into unfair trade.²⁷

25. Annual reports of the Commission have been submitted to the European Parliament following its Resolution of 16 December 1981 *on the Community's anti-dumping activities*, OJ (1981) C 11/37, and the more recent report of the European Parliament's Committee on External Economic Relations on the Anti-dumping policy of the European Community, PE 147.178/fin of 30.11.1990, rapporteur: Mr. Gijs DE VRIES.

26. The Commission's anti-dumping report said that the number of professionals handling cases at the Commission dropped from 94 to 89 in 1992, making a total of some 130 including supporting staff. See, Commission, *11th anti-dumping report (1992)*, Com(93) 516 final, p97. *Proposal for increasing staff, shortening inquiry deadlines and restructuring the anti-dumping unit* was approved by the Commission on November 11, 1993 and submitted to the Council, see *Financial Times*, Nov. 4, p6 and Nov. 5, p8, 1993.

27. Commission, *Proposal for a Council Regulation on the introduction of time-limits for investigations carried out under the Community instruments of commercial defence and modification of the relevant Council Regulations*, COM(93) 51, OJ (1993) C 328/8. Based on this proposal, Council Regulation (EEC) No 288/82 *on common rules for imports*, OJ (1982) L 35/1 as last amended by Council Regulation (EEC) No 2978/91, OJ (1991) L 284/1, and Council Regulation (EEC) No 2423/88, OJ (1988) L 209/1 were to be amended. See, Coun.Reg.(EC) No 521/94, *on the introduction of time limits for investigation procedures carried out against dumped or subsidized imports from countries not members of the European Economic Community and amending Regulation (EEC) No 2423/88*, OJ (1994) L 66/7, and Coun.Reg.(EC) No 522/94 *on the streamlining of decision-making procedures for certain Community instruments of commercial defence and amending Regulation (EEC) No 2641/84 and No 2423/88*, OJ (1994) L 66/10.

2.2. The Council

The Council, consisting of one delegate from each Member State, plays a limited but very decisive role in anti-dumping proceedings. The Council shall decide what proportion of the provisional anti-dumping duty should be definitively collected where a provisional duty has been applied.²⁸ In addition, only the Council can impose a definitive anti-dumping duty or extend provisional measures, acting by simple majority on a proposal submitted by the Commission.²⁹ In spite of the fact that the Commission can terminate the proceeding in the course of investigation, after consultation with the Advisory Committee, where objection is raised within the Advisory Committee the Commission should submit to the Council immediately a report on the result of the consultation, together with a proposal that the proceeding be terminated. The proceeding shall stand terminated if the Council has not decided otherwise within one month.³⁰ Nevertheless the Council has generally accepted the Commission's proposal.³¹

28. Article 12(2) of the Community Anti-dumping Regulation.

29. *Ibid*, Article 11(6) and 12(1). The terms 'qualified majority' in Article 11(6), 12(1) and (2)(a) were replaced by the terms 'simple majority'. See, Coun.Reg.(EC) No 522/94, OJ (1994) L 66/10.

30. *Ibid*, Article 9(1). It should be noted that the Council still acts by a qualified majority when the Commission submits a report of the consultation on termination of proceedings without protective measures because an objection has been raised within the Advisory Committee.

31. It is exceptional for the Council, acts by qualified majority on a proposal for definitive action submitted by the Commission, not to impose protective measures. See, *Magnesite (dead-burned)* (China and North Korea), OJ (1986) C 149/2, and *Kraftliner*, Com.Dec. 88/125/EEC, OJ (1988) L 62/39, where the Commission proposals encountered resistance from certain Member States which felt that such measures would be harmful to their home countries' industries.

Following the adoption of the *Single European Act*, the Council discontinued its old unanimity practice.³² Since the *Single European Act*, most of the Council's decisions have been taken by qualified majority,³³ on the basis of Commission proposals. This decision-making structure through the qualified majority system promotes relatively speedy resolution of anti-dumping disputes and avoids delaying tactics of Member States in the Council. In the field of commercial defence, however, the effectiveness of the Community's instruments of commercial defence has been strongly criticised by the Commission.³⁴ As a result, definitive measures are imposed by the Council, acting by simple majority.³⁵

2.3. The Member States : The Advisory Committee

Any consultations provided for in the Anti-dumping Regulation take place within an Advisory Committee which is chaired by a representative of the Commission and consists of representatives of each Member State.³⁶ In accordance with the Anti-dumping Regulation, the Commission should consult

32. 'Section I: Institutional Provisions' of Chapter II of Title II in *Single European Act*, OJ (1987) L 169/1, p5 and 7.

33. Qualified majority voting in the Council of Ministers requires 54 out of 76 votes, divided among the Member States as follows when the number of member states were 12:

Belgium	5	Greece	5	Italy	10	Portugal	5
Denmark	3	France	10	Luxembourg	2	Spain	8
Germany	10	Ireland	3	Netherland	5	United Kingdom	10

34. The Commission criticised that excess time delays cause uncertainty, reduce the chance that measures, once taken, have the desired effect, and contribute to the creation of a lack of confidence in the effectiveness of Community commercial policy. Commission, Proposal for a Council Regulation *on the introduction of time limits for investigations carried out under the Community instruments of commercial defence and modification of the relevant Council Regulations*, COM(93) 541 final, pl.

35. Coun.Reg.(EC) No 522/94, OJ (1994) L 66/10.

36. Article 6(1) of the Community Anti-dumping Regulation.

the Advisory Committee whenever consultations are required by this Regulation.³⁷ Consultation should in particular cover:³⁸

- (a) the existence of dumping and the methods of establishing the dumping margin ;
- (b) the existence and extent of injury;
- (c) the causal link between the dumped imports and injury
- (d) the measures which, in the circumstances, are appropriate to prevent or remedy the injury caused by dumping and the ways and means for putting such measures into effect.

The principal role of the Advisory Committee which should be emphasised is the fact that the Commission should submit to the Council a report on the results of the consultation, together with a proposal if there is disagreement in the Advisory Committee on a Commission decision to commence or terminate a proceeding, or to impose provisional duties.³⁹ The Council, acting by a qualified majority, can decide differently within one month. For example, the Commission is not entitled to impose a provisional anti-dumping duty if at least one Member State disagrees. In addition to respective Member States' participation in the Advisory Committee, they play an important role in collecting anti-dumping duties through their customs authority.

37. Consultation is required in following Articles: Article 5(5) complaint; Article 7(1) initiation and subsequent investigation; Article 9(1) termination of proceedings without protective measures; Article 10(1) undertakings; Article 11(2) provisional duties; Article 14(2) and Article 15(2) review, and Article 16 refund.

38. Article 6(4) of the Community Anti-dumping Regulation.

39. See, Article 6(4) and Article 9(1) jointly.

3. ANTI-DUMPING PROCEDURES IN THE EUROPEAN COMMUNITY.

According to the 1979 GATT Code, an investigation should be initiated upon a written request by or on behalf of the industry affected, including sufficient evidence of dumping, injury and a causal link between the two.⁴⁰ The Code, however, keeps silence on the details of the procedures to be adopted. Therefore, all countries may adopt their own style of procedures. As a result, the Community has set up its own essential procedural provisions to cover complaint,⁴¹ initiation of proceeding and subsequent investigation,⁴² termination of proceedings where protective measures are unnecessary,⁴³ relief measures including acceptance of undertakings,⁴⁴ and imposition of provisional duties⁴⁵ and definitive duties.⁴⁶

40. Article 5(1) of the 1979 GATT Anti-dumping Code.

41. Ibid, Article 5.

42. Ibid, Article 7.

43. Ibid, Article 9.

44. Ibid, Article 10.

45. Ibid, Article 11.

46. Ibid, Article 12. Relief measures will be discussed in detail *infra* chapter 7.

3.1. Complaint

Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry⁴⁷ which produces the like product and which considers itself injured or threatened by dumped imports may lodge a written complaint containing sufficient evidence⁴⁸ of the existence of dumping and injury resulting therefrom to the Commission or a Member State.⁴⁹

Generally, complaints are lodged by the European manufacturers' associations of the industry concerned like CEFIC, EECA, Alarm and SCAN.⁵⁰ Complaints, however, can also be brought by individual Community producers⁵¹ of the product in question as long as they meet the 'major propor-

47. For the definition of the 'Community Industry', see *Ibid*, Article 4(5).

48. The term 'sufficient evidence' has not been clearly defined. However, according to Art. 7 of the 1968 Community Anti-dumping Regulation (Coun.Reg. No 459/68), the complaint should provide a description of the allegedly dumped product; the name of the exporting country; where possible, the names of the country of origin, the producer and the exporter of the product in question; and evidence both of dumping and injury resulting therefrom for the industry which considers itself injured or threatened.

49. Article 4(5), 5(1),(2) and (3) can be read jointly, and see the definition of the term 'Community industry' in the Article 4(5) of the Anti-dumping Regulation and *infra* chapter 5.

50. CEFIC (the European Council of Chemical Manufacturers' Federation) in *Audio tapes in cassettes* (Korea, Japan and H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p5. EECA (the European Electronic Component Manufacturer's Association) in *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p13. Alarm (the Association for Legal Audio-Radio Measures) in *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p8. SCAN (the Society for Coherent Anti-dumping Norms) in *Colour TV receivers* (Korea, Malaysia, China, Singapore and Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50.

51. In *Retail electronic weighing scale* (hereinafter REWS), 9 Community producers representing approximately 80% of the total Community production of REWS lodged a complaint. See, *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p20. In *Oxalic acid* (Korea, Taiwan), Com.Reg.(EEC) No 699/88, OJ (1988) L 72/12, the complaint was lodged by a manufacturer accounting for a large proportion of Community production.

tion of the total Community production' test.⁵² Whether a complaint is submitted initially to the Commission or a Member State, in practice, it would be submitted to the Commission because a Member State receiving a complaint should forward it to the Commission.⁵³ The Commission must send a copy of any complaint it receives to Member States.⁵⁴

According to Article 5(6), a Member State which is in possession of sufficient evidence of dumping and caused injury should communicate such evidence to the Commission. Furthermore, it should be noted that according to Article 5(1) of the 1979 GATT Anti-dumping Code,⁵⁵ the Commission may lodge a complaint on its own initiative, when the Commission holds sufficient evidence of dumping and injury against Community industry,⁵⁶ even though there is no such a provision in the Anti-dumping Regulation of the Community. If a complaint is withdrawn, the proceedings may be terminated unless such termination would not be in the interest of the Commu-

52. Article 4(5) of the Anti-dumping Regulation. Dr. Beseler, Head of the Commercial Defence Division, DG-1, at the CEFIC Anti-dumping Seminar held in Brusel, 1981, suggested that a share of production of 25% or more of the Community total production would be regarded as acceptable as a major proportion of the Community production. Ivo Van Bael & J.-F. Bellis, *Anti-dumping and Other Trade Protection Laws of the EEC* (2nd ed.), CCH Editions Limited, 1990, (hereinafter referred as to Bael & Bellis). In most determinations, the Commission has not defined clearly but just said a major proportion of the Community production.

53. Ibid, Article 5(3).

54. Ibid, Article 5(3).

55. Article 5(1) of the GATT Anti-dumping Code provides that an investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected. In special circumstances, the authorities concerned may decide to initiate an investigation without having received such a request.

56. There is no provision in the Community Anti-dumping Regulation to authorise the Commission to start a proceeding on its own initiative. However, according to Article 7(1) and Article 14, the Commission may start an anti-dumping proceeding on its own initiative. In practice, however, no anti-dumping proceeding has ever been initiated by complaint from the Commission. See, Vermulst, *supra* note 17, p204, and Van Bael & Bellis, *supra* note 52, p181.

ity.⁵⁷

3.2. Initiation of Proceedings

Where, after consultation in the Advisory Committee it is obvious that there is sufficient evidence to defend commencing a proceeding, the Commission should initiate a proceeding within one month of the lodge of the complaint and publish a notice in the *Official Journal of the European Communities*;⁵⁸ so advise the exporters and importers known to the Commission to be concerned as well as representatives of the exporting country and the complainants;⁵⁹ and commence the investigation at Community level which covers both dumping and injury resulting therefrom.⁶⁰

When it becomes obvious after consultation that the complaint does not contain sufficient evidence to justify initiating an investigation, the complainant should be so informed, and the case is terminated.⁶¹ The Complainant, however, may appeal to the ECJ.⁶²

57. Article 5(4) of the Community Anti-dumping Regulation.

58. Article 7(1)(a) of the Community Anti-dumping Regulation, amended by Coun.Reg.(EC) No 521/94, OJ (1994) L 66/7, p8.

59. Ibid, Article 7(1)(b).

60. Ibid, Article 7(1)(c). The investigation of dumping normally covers a period of not less than 6 months immediately prior to the initiation of the proceeding.

61. Ibid, Article 5(5). See Article 5(3) of the 1979 GATT Anti-dumping Code, which provides that an investigation should be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceedings.

62. See, Section II of *infra* chapter 7: Judicial Review. For the admissibility standards used by the Court, see Bellis, "Judicial Review of EEC Anti-dumping and Anti-subsidy Determinations After "Fediol": The Emergence of a New Admissibility Test", (1984) 21 *CML Rev.*, p539, and A.Arnall, "Challenging EC Anti-dumping Regulations: The Problem of Admissibility", (1992) 13 *ECLR (Issue 2)*, p73-81.

3.3. Role of the Commission in Investigation

If the Commission decides to commence investigation, after consultation, it should seek all necessary information and carry out investigation into the company concerned, even in a third country.⁶³ Furthermore, the Commission may request co-operation from Member States and the interested parties and evaluate information supplied by the interested parties.⁶⁴ The investigations of the establishment of dumping and injury therefrom are carried out concurrently.⁶⁵ This could be an unfortunate tilt against the producer/exporter because it means that the exporter must comment on the issue of injury before the complainant's reply to the injury questionnaire.⁶⁶

3.3.1. Searching for Information and Requesting Co-operation

The Commission should seek all information it deems to be necessary. In order to obtain the information necessary to determine whether dumping took place, the Commission will send questionnaires to all known exporters and importers of the allegedly dumped products. Replying fully to questionnaires within the short time allocated, however, causes much

63. Article 7(2) of the Community Anti-dumping Regulation.

64. Ibid, Article 7(3).

65. Article 7(1)(c) of the Community Anti-dumping Regulation provides that 'such investigation shall cover both dumping and injury resulting therefrom'.

66. Ivo Van Bael, "EEC Anti-dumping Law and Procedure Revisited", (1990) 24 *JWT* (No 2), p18. However, if the exporter can prove that no material injury has been caused, the Commission will refrain from any further investigation into the existence of dumping. *Thin Polyester film* (Korea), Com.Dec.91/303/EEC, OJ (1991) L 151/89, *Polyester Yarn* (Korea), Com.Reg.(EEC) No 2904/91, OJ (1991) L 276/7, p18, *Polyester film* (Korea), Com.Dec.89/560/EEC, OJ (1989) L 305/31, *Sacchalin and its salts* (Korea, USA, China), Com.Dec.83/626/EEC, OJ (1983) L 352/49, p50.

trouble to defendants.⁶⁷ The burden of reply could be reduced without making the Commission's task of establishing the facts more difficult, if the Commission relied more on on-the-spot verifications.⁶⁸

Where it is necessary, the Commission shall carry out investigations which cover dumping and injury resulting therefrom⁶⁹ in third countries with assistance of officials of those Member States which so request.⁷⁰ In addition, the Commission may request Member States to supply information, to execute all necessary checks and inspections, and to carry out investigation in third countries with officials of the Commission who are authorised to assist the officials of Member States in performing their duties.⁷¹ Such requests from the Commission have binding force, in practice, because Member States should do whatever they can in order to give effect to the requests according to Article 7(3).

Although the Commission should seek information and where it consid-

67. In *REWS (Retail Electronic Weighing Scale)*, Com.Reg.(EEC) No 1130/93, OJ (1993) L 112/20, the Commission sent questionnaires to the exporting companies in Korea on Apr. 8, 1992, and asked them to reply by Jun. 30, 1992. During this period, an exporting company had to spend almost all its business operation on preparing 372 pages of reponse, because all the weighing scale exporting companies are small and medium-sized enterprises. See, D.T. Lee, "An Analysis on the European Community's Anti-dumping Procedures and Korea's Countermeasures", (1993) *Journal of Int'l Management* (Korean publication), p 134.

68. Ivo Van Bael, *supra* note 66, p17. In this article, the author insisted that the Commission's "right to seek all information it deems to be necessary" be subjected to a rule of reason or to the proportionality principle.

69. Therefore, it is possible to escape from further antidumping investigation where the exporter can prove that there has been no material injury, and where it becomes clear that there has been no dumping. See, *Wheeled loaders*(Japan), Com.Dec.89/111/EEC, OJ (1989) L 39/35, p35; *Dead burned natural magnetic* (China, North Korea), Coun.Dec.86/59/EEC, OJ (1986) L 70/41, p41; *Saccharin and its salt* (China, Korea, USA), Com.Dec.83/626/EEC, OJ (1983) L 352/49, p49; *Monochrome portable television sets* (Korea), Com.Dec.81/1012/EEC, OJ (1981) L 364/49, p49.

70. Article 7(2)(b) of the Community Anti-dumping Regulation.

71. *Ibid*, Article 7(3)(a) and (d).

ers it appropriate, examine and verify the record of importers, exporters, traders, agents, producers, trade associations and organisations, it can not compel information to be submitted by any interested parties except Member States because it can carry out its investigations in third countries only when the firm concerned and the government of the country in question give their consent.⁷² Therefore, voluntary co-operation of the interested parties is indispensable and is in their interest as well. The reason is that without voluntary co-operation, the Commission may make its preliminary or final findings on the basis of the facts available.⁷³ As demonstrated in *Video cassette recorders*,⁷⁴ this means the Commission makes its preliminary or final findings on the basis of the allegations set forth in the complaint.⁷⁵

Where information supplied by any interested party or third country is false or misleading, such information may be disregarded and any claim to which it refers disallowed.⁷⁶ In *Video cassette recorders*,⁷⁷ the Commission discovered that there were partial discrepancies between the companies' replies to the questionnaire and their internal documents, so the Commission relies on the facts available. It is worth pointing out, however, that in this case, concerning partial discrepancies in costs of

72. Article 7(2) and (3) of the Community Anti-dumping Regulation.

73. Ibid, Article 7(7)(b). In *Video cassette recorders* (Korea, Japan), Coun.Reg.(EEC) No 501/89, OJ (1989) L 57/55, and *Video tapes* (Korea, Hong Kong), Com.Reg.(EEC) No 4062/88, OJ (1988) L 356/47, p52, the highest dumping margin found with regard to an exporter who had co-operated in the investigation was applied to non co-operating parties.

74. *Video cassette recorders* (Korea, Japan), Coun.Reg.(EEC) No 501/89, OJ (1989) L 57/55, and see, *Daisy wheel printers* (Japan), Coun.Reg.(EEC) No 34/89, OJ (1989) L 5/23.

75. In *LAECs* (Korea, Taiwan), Com.Reg.(EC) No 371/94, OJ (1994) L 48/10, p11, in the complete absence of information from the Korean producing exporters, normal value and export price was established on the basis of the available facts which were given in the complaint.

76. Article 7(7)(b) of the Community Anti-dumping Regulation.

77. *Video cassette recorder* (Japan, Korea), Com.Reg.(EEC) No 2684/88, OJ (1988) L 240/5, p5.

production between the companies' replies and their internal documents, the Commission disregarded all cost of production data and made its findings on the basis of the facts available. Therefore, the Commission may disregard information which is favourable to the exporter, where false or misleading information is supplied.⁷⁸ It can be argued, however, that this article is duplication because the Commission has made findings on the basis of the facts available where the investigation is "significantly impeded".⁷⁹

There has been no clear guideline, therefore, in this respect, although the Commission has tried to justify its findings based on the facts available in accordance with Article 7(7)(b) with the reason that the use of a more favourable method would reward non-co-operation and would create an opportunity for circumvention of the duty.⁸⁰ It is worth recalling the *Allied* case,⁸¹ in which the Court held that the Commission should use those facts which are closest to economic reality and the 'Recommendation Concerning Best Information Available' of the GATT Committee on Anti-dumping Practice.⁸²

78. C. Norall, "The New Amendments to the EC's Basic Anti-dumping Regulation", (1989) 26 *CML Rev.*, p100.

79. J-F. Bellis, E. Vermulst and P. Waer, "Further Changes in the EEC Anti-dumping Regulation: A Codification of Controversial Methodologies", (1989) 23 *JWT* (No 2), p31.

80. *Dot-matrix printers* (Japan), Coun.Reg. (EEC) No 3651/88, OJ (1988) L 317/33, p44.

81. Case 53/83, *Allied Corp. v Council*, [1985] ECR 1621, at 1658.

82. The GATT Committee on Anti-dumping Practice, *the Recommendation concerning best information available*, reproduced in Van Bael & Bellis, *supra* note 52, p 191. It said that 'it is clear that if an interested party does not co-operate and thus relevant information is being withheld from the investigating authorities this situation could lead to a result which is less favourable to the party than if the party did co-operate'.

3.3.2. Executing Investigation

The Commission, where it considers necessary, would examine and verify all information and carry out on-the-spot investigation at the premises of importers, Community producers and foreign exporters who are producing or selling the product in question during the investigation period,⁸³ even in a third country if the firms concerned and the government of the country in question have been officially informed and raise no objection.⁸⁴ The Commission, sometimes, choose representative firms for inspection with the agreement of the exporters.⁸⁵ The Commission officials conducting on-the-spot investigation are accompanied by an official of a Member State and *vice versa*.⁸⁶

In practice, verifications at the premises of the parties concerned take no longer than two or three days.⁸⁷ The Commission, therefore, informs in advance the parties concerned of the date of inspection and of the type of information to be verified. The purpose of a verification visit is to ensure the reliability of the data supplied in the question-

83. In *Orthoxylene* (Puerto Rico, USA), Com.Reg.(EEC) No 1411/81, OJ (1981) L 141/29, p29, the Commission carried out inspection not only at the premises of a Belgian company in connection with sales made by two related exporters located respectively in Panama and Puerto Rico but also in its own offices in Brussels.

84. Article 7(2)(a) and (b) of the Community Anti-dumping Regulation. It is usually to the advantage of the interested parties to co-operate in order to escape from the Commission's preliminary or definitive findings based on the facts available, as discussed above.

85. *Cotton Yarns* (Turkey), Com.Reg.(EEC) No 3453/81, OJ (1981) L 347/19, p19.

86. Article 7(2)(b) and 7(3)(d). The officials from a Member States, however, play a very limited role in substantive determinations because they are not permitted access to the confidential data gathered by the Commission during the investigation.

87. Van Bael & Bellis, p195. There is no guideline in the Community Regulation on the exact procedure to be followed during the verification. No official report on the verification is accessible to the parties concerned.

naire. As we have seen in *Video cassette recorders*,⁸⁸ the Commission officials usually pay attention to cost of production data and sales data (including domestic and export) of the Companies involved. The results of verifications are very important to the Commission's findings, so no provisional determination is made without an on-the-spot investigation. To make matters worse, the Commission may disregard any information which it has been unable to verify.⁸⁹

3.4. Legal Status of Interested Parties in Investigation

Affected by the first anti-dumping cases in the ECJ⁹⁰, the Community has improved lack of transparency as well as developed case law in the field of anti-dumping procedures which may establish some restrictions to the discretionary powers of the Commission.⁹¹ As a result, the Community anti-dumping practices are considerably clearer and more transparent now

88. *Video cassette recorders* (Korea and Japan), Com.Reg. (EEC) No 2684/88, OJ (1988) L 240/5, p15.

89. Article 7(7)(b) of the Community Anti-dumping Regulation.

90. Cases 113, 118-121/77, *Japanese Ballbearing cases* [1979] ECR 1185, see, footnote 101. After these cases, the Council immediately enacted a special regulation which introduced the right of the respondents to be informed of the essential facts and considerations in the Commission's findings. Coun.Reg.(EEC) No 1681/79, OJ (1979) L 196/1. A few months later, the Community approved the Tokyo Round Agreements in Coun.Dec 80/271/EEC, *concerning the conclusion of the Multilateral Agreements resulting from 1973 to 1979 trade negotiations*, OJ (1980) L 71/1, and adopted the new anti-dumping regulation in order to accommodate the changes of the 1979 GATT Anti-dumping Code. Coun.Reg. (EEC) No 3017/79, OJ (1979) L 339/1.

91. J.K. Lockett, "EEC Anti-dumping Law and Trade Policy After Ballbearings II: Discretionary Decisions Masquerading as Legal Process?", (1987) 8 *Nw J.I.L. & Bus.*, p 369. Ivo Van Bael, "A Practitioner's Guide to Due Process in EEC Anti-trust and Anti-dumping Proceedings", (1984) 18 *Int'l Law.*, p 858.

than they were before the *Japanese Ballbearings* cases.⁹²

Consequently, the Anti-dumping Regulation stipulates basically three kinds of rights of interested parties: the right to inspect information; the right to be informed of the essential facts and considerations; and the right to be heard.

3.4.1. The Right to Inspect Information

In parallel to the Commission's right of investigation,⁹³ the complainant and the exporters and importers known to be concerned, as well as the representatives of the exporting country, may inspect all information available to the Commission by any party to an investigation⁹⁴ as distinct from internal documents prepared by the authorities of the Community or its Member States.⁹⁵ In order for them to be able to inspect such information, it should be relevant to the defence of their interests, it should not be confidential within the meaning of Article 8, and it must be used by the Commission in the anti-dumping investigation. To this end, they shall address a written request to the Commission indicating the information required.⁹⁶

Information should ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the

92. Ivo Van Bael, *Ibid*, p858-861. For a review of the earlier period, see generally P. Didier, "EEC Anti-dumping Rules and Practices", (1980) 17 *CML Rev.*, p349; Van Bael, "Ten Years of EEC Anti-dumping Enforcement", (1979) 13 *JWTL*, p398.

93. Article 7(2) and (3) of the Community Anti-dumping Regulation.

94. Concerning this term, the Court held very broadly in the *Timex* case that 'all non-confidential information, whether supplied by a Community undertaking or an undertaking in a non-member country, which has had a decisive influence on its decision must be made available to the complainant requesting it', Case 264/82, *Timex v Council & Commission* [1985] ECR 861, at 869.

95. Article 7(4)(a) of the Community Anti-dumping Regulation.

96. *Ibid*, Article 7(4)(a).

supplier or the source of such information.⁹⁷ However, if it appears that a request for confidentiality is not warranted and if the supplier is unwilling either to make the information public or to authorise its disclosure in generalised or summary form, the information in question may be disregarded. The information may also be disregarded where such request is warranted and where the supplier is unwilling to submit a non-confidential summary, provided that the information is susceptible of such summary.⁹⁸

In this connection, it can be argued that the confidentiality provisions of the Article 8 should be interpreted as narrowly as possible⁹⁹ based on the hypothesis that if the confidentiality afforded by the Commission is broader than necessary to protect business secrets, the rights of other parties to the investigation are unduly restricted. It should be recalled, however, that information received pursuant to this Regulation should be used only for the purpose for which it was requested, and the disclosure of information in general and as the evidence in court proceeding, must take into account the legitimate interest of the parties involved and that their business secrets should not be revealed.¹⁰⁰

97. Ibid, Article 8(3).

98. Ibid, Article 8(4).

99. European Parliament Resolution *on the Commission's Anti-dumping activities*, OJ (1982) C 11/37. It states on the rights of defendants that it considers that defendants or their representatives should have right of access to all material facts on which the Commission based its decision to open an investigation, subject only to the confidentiality provisions of Article 8 which should be interpreted as narrowly as possible.

100. Article 8(1) and (5) of the Community Anti-dumping Regulation. As we have seen, the right of the interested parties to inspect information is very limited by the confidentiality rules. This limitation, however, could be partly overcome through the introduction of an "administrative protective order" system, whereby counsel for interested parties have access to confidential information but are not allowed to reveal it to their clients. See, Ivo Van Bael, "EEC Anti-dumping Law and Procedure Revisited", (1990) 24 *JWT* 2, p18.

3.4.2. The Right to be Informed of Essential Facts and Considerations

In the *Japanese ballbearing I* cases,¹⁰¹ the Advocate General criticised the lack of disclosure of essential information by the Commission to the parties concerned which led to a situation in which nobody but the Commission knew what was really going on in its investigation.¹⁰² As a result of this criticism, exporters' and importers' right¹⁰³ to be informed of essential facts and considerations on which Commission's determinations were based was officially acknowledged after the *Japanese Ballbearing* cases.¹⁰⁴ It is stipulated that exporters and importers of the product subject to the investigation and the representatives of the country of origin, may request to be informed of the essential facts and

101. The "*Japanese Ballbearings I cases*" means five judgments of the ECJ concerning anti-dumping. Case 113/77, *NTN Toyo Bearing Co. v Council* [1979] ECR 1185; Case 118/77, *Import Standard Office v Council* [1979] ECR 1277; Case 119/77, *Nippon Seiko K.K. v Council* [1979] ECR 1303; Case 120/77, *Koyo Seiko co. v Council* [1979] ECR 1337; and Case 121/77, *Nachi Fujikoshi Corp. v Council* [1979] ECR 1363, (hereinafter referred to as "*Japanese Ballbearing I*").

102. The Opinion of Advocate General J.P. Warner, covering all five cases, was delivered on Feb. 14, 1979. [1979] ECR 1185, at 1212.

103. In the *Timex* case, Case 264/82, *Timex v Council & Commission*, [1985] ECR 849, at 869, the Court made it clear that the right to be informed is a fundamental right which can be claimed by all parties to the proceeding, including the complainants, although the Anti-dumping Regulation refers only to exporters and importers. This right, however, does not extend to determination such as a provisional duty and acceptance of undertakings.

104. In *Timex*, the Commission refused to provide the complainant with certain basic details concerning the dumping calculations. As a result, the complainant was unable to ascertain whether or not the Commission was using the correct facts. The Court held that in failing to disclose the facts, essential procedural requirements were breached. The Court annulled the regulation. *Ibid*, at 870-71.

considerations¹⁰⁵ on the basis of which it is intended to recommend the imposition of definitive duties or the definitive collection of amounts secured by the way of a provisional duty.¹⁰⁶

Such requests of the interested parties must be addressed to the Commission in writing; the particular issues on which information is sought must be specified; and the request be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty.¹⁰⁷ The Commission's response to this request from the parties involved may be orally or in writing informed.¹⁰⁸ Comments of the interested parties on the information given by the Commission should be taken into consideration if they are received within the period set by the Commission in each case, which should be at least 10 days.¹⁰⁹

According to Article 8 of the Anti-dumping Regulation, disclosure of confidential information is strictly applied. In practice, the parties to an Community anti-dumping proceeding only have a limited access to the non-confidential summary of the confidential information supplied by other parties. Therefore, introduction of a special disclosure system like the U.S. protective order system may be very helpful from a due process point of view.¹¹⁰

105. In *Japanese Ballbearing I*, the Commission refused to inform the exporters of any detail concerned with: the alleged dumping margins and their method of calculation; the use of constructed normal value; method of injury determination. See, *Japanese Ballbearings I*, *supra* note 101, at 1253-66.

106. Article 7(4)(b) of the Community Anti-dumping Regulation.

107. *Ibid*, Article 7(4)(c)(i).

108. *Ibid*, Article 7(4)(c)(ii). However, information should be given no later than 15 days prior to the submission by the Commission of any proposal for final action. *Ibid*, Article 7(4)(c)(iii).

109. *Ibid*, Article 7(4)(c)(iii).

110. See, *supra* footnote 100.

3.4.3. The Right to be Heard

Where, after consultation it is apparent that there is sufficient evidence to justify initiating a proceeding the Commission should state in the *Official Journal of the European Communities* the period within which interested parties may apply to be heard by the Commission. For this purpose, the Anti-dumping Regulation stipulates two kinds of hearing, namely, an oral hearing¹¹¹ and a confrontation meeting.¹¹²

In case of an oral hearing, the Commission not only may hear the interested parties at any stage of the proceeding but also must hear them if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard orally.¹¹³ These oral hearings are more in the nature of informal meetings, because not only are there no formal hearing procedure and official transcript, but also, they are not in public.¹¹⁴ As a result of the Commission's strict policy on deadlines for reply to questionnaires, hearings become more meaningful because they may be the only forum where exporters have the opportunity to present additional comments on the question of injury after the expiry of the deadline for questionnaires.¹¹⁵

111. Article 7(5) of the Community Anti-dumping Regulation.

112. Ibid, Article 7(6).

113. Ibid. A number of interested parties stopped requesting hearings preferring to discuss their case with Community officials in informal meetings rather than to present a written request.

114. It should be remembered that there are no guidelines for hearing procedure in the Community Anti-dumping Regulation.

115. Because the exporters are requested to comment on the injury allegations at the same time as their answer to the dumping questionnaires. See, supra note 66.

Furthermore the Commission should, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and any rebuttal argument put forward.¹¹⁶ Such confrontation meetings played a very important role in Community anti-dumping proceedings in the 1970s. However, they have lost popularity because of increase of the Community anti-dumping staff and legalisation of the investigation after the 1979 *Japanese Ballbearing* cases. In providing this opportunity the Commission shall take account of the need to preserve confidentiality and of the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.¹¹⁷

3.5. Termination of Proceedings Without Measures¹¹⁸

Anti-dumping investigations are concluded without protective measures where the Community authorities determine after consultation that such measures are unnecessary¹¹⁹ because there has been no dumping or injury caused therefrom¹²⁰ or for other reasons such as the withdrawal of

116. Ibid, Article 7(6).

117. Ibid, Article 7(6).

118. Termination of investigation with protective measures will be analysed in section I of Chapter 7.

119. Article 9(1) of the Community Anti-dumping Regulation.

120. *Cotton yarn* (Egypt), Com.Dec.92/179/EEC, OJ (1992) L 82/70, p70. The Commission terminated this anti-dumping proceeding without protective measures because of de minimis dumping margin (0.1%).

Haematite pig iron (Turkey), Com.Dec.423/ECSC, OJ (1992) L 230/30, p30. The Commission terminated the proceeding on the basis of the fact that the Turkish contribution to any material injury suffered by the Community industry was negligible.

the complaint,¹²¹ a lack of cooperation from the Community industry¹²² and other bilateral trade arrangements,¹²³ or because it is discovered that the export to the Community did not originate from the country under investigation.¹²⁴ If objection is raised within the Advisory Committee on the Commission's determination that no protective measures are necessary, the Commission should submit to the Council a report on the results of the consultation, together with a proposal that the proceeding be terminated. The proceeding should automatically be concluded if, within one month, the Council, acting by a qualified majority, has not decided otherwise.¹²⁵ It seems that a Member State has power to veto a Commission proposal. However, this Commission's determination is likely to pass in its original form because of the role of the Council acting by a qualified majority in decision making procedures.¹²⁶

121. In 1993, 1 investigation was terminated without protective measures due to a finding of no dumping, 1 due to finding of no injury and 4 due to withdrawal of the complaint. Commission, *12th Anti-dumping Report* (1993), COM(95) 16 final, p 67 and p 104-107.

122. *Manganese steel wearparts* (S. Africa), Com.Dec. 93/318/EEC, OJ (1993) L 122/46. In this proceeding, during the course of the investigation on injury, the Commission received information about only a small proportion of the total Community production. In the absence of information on the rest of the Community industry, it was impossible to make findings of injury.

123. *Seamless steel tubes* (Czech and Slovak), Com.Dec.93/526/EEC, OJ (1993) L 252/39.

124. *Electronic typewriters* (Taiwan), Com.Dec. 86/193/EEC, OJ (1986) L 140/52, p52. This investigation was terminated because the operation performed in Taiwan did not confer Taiwanese origin on the product in question, even though the typewriters were shipped from Taiwan.

125. Article 9(1) of the Community Anti-dumping Regulation.

126. The imposition of definitive measures remains in the competence of the Council, but decision has been taken by simple majority since 15 March 1994. Coun.Reg.(EC) No 522/94, *on the streamlining of decision-making procedures for certain Community instruments of commercial defence and amending Reg.(EEC) No 2641/84 and No 2423/88*, OJ (1994) L 66/10. It should be noted that this amendment does not cover Article 9 of the Community Anti-dumping Regulation. As a result of this amendment, the Commission has more weight than the Council in decision-making procedures.

In *Audio tapes on reels*, the anti-dumping proceeding was terminated without any protective measures,¹²⁷ because audio tapes on reels are a different product from audio tapes in cassettes,¹²⁸ on which definitive anti-dumping duties had been imposed. Subsequently, the complainant informed the Commission that it had decided to withdraw the complaint with regard to audio tapes on reels owing to the imposition of definitive duties on tapes in cassettes. The Commission therefore decided to terminate the proceeding concerning audio tapes on reels without protective measures.

The termination must be notified to any representatives of the country of origin or export and the parties known to be concerned and must be announced in the *Official Journal of the European Communities*, setting forth its basic conclusion and a summary of the reasons therefor.¹²⁹

4. ANTI-DUMPING PROCEDURES IN KOREA

4.1. Anti-dumping Procedures

The new Korean anti-dumping law¹³⁰ was amended in 1993 to comply with GATT guidelines and it was designed to model the US law and procedures. Under this law, the Ministry of Finance (hereinafter referred to as "MOF") coordinates the entire investigation and imposition of duty and

127. *Audio tapes on reels* (Korea, Japan and Hong Kong), Com.Dec.92/62/EEC, OJ (1992) L 28/25, p26.

128. *Audio tapes in cassettes* (Korea, Japan and Hong Kong), Coun.Reg.(EEC) No 1251/91, OJ (1991) L 119/35.

129. Article 9(2) of the Community Anti-dumping Regulation.

130. The "new Korean anti-dumping law" means Article 10 of the Korean Customs Act and Article 4(2) through 4(15) of the Enforcement Decree of the Customs Act.

imposes the anti-dumping duty,¹³¹ while the Korean Trade Commission (hereinafter referred to as "KTC"), an independent arm of the Ministry of Trade and Industry (hereinafter referred to as "MTI") investigates the primary injury to the domestic industry, and the Office of Customs Administration (hereinafter referred to as "OCA") investigates whether the imports are dumped and calculates the dumping margin.¹³² The apparent procedure in a Korean anti-dumping proceedings is as follows:

(1) Once any person having an interest in or the competent Minister having jurisdiction over the domestic industry requests the imposition of an anti-dumping duty,¹³³ the KTC decides whether or not to initiate an investigation and report the result of the investigation to the Minister¹³⁴ within 1 month.¹³⁵

(2) The Minister notifies matters for imposition of anti-dumping duties and the initiation of investigation within 10 days after receipt of the report, and publishes in the Official Gazette (hereinafter referred to as "OG").¹³⁶

(3) Within three months or so, the investigation authorities submit reports¹³⁷ to the MOF,¹³⁸ and the MOF decides whether or not to initiate a full investigation within 1 month from the date on which reports are submitted.¹³⁹

131. Article 1, 2 and 7 of the Korean Customs Act (hereinafter referred to as "Act").

132. Article 4(4)(i) of the EDCA.

133. Article 4(2)(i) of the EDCA.

134. The Minister means the Minister of Finance.

135. Article 4(3)(i) of the EDCA.

136. Article 4(3)(iii) of the EDCA.

137. The KTC issues a report on the result of a provisional investigation, and the OCA issues a letter of resolution on a provisional determination.

138. Article 4(4)(ii) of the EDCA.

139. Article 4(4)(iii) of the EDCA.

(4) The investigation authorities initiate a final investigation from the day after the date on which provisional reports are submitted, and submits final reports within 3 months.¹⁴⁰

(5) The MOF decides whether anti-dumping duty should be imposed within 1 month from the date on which final reports are submitted,¹⁴¹ and takes a measure for the imposition of an anti-dumping duty within 1 year from the date of the request for investigation.¹⁴²

In Korea, complaints are lodged by the individual company instead of the manufacturers' association of the industry concerned.¹⁴³ Complaints, however, can also be brought the corporations and organisations, as long as they are composed of domestic producers or acting on their behalf.¹⁴⁴

4.2. Confidentiality of Materials Concerned and Legal Status of Interested Person

The Minister or the investigation authorities requests information related to the administration agency concerned, domestic producers, exporter, importers and other interested persons.¹⁴⁵ Materials submitted under a condition of confidentiality should not be disclosed.¹⁴⁶ However, if an

140. Article 4(4)(v) of the EDCA.

141. Article 4(4)(vii) of the EDCA.

142. Article 4(4)(viii) of the EDCA.

143. Korea Precision Co. in *Ballbearings* (Thailand), Finance Ministry Announcement (hereinafter referred to as "FMA") No 1993-10, OG (1993) No 12379, p136, Dong Yang Chemical Co. in *Soda Ash* (China), FMA No 1993-75, OG(1993) No 12606, p183, Hwekst Industry Co. in *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p190, and Hankuk Vetrotex Co. in *Glass Fiber* (USA, Japan and Taiwan) FMA No 1994-57, OG (1994) No 12786, p26.

144. Article 4(2)(iii) of the EDCA. Korea Promotion Association for Precision Chemistry in *Phosphoric Acid* (China), FMA No 1993-6, OG (1993) No 12350, p21.

145. Article 4(8)(i) of the EDCA.

146. Article 4(8)(ii) of the EDCA.

interested person fails to present relevant documents, or refuses or prevents an investigation, or it is difficult to verify materials for any reason, the investigation authorities may take anti-dumping measures using available materials.¹⁴⁷

The rights of interested persons are inadequate compared to the Community anti-dumping law, while confidentiality of materials submitted is well protected by the Korean anti-dumping law. Although the Minister should accept a request for an inspection of relevant documentary evidence from an interested person,¹⁴⁸ the interested person's opportunity to address a public hearing, or to consult an interested person with opposing views¹⁴⁹ is at the discretion of the MOF and the investigation authorities.¹⁵⁰

147. Article 4(8)(v) of the EDCA. *Soda Ash* (China), p184, *Printing Plate* (Japan), p191, and *Glass Fiber* (USA, Japan, Taiwan), p27.

148. Article 4(8)(vii) of the EDCA provides that if an interested person request an inspection of relevant documentary evidence presented and materials submitted or informed, the Minister or the investigation authorities, excluding those to be kept confidential, shall accept it unless there is any special circumstance.

149. In *Glass Fibre*, a confrontation meeting was held. *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p27. Before this determination, the interested persons did not cooperate to submit related materials. As a result, no confrontation meeting could be held. See, *Ball bearings* (Thailand), p137, *Soda Ash* (Chiina), p183, and *Printing Plate* (Japan), p192.

150. Article 4(8)(viii) of the EDCA.

4.3. Termination of Proceedings Without Measures

The Minister suspends or terminates the final investigation where dumping margin or material injury is deemed to be minimised according to the result of the provisional investigation,¹⁵¹ or the withdrawal of the complaint.¹⁵² In this case, any provisional measure taken is withdrawn,¹⁵³ and as a result the MOF should refund the provisional anti-dumping duty paid or release the offered security.¹⁵⁴

Between 1986 and 1993, in Korea, only 15 anti-dumping investigations were initiated. Of these, 6 were terminated without protective measures; in 7, measures were imposed in the form of anti-dumping duties,¹⁵⁵ and in 2, in the form of undertakings.¹⁵⁶ At the time of writing this thesis, the full text of the Korean anti-dumping determination is available only for 6 determinations in which anti-dumping duties were imposed. Therefore, in this thesis the discussion is based on those 6 determinations.

151. Article 4(4)(iv) of the EDCA. In *Acet Aldehyde* (Japan), 86.12.9. *Alginic Acid* (Hong Kong), 86.4. *Slider Fastner* (Japan), 88.2.19. and *Polyacrylamid* (UK, France, Germany) 91.2. 21., the antidumping proceedings were terminated because material injury etc. was minimised even though dumping was found. See, Shin U-Kyun, "The Relief System for Industrial Injury After Uruguay Round in Korea", *The Customs Journal* 1994.(No 6), p35. KIEP, 1992, p202.

152. Article 4(5)(i) of the EDCA. In *Organic Peroxides* (Japan, Holland), 1989.2.27., and *H-Acid* (Japan, India, China), 1992.12.15., the investigations were not to initiated or terminated since the request for the imposition of antidumping duty were withdrawn. See, *Ibid.*

153. Article 4(5)(ii) of the EDCA.

154. Article 4(5)(iii) of the EDCA.

155. *Polyacetal resin* (USA, Japan), 1991.9.14., *Phosphoric Acid* (China), FMA No 1993-6, OG (1993) No 12350, p21, *Ballbearings* (Thailand), FMA No 1993-10, OG (1993) No 12379, p136, *Soda Ash* (China), FMA No 1993-75, OG (1993) No 12606, p182, *Printing Plate* (Japan), FMA No 1993-76, OG (1993) No 12606, p190 and *Glass Fibre* (USA, Japan, Taiwan), FMA No 1994-57, OG (1994) No 12786, p26.

156. *Dicumyl Peroxide* (Japan, Taiwan), 1988.12.16. and *Alumina Cement* (France), 1989.8.17.

**Chapter 4 : SUBSTANTIVE ASPECTS OF
THE ANTIDUMPING LAWS -
DETERMINATION OF DUMPING**

1. INTRODUCTION

Under Council Regulation 2423/88,¹ the Community's anti-dumping law, the *a priori* requirement for the imposition of anti-dumping duties is the establishment of existence of dumping. Article 2 (1) of the Regulation provides that an anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury. Thus, there are three requirements; existence of dumping, injury caused by the dumped products, and causal link between the dumped imports and the injury suffered by the Community industry. A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.² For the determination of normal value, Community authorities have to determine whether the models sold by the exporters in their domestic markets were like products with features that were sufficiently akin to those of the exported models to allow a valid price comparison;³ whether sales in the exporters' domestic market could be considered as being representative; whether they were made in the ordinary course of trade; and whether sales in the exporters' domestic market were made at prices which covered the full cost of production.⁴

1. Coun.Reg.(EEC) No 2423/88 *on protection against dumped or subsidised imports from countries not members of the European Economic Community*, OJ (1988) L 209/1.

2. *Ibid.* Article 2(2). Such a finding is usually achieved by a three step procedure: the determination of normal value; the determination of export price; and the comparison of the two.

3. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p10.

4. *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p18.

2. NORMAL VALUE

2.1. Domestic Market Value

Normal or fair value usually means the price set by the exporting firm in its home market. Following the pattern of the GATT Anti-dumping Code, the EC Anti-dumping Regulation requests the Community institutions to establish normal value preferably on the basis of the 'comparable price actually paid or payable in ordinary course of trade for the like product intended for consumption in the exporting country or country of origin'.⁵ However, in addition to the price in the exporting country or country of origin, alternative standards may be used as normal value in certain cases. These are export price to a third country or constructed value.⁶

The normal value will correspond to the weighted average⁷ of the domestic market prices of all sales to independent customers during the investigation period⁸ (at least six months and usually a maximum of twelve months).⁹ The Commission will usually establish a specific normal value

5. See, *supra* note 1, Article 2(3)(a).

6. Ibid, Article 2(3)(b). It provides that when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison, the normal value shall be the comparable export price to any third country, or the constructed value.

7. Ibid, Article 2(13). When comparing normal value with export price, the Community is comparing a normal value established on a weighted average basis with an export price decided on a transaction-by-transaction basis. This double standard may cause inflation of dumping margin.

8. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p8.

9. In *DRAMS*, however, the Commission accepted the exporter's argument that normal value should be established on a quarterly basis, because DRAM production in general is characterised by substantial cost reductions over time due to the learning curve effect and those cost reductions are reflected in sales prices in both the domestic and export markets. *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p16.

for each exporter who has made sales on the domestic market. If the exporter sells all his products abroad or if he does not produce the product, the Commission will use the domestic prices of other exporters.¹⁰

Where an exporter sells on its home market to related companies, normal value is computed on the basis of the prices set by the related companies for their first independent buyers on the home market.¹¹ Furthermore, the Commission uses domestic market prices as it finds them and regards them as representatives prices.¹²

On the other hand, establishment of separate normal values should be considered for sales to OEM (Original Equipment Manufacturer) and sales to specific categories of independent customers. In the case of sales for OEM, that is to say, sales to customers who sell under their own brand name and therefore incur costs normally incurred by the manufacturers, such as advertising, warranty etc., separate normal values were established.¹³ However, regarding sales to specific categories of independent customers, i.e. independent distributors, dealers and end-users, separate normal value is established only for independent distributors,¹⁴ and not

10. Ibid, Article 2(3)(c).

11. Ibid, Article 2(7) and *Electronic Typewriters (Japan)*, Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1.

12. *Compact disc players (Korea, Japan)*, Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p8. *Audio tapes in cassettes (Korea, H.K.)*, Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p7. *Radio-broadcast receivers (Korea)*, Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p11. *DRAMs (Korea)*, Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p16. *Retail electronic weighing scale (Korea, Singapore)*, Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p27. *Microdisks (Korea, H.K.)*, Com.Reg.(EEC) No 534/94, OJ (1994) L 68/5, p6. Among them, in *Retail electronic weighing scale* (hereinafter referred to as REWS), and in *Microdisks*, normal value for the models exported to the Community passed the 5% threshold.

13. *Compact disc players (Korea, Japan)*, Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p8. *Colour TV receivers (Korea, Malaysia, China, Singapore and Thailand)*, Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p57.

14. *Compact disc players (Korea, Japan)*, Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p8.

for dealers and end-users¹⁵ with the reason that a specific level of trade can only be adequately identified if a demonstration is made of all relevant factors including the functions of both seller and buyer and the consistency of quantities, costs and prices at the distribution level in question, in relation to other levels.

2.2. Alternatives to Domestic Market Prices.

As already noted, not the market price in the exporting country but alternative standards, such as constructed value or export price to a third country, should be used as normal value in the following situations:

First, where there are no sales of the like product on the domestic market of the exporting country or country of origin.¹⁶

Second, when there are no sales in the ordinary course of trade on the exporting country's home market.¹⁷ For the purpose of determining normal value, transactions between parties which appear to be associated or to have a compensatory agreement with each other may be considered as not being in the ordinary course of trade unless the Community authorities are satisfied that the prices and costs involved are comparable to those involved in transactions between parties which have no such link.¹⁸

Under its previous practice, the Commission regarded transactions between related parties as not being in the ordinary course of trade and established normal value on the basis of constructed value.¹⁹

15. Ibid, p9. *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p22 and 23.

16. See, *supra* note 1, Article 2(3)(b).

17. Ibid, Article 2(3)(b).

18. Ibid, Article 2(7).

19. This practice has been given up since the *Electronic Typewriters* determination. See, *Electronic typewriters* (Japan), Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1.

The Community's current practice, however, is that when an exporter sells in its home market to related parties, the Community will set normal value based on the prices charged by the related firms to their first independent buyers, because the Community now regards sales firms as the sales departments of a manufacturer and treats them as a single economic unit.²⁰ In *Canon v. Council*, the ECJ supported the Community authorities' view and held that regard must primarily be had to the price actually paid or payable in the ordinary course of trade in order to establish the normal value, the other possibilities being merely subsidiary.²¹ Setting normal value at the sales price adopted by sales firms rather than manufacturing firms makes it easier for the Community to find the existence of dumping because of inflation of normal value.²² It is worth noting that this Community practice may really discourage exports from third countries which have a more complex and hierarchically long vertical distribution structure.

Third, when sales on the domestic market of the exporting country or country of origin do not permit a proper comparison,²³ the export price to the third country or the constructed value shall be regarded as the normal value. Therefore, if home sales of the exporting firms are too small to compare with export sales, the representative character of home sales has been denied by the Community. After *Electronic Typewriters*,

20. The Commission took the view that the specific division of both production and sales activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity. See, *Compact disc players* (Korea, Japan), Com.Reg. (EEC) No 2140/89, OJ (1989) L 205/5, p9. This Commission's method was supported by the ECJ. See, jointed cases 277/85 and 300/85, *Canon Inc. and Others v Council*, [1988] ECR 5731, at 5799.

21. Jointed cases 272 and 300/85, *Cannon Inc. and Others v Council*. [1988] ECR 5731, at 5799.

22. Details will be discussed in 'part 3. Comparison' in this Chapter.

23. See, *supra* note 1, Article 2(3)(b).

therefore, the Commission adopted the 5% rule, eg., home sales of the exporting firms would be regarded as sufficiently representative if they represent on a model-by-model basis at least 5% of exports by volume to the Community.²⁴ Since *Printers*,²⁵ the Community authorities have denied the representative character of home sales when the sales have made below cost in the home market of the exporting country, even though such sales constituted not less than 5% of the total quantities imported.²⁶

2.3. Constructed Value.

Based on the reasons in Article 2(3)(b) of the EC Anti-dumping Regulation, the Community enjoys discretion to use the export price to third countries or the constructed value as the normal value. The Regulation provides that the constructed value is determined by adding the cost of production and a reasonable margin of profit.²⁷ In EC practice, export price to a third country has seldom been used to establish the normal value. One reason for this may be to do with administrative convenience. The other is that the exporting firms in EC anti-dumping action have rarely claimed use of export price to a third country to establish normal value.²⁸

24. *Electronic Typewriters (Japan)*, Com.Reg.(EEC) No 3643/84, OJ (1984) L 335/43, p44.

25. *Serial-Impact Dot-Matrix Printers (Japan)*, Coun.Reg.(EEC) No 3651/88, OJ (1988) L 317/33, p36.

26. In *Radio-broadcast receivers*, normal value was constructed even though the exporter sold to related parties because domestic sales of comparable models to independent buyers either fell below, in volume terms, 5% of sales of products exported to the Community, or were sufficiently representative but made at a loss. *Radio-broadcast receivers (Korea)*, Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p11.

27. Article 2(3)(b)(ii) of the Community anti-dumping regulation.

28. P. Waer, "Constructed Normal Values in EC Dumping Margin Calculations", (1993) 27 *JWT* (No.4), p48.

The main issue in constructed normal value is to determine a reasonable amount for selling, administrative and other general (SGA) expenses and a reasonable amount of profit. According to Article 2(3)(b)(ii) of the 1988 Regulation,²⁹ three problems can be outstanding. The first issue is the question of whether the use of domestic SGA is reasonable. The second issue is the question of whether the use of other producers' domestic SGA expenses is reasonable for a finding of dumping. The last issue is whether the provision concerned with constructed normal value in the EC Anti-dumping Regulation is compatible with current GATT rules.

2.3.1. Reasonableness of Domestic SGA Expenses

As mentioned above, the mere fact that the domestic SGA expenses of the exporters are higher than their export SGA expenses, can cause a finding of dumping.³⁰ However, where there are no or insufficient sales of the like product on the domestic market of the exporting country, or where sales are not profitable, the treatment of SGA expenses is the essence of the problem.

As has been explained in *Electronic Typewriters*,³¹ the Commission

29. It provides that 'The cost of production shall be computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses. The amount of for selling, general and administrative expenses and profit shall be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of the like products on the domestic market'.

30. There may be numerous reasons for high domestic SGA expenses, eg., distribution structure, advertising costs and so on.

31. *Electronic typewriters* (Japan), Com.Reg.(EEC) No 3643/84, OJ (1984) L 335/43, p44.

has regarded constructed value as a surrogate for domestic market price.³² Therefore, the normal value includes all SGA expenses incurred by exporters home sales since *Electronic Typewriters*.³³ It has become the Commission's practice to include SGA expenses in the constructed value, where there are no such sales on the exporters' home market, as if sales on the home market had taken place.³⁴ A finding of dumping can arise merely from the fact that the domestic SGA costs of the exporter's sale in the domestic market of the comparable models are higher than the export SGA costs.³⁵ Thus, these artificial SGA expenses make the normal value high in favour of a finding of dumping. In *DRAMs*,³⁶ for instance, the Commission allocated all R&D (Research and Development) expenses incurred in the period of investigation which related to DRAMs, be it current or future products, to the DRAMs sold in the period of investigation. Taking particular account of the high future R&D costs and the large capital investment requirements of this industry, the fact that R&D expenses for future products which were never exported to the Community were allocated to the constructed normal value indicated the Commission's intention to create artificial and higher domestic SGA expenses for a finding of dumping.

32. This has consistently been supported by the ECJ. See, Case 250/85, *Brother v Council*, [1988] ECR 5683, at para. 18, Joined Cases 277 and 300/85, *Cannon v Council*, [1988] ECR 5731, at para. 26, Joined Cases 273/85 and 107/86, *Silver Seiko v Council*, [1988] ECR 5927, at para. 16, and Case C69-89, *Nakajima All Precision v Council*, [1991] ECR I-2069, at para. 64.

33. *Ibid.*

34. In *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p10, the Commission took the view that where there were no or insufficient sales on the domestic market, the amounts used in the constructed values for SGA expenses and profit were the weighted averages of the expenses incurred and profit realised by the same producer or exporter on its other profitable models sold on the domestic market.

35. *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p8. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p11.

36. *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p16.

Therefore, with respect to R&D, R&D costs incurred in the past and deferred to the period of investigation only for the current exported products should be the basis for the constructed normal value. It remains to be seen how the Community authorities react to the 1994 GATT Anti-dumping Code providing that costs should be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production.³⁷

It has been suggested that the Community's approach on this basis 'as if sales on the domestic market had taken place' may be necessary to avoid 'would be' dumpers using cheaper material or more efficient production plants for their output sold for export, compared with their production sold on the domestic market.³⁸ However, the method of using the costs incurred for those inadequate home market sales is used consistently because constructed value is theoretically used only where home market sales are inadequate.

2.3.2. Reasonableness of the Use of Other Producers'

Domestic Expenses

According to Article 2(3)(b)(ii) of the EC Anti-dumping Regulation, where the amount for SGA expenses and profit of the producer or exporter is unavailable or unreliable or is not suitable for use they shall be calculated by reference to the expenses incurred and profit realised by other producers in the country of origin or export on profitable sales of the like product. Therefore, in case where sales on the domestic market

37. Article 2(2)(1)(1) of the 1994 GATT Antidumping Code. Commission, *Proposal for the Council Decision Concerning the conclusion of the results of the Uruguay Round of Multilateral Trade Negotiations (1986-94)*, Com(94) 143 final, p146.

38. Beseler & Williams, *Anti-dumping and Anti-subsidy Law: the European Community*, London: Sweet & Maxwell, 1986, p59.

are unprofitable but sufficient quantities are sold, or where the producer or exporter does not have sales of other comparable models, the SGA expenses are calculated by reference to the expenses incurred by other producers on their profitable sales of the like product in their domestic market.³⁹ However, the question may arise of whether the use of other producers' domestic SGA and profit, where an exporter has no such sales on its home market, is reasonable, since that the exporter concerned does not usually know other producers' exact SGA expenses and whether they are dumping. In the *Electronic Typewriters* case, however, the ECJ held that 'contrary to TEC's (Toyo Electronic Company) argument that the method adopted by the institutions leads to results which are unforeseeable because the manufacturer concerned cannot know the profit margins of its competitors; it must be observed that references to factors not known to the manufacturer concerned often prove necessary under the system laid down by Regulation No. 2176/84 where, as in the present case, it is not possible to take real price as a basis, and a certain degree of unforeseeability has to be accepted in such operations'.⁴⁰

The other question is that use of other producers' domestic SGA may ascribe dumping margins of exporters who have domestic sales and who are clearly dumping, to exporters who do not have domestic sales and who may obtain reasonable profit margins on their export sales. As have seen in the *Nakajima* case,⁴¹ the Commission's methodology which establishes the

39. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p 10, and *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L313/5, p8.

40. Cases 260/85 & 106/86, *Toyo Electronic Company Ltd. v Council*, [1988] ECR 5855, at 5917.

41. *Serial-Impact Dot-Matrix Printers* (Japan), Com.Reg.(EEC) No 1418/88, OJ (1988) L 130/12, p18. Case C-69/89, *Nakajima v Council*, [1991] ECR I-2069, at I-2188 and I-2189. In this case, Nakajima was an original equipment manufacturer (OEM), wholly engaged in export sales, mostly on an OEM basis.

price of the exported products as if they had been sold on the domestic market, where the foreign producer does not sell the product concerned in his home market, becomes problematic, because the producer does not incur any cost (or make any profit) for the product in his home market.

According to the Commission, however, 'where no or insufficient such sales took place, the allocation was based on a weighted average of expenses incurred and profit realised by the other exporter, investigated on their profitable sales to OEM's (Original Equipment Manufacturer)⁴² on domestic market of the like product.⁴³ In addition to the Commission's determination, the ECJ held that 'the normal value of a product must in all cases be constructed as if the product was intended for distribution and sale within the domestic market, regardless of whether or not the producer has, or has access to, a distribution structure'.⁴⁴

In *Radio-broadcast receivers*,⁴⁵ even though the exporter's domestic sales of the comparable models exceeded 5% of sales of products exported to the Community, the normal value was constructed based on sales on the domestic market to independent distributors.⁴⁶ However, as domestic sales to independent distributors failed to exceed the 5% threshold, SGA ex-

42. In joined Cases C-133/87 & C-150/87, *Nashua Corporation v Commission and Council*, [1990] ECR I-719, at para. 3, and in Case C-156/87, *Gestetner Holdings v Council and Commission*, [1990] ECR I-781, at para. 3, the Court defined an OEM as a supplier under its own brand of products manufactured by other undertakings.

43. *Idem*, OJ (1988) L 130/12, p18.

44. *Idem*, Case C-69/89, at I-2187.

45. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p11.

46. On the Korean market, most domestic sales to independent buyers were made to car manufacturers. The sales to car manufacturers, a significant difference in price structure and quantities sold was found. In spite of the fact that there are price difference between type of customer, the price difference lay in the lower profit margins on sales to car manufacturers, according to the investigation. This means the exporter obtained a certain amount of profit margin on their domestic sales.

penses were calculated by reference to the average expenses of the other producers' domestic SGA. For this price to be genuinely comparable with the export price, as pointed out in the Second Report of the Group of Experts,⁴⁷ the Commission should have considered differences between the quantities sold to distributors and the quantities sold in the Community, because the quantities sold to car manufacturers were more comparable to the export sales.

There are several criticisms which can be made with regard to the Community's position on the use of other producers' domestic SGA. First, the Community should take into account the cost structure of a particular producer, in particular its export cost structure, when considering the 'reasonable SGA expenses' to be used in constructing normal value. Otherwise, overestimated SGA expenses may give rise to an artificial dumping margin.

Second, the exporter may never be able to check whether the Commission calculated the constructed normal value correctly as the SGA and profit used by the Commission are those of other producers and the related data will be treated as confidential within the meaning of the Anti-dumping Regulation.⁴⁸ Above all, the determined normal value should be genuinely comparable with the export price.

2.3.3. The Determination of Profit

The amount of profit is calculated by reference to the profit realised by the producer or exporter on the profitable sales of like products on the domestic market. Where the exporter concerned does not

47. Antidumping and Countervailing Duties, Second Report adopted on 27 May 1960, GATT BISD 9th supp. 194, at 196.

48. J.-F. Bellis, E. Vermulst & P. Waer, "Further Changes in the EEC Anti-dumping Regulation: A Codification of Controversial Methodologies", 25 *JWT* (No.2) 1989, p26.

have sufficient profitable domestic sales, the amount of profit is calculated by reference to profit realised by other producers or exporters on the profitable domestic sales of like products.⁴⁹ If there are no domestic sales of like products, the Community authorities will use the profit by the exporter or other producers or exporters in the same business sector.⁵⁰

Since *Electronic typewriters*,⁵¹ profit margin has been determined on the basis that constructed normal value is a surrogate for domestic market price and should therefore approximate the result which would be obtained if sufficient profitable domestic sales had been made.⁵² The result of the methodology adopted in *Electronic typewriters* has been to raise the profit margin used in constructed normal value determinations:⁵³ 7 to 14% in *Small screen colour TV receivers*;⁵⁴ and 13.5% in *DRAMs*.⁵⁵

As far as constructed values for OEM export sales are concerned,

49. *Synthetic fibres of polyesters* (Korea, India), Com.Reg.(EEC) No 1956/92, OJ (1992) L 197/25, p27.

50. Article 2(3)(b)(ii) of the Community Anti-dumping Regulation. In the judgment in Case C-69/89, *Nakajima All Precision v Council*, [1991] ECR I-2069, at 2186, para. 61, it was held that the three methods of calculating the constructed normal value thus laid down in Article 2(3)(b)(ii) of the basic regulation should be considered in the order in which they are set out. This was upheld in Case C-105/90, *Goldstar Co.Ltd v Council*, [1992] ECR I-677, at I-725.

51. *Electronic typewriters* (Japan), Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, p3.

52. Prior to *Electronic typewriters*, the Commission usually select a single profit margin for all the constructed value, regardless of the profitability of each specific exporter's domestic sales. See, 1% in *Chemical fertilizer* (USA), Coun.Reg.(EEC) No 349/81, OJ (1981) L 39/4, p5, 10% in *Louvre doors* (Singapore, Malaysia), Com.Dec.81/366/EEC, OJ (1981) L 135/33, p33.

53. 14.6% in *Photocopiers* (Japan), Coun.Reg.(EEC) No 535/87, OJ (1987) L 54/12, p13; 37% in *Dot-matrix printers* (Japan), Coun.Reg.(EEC) No 3651/88, OJ (1988) L 317/33, p36.

54. *Small screen colour TV receivers* (Korea), Com.Reg.(EEC) No 3232/89, OJ (1989) L 314/1, p4.

55. *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17.

since *Electronic typewriters*, constructed normal value for OEM is a surrogate for domestic market price and would be obtained if there had been OEM sales on the domestic market and 5% of a profit was used as a standard profit margin.⁵⁶ However, in current determinations, the Community authorities, in line with previous practice,⁵⁷ usually apply a lower profit level to the constructed value and the profit used when constructing normal value for OEM transactions is one third of the profit realised on own brand sales.⁵⁸

2.3.4. Compatibility of the EC Anti-dumping Law with GATT Rules

According to Article 2(4) of the GATT Anti-dumping Code,⁵⁹ it is clear that the GATT Anti-dumping Code does not clearly mandate use of domestic SGA, but only imposes a standard of 'reasonableness'. Therefore the text of the GATT Code does not prescribe any particular method for determining the SGA costs to be used in the constructed market value, except that the amount should be reasonable. The standard of reasonable-

56. *Small screen colour TV receivers* (Korea), Com.Reg.(EEC) No 3232/89, OJ (1989) L 314/1, p4. *Plain paper photocopiers* (Japan), Com.Reg.(EEC) No 535/87, OJ (1987) L 54/12, p14.

57. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p10, and Coun.Reg.(EEC) No 112/90, OJ (1990) L 13/21, p25. In this determination, the Commission applied a profit rate which only corresponded to 30% of that realized on the exporter's brand sales.

58. *Colour TV receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p57.

59. Article 2(4) of the GATT Anti-dumping Code provides that 'When there are no sales of the like product in the ordinary course of trade in the domestic market or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison...with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits.'

ness in the determining of SGA cost in the GATT Code is also incorporated in Article 2(3)(b)(ii) of the EC Anti-dumping Law. It follows that the EC rules are, as such, not a clear GATT violation.

However, in the Second Report of the Group of Experts adopted in 1960,⁶⁰ the report stated that 'whatever the particular method used for determining both production and sales cost, the aim should always be to arrive at a normal value which was genuinely comparable with the export price'. Thus, the fair export price can be an alternative standard, for the concept of constructed value rather than the cost of inadequate home market sales.

2.4. Sales at a Loss.

The EEC Anti-dumping Regulation was amended in 1979⁶¹ to incorporate the concept of sales below cost. As a result, the EC adopted a very broad conception of cost which indicates average cost (or fully allocated cost) rather than marginal cost as having been provided in Article 2(4).⁶² From the viewpoint of economic reality, pricing between average cost and marginal cost should not be regarded as dumped price if such price is set only for a short period, as rational firms are willing to reduce prices to the level of marginal cost in short-term periods of slack demand.

In this respect, the Commission has refused to allow any exception

60. Anti-dumping and Countervailing Duties, Second Report adopted on 27 May 1960, GATT Bisd, 9th Supp. 194, at 196.

61. Cou.Reg.(EEC) No. 3017/79, OJ (1979) L 339/1.

62. Article 2(4) of the EC Anti-dumping Regulation provides that 'Where there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for consumption in the country of origin is less than the cost of production as defined in paragraph 3(b)(ii), sales at such prices may be considered as not having been made in the ordinary course of trade'.

to the rule that normal value should cover full allocated costs of production⁶³ even in the case of production facilities in a start-up or expansion phase where it is unrealistic to expect full costs to be covered within the investigation period.⁶⁴ Such a practice undoubtedly avoids difficulties for investigation, mainly with regard to administrative convenience, but can also cause severe distortion in dumping margins found. It remains to be seen how the Community authorities react to the 1994 GATT Anti-dumping Code providing that costs should be adjusted appropriately for circumstances in which costs during the period of investigation are affected by start-up operations.⁶⁵

3. EXPORT PRICE⁶⁶

3.1. Background

Article 2(8) of the EEC Anti-dumping Regulation provides that the export price shall be the price actually paid or payable for the products

63. *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) 3262/90, OJ (1990) L 313/5, p8, *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p16, and *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p22. In these determinations, the Commission took the view that normal value is established on the basis of the weighted average domestic selling price and at prices permitting the recovery of all or full cost of production reasonably allocated in the ordinary course of trade on the domestic market of the exporters.

64. J.-F. Bellis, "The EEC Anti-dumping System", *Anti-dumping Law and Practice* (J.H. Jackson & E. Vermulst ed.), Harvester Wheatsheaf, Chicago, 1989, p75.

65. Article 2(2)(1)(1) of the 1994 GATT Anti-dumping Code. Commission, *Proposal for a Council Decision Concerning the conclusion of the results of the Uruguay Round of Multilateral Trade Negotiation* (1986-94), Com(94) 143 final, p146.

66. For the determination of dumping and/or dumping margin, normal value is compared with the export price of the imported products to the Community which is basically the dumped price.

sold for export to the Community.⁶⁷ In fact, the Commission always nets back the export price to the ex-factory level in the exporting country.⁶⁸ These export prices to the Community include those for export via independent exporters.⁶⁹ Where exporters made sales to independent buyers in the Community directly, the export price is established on the basis of the price actually paid or payable by the independent buyers to the exporters.⁷⁰ In some determinations,⁷¹ the Commission has developed the practice of restricting the volume of transactions investigated so that at least 60% of all export sales of each particular exporter are covered.

In accordance with the GATT Anti-dumping Code,⁷² the EEC Anti-dumping Regulation provides that the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer.⁷³ There are three conditions to be satisfied, however, in order to construct the export price: first, where there are no export

67. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

68. Article 2(8)(a) of the Community Anti-dumping Regulation provides that the export price shall be the price ... net of all taxes, discounts and rebates actually granted and directly related to the sales under consideration.

69. *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17. Therefore, export prices were partly determined on the basis of the prices actually paid or payable to the the independent exporter, Texas Instruments Ltd.

70. *REWS* (Korea, Singapore), Com.Reg. (EEC) No 1103/93, OJ (1993) L 112/20, p22. In this determination, the Korean producers identified sales as being made at the level of importer/distributor or dealer, and the Commission was satisfied, on the basis of the evidence presented, that this was the case.

71. In *Daisy wheel printers* (Japan), Com.Reg.(EEC) No 2005/88, OJ (1988) L 177/1, p5, and *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p9, the Commission verified at least 70% of all transactions during the investigation period. However, in *Colour TVs receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg. (EC) No 2376/94, OJ (1994) L 255/50, p59, a minimum of 60% of all export transactions made by the exporters concerned during the investigation period were considered.

72. Article 2(5) of the 1979 GATT Anti-dumping Code.

73. Article 2(8)(b) of the Community Anti-dumping Regulation.

price; or second, where it appears that there is an association or a compensatory arrangement between the exporters and the importer or a third party;⁷⁴ or third where, for other reasons,⁷⁵ the export price is unreliable.⁷⁶

3.2. Alternatives to Export Price

3.2.1. Categories of Customers

The export price is the price actually paid or payable for the product sold for the export to the Community when the foreign producer sells directly to the importer in the Community. In some cases, however, the foreign producer does not sell directly to the Community importer,⁷⁷ or their export sales were made to OEM basis.⁷⁸ In these cases, the

74. *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 3113/92, OJ (1992) L 34/8, p12. *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p22. *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p7.

75. In *Synthetic fibre hand-knitting* (Turkey), Com.Dec.84/131/EEC, OJ (1984) L 67/60, p61, the Commission constructed the export price for an importer who invoiced his deliveries for the Community via an intermediate company in a third country, because the export prices expressed in that company's invoices could not be regarded as those obtained in normal trading.

76. The Regulation does not elaborate on what those 'other reasons' could be. Nor does Article 2(5) of the 1979 GATT Antidumping Code mention the other reasons. It stipulates that the export price may be constructed if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

77. *Housed bearing units* (Japan), Com.Reg.(EEC) No 2516/86, OJ (1986) L 221/16, p17. *Styrene monomer* (USA), Coun.Reg.(EEC) No 1570/81, OJ (1981) L 132/17, p17. In *Styrene monomer*, the Commission used the price charged by the producer to the broker or trader or trading house as the export price even though the seller did not know whether the material was destined for the Community or for other export markets.

78. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p7.

export price is determined on the basis of the price paid or payable to the intermediary. Such intermediary should have the same treatment as an independent exporter,⁷⁹ because the exporter to the Community is not the producer but the intermediary, i.e. trading house, broker, or trader. When export sales were made on the OEM basis, separate export prices are established for these sales on the basis of the prices charged when the products were sold for export by the manufacturer to the OEMs.⁸⁰ That is to say, the export price is determined on the basis of the price paid or payable by the OEM purchaser. All these approach by the Commission to determining the export price are nothing else but to make the export price as low as possible and create a dumping margin artificially.

3.2.2. Constructed Export Price

In accordance with the EC Anti-dumping Regulation, the Commission may construct the export price whenever it finds an association or a compensatory arrangement between parties concerned, as has been seen in several anti-dumping determinations.⁸¹

Where the Commission decides to construct the export price, it uses the resale price to the first independent buyer in the European Community. From this resale price, the Commission gives allowance with three reasons:

79. See, *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17.

80. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p7. *Photocopiers* (Japan), Com.Reg.(EEC) No 2640/86, OJ (1986) L 239/5, p8.

81. *Serial-Impact Dot-Matrix Printers* (Japan), Coun.Reg.(EEC) No 3651/88, OJ (1988) L 317/33, p37, *Video Cassette Recorders* (Korea, Japan), Com.Reg.(EEC) No 2684/88, OJ (1988) L 240/5, p9, and see, *supra* note 73. In such determinations, the Community institutions constructed the export price almost automatically when exports were made to exporter's subsidiary companies in the Community.

- all costs incurred between importation and resale,⁸²
- a reasonable profit margin,⁸³ and
- the costs incurred by the exporter from the moment the product left the factory (eg., CIF cost and transportation).⁸⁴

Article 2(8)(b) of the Regulation providing that such allowance shall include a reasonable margin for overheads and profit,⁸⁵ makes it clear that the deduction for constructing the export price includes indirect costs as well as direct costs, in spite of the fact that only direct costs are deducted with respect to normal value.

Besides, a reasonable profit margin for the importers is deducted in the construction of the export price. This allowance for indirect cost and a reasonable profit margin may cause an artificial dumping finding. Therefore, the profit margins deducted in the construction of export

82. These costs include customs duties, any anti-dumping duties and other taxes payable in the importing country by reason of the importation or sale of the goods. See, Article 2(8)(b)(ii) of the Community Anti-dumping Regulation. In *Colour TV receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg.(EEC) No 2376/94, OJ (1994) L 255/50, p60, the 'Imposta Erariale di Consumo', a luxuries tax levied in Italy was deducted from its resale price.

83. A reasonable margin for overheads and profit and/or any commission usually paid or agreed should be deducted. See, Article 2(8)(b)(iii) of the Community Anti-dumping Regulation.

84. These costs includes usual transport, insurance, handling, loading and ancillary costs. See, Article 2(8)(b)(i) of the Community Anti-dumping Regulation.

85. Usually around 5%. See, *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p7, *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p22, *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17, *Audio tapes in Cassettes* (Korea, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p9, and *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p7. But see *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p12: 8%, and *Housed Bearing Units* (Japan), Coun.Reg.(EEC) No 374/87, OJ (1987) L 35/32: 6%.

prices should be kept at the lowest possible level.⁸⁶ Furthermore, the Community Regulation 2(8)(b)⁸⁷ provides that such deductible 'costs shall include those normally borne by an importer but paid by any party either in or outside the Community which appears to be associated or to have a compensatory arrangement with the importer or exporter'. Thus, if the product is a consumer branded one, which is in need of the establishment of a well-established distribution, servicing and advertisement⁸⁸ network, allowance may cause serious distortions by the use of constructed export price. It can be observed, for example, that a company selling to both related and unrelated distributors may find that prices to independent importers result in no dumping while the same price to related importers results in dumping margins.⁸⁹ Therefore, the exporters who want to escape a finding of dumping from the Community must carry out their business without advertising and the related elaborate distribution and servicing network, while their competitors in the Community enjoy all those facilities.

4. COMPARISON

In accordance with Article 2(6) of the GATT Anti-dumping Code providing that the purpose of making adjustments to the price is to effect a

86. For the purpose of ensuring a fair comparison, the profit margin should not be deducted as it is not deducted in the construction of normal value. It should be noted that the level of the profit margin in the construction of normal value is usually much higher than that of the export price.

87. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

88. In *Audio tapes in cassettes* (Korea, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p9, the Commission adjusted the export price for advertising costs corresponding to sales made in the Community but paid or reimbursed by the exporters associated with the importers.

89. J.-F. Bellis, *supra* note 64, p80.

fair comparison between the export price and the domestic price in the exporting country, the EC Anti-dumping Regulation before August 1988,⁹⁰ was an almost *verbatim* repetition of Article 2(6) of the 1979 GATT Anti-dumping Code. The amendment to the EC Anti-dumping Regulation in 1988,⁹¹ however, significantly changed the provisions applicable to comparison. In practice, the EC has used its policy on making adjustment for comparisons which cannot be regarded as fair.

According to the comparison provision provided in the EC Regulation 2(9)(a),⁹² two main symmetry issues arise, in cases where the price actually paid or payable for the product sold for export to the Community is unreliable. The first issue is the differential treatment of indirect selling expenses in each market, and the second issue is the widespread use of averaged normal value as the standard for comparison with individual export sales prices.

In case of the former issue, where the exporter carries out distribution through its sales subsidiary in the Community, the EC gives allowance to all indirect expenses incurred by the sales subsidiary of the exporter,⁹³ while it make virtually no deduction for the indirect expenses

90. Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1.

91. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

92. Article 2(9)(a) of the 1988 Community Anti-dumping Regulation provides that the normal value and the export price shall be compared as nearly as possible at the same time. For the purpose of ensuring a fair comparison, due allowance in the form of adjustments shall be made in each case, on its merits, for the differences affecting price comparability, i.e. for differences in: (i) physical characteristics; (ii) import charges and indirect taxes; (iii) selling expenses resulting from sales made.

93. In *Audio tapes in cassettes* (Korea, Japan), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, P9, the Commission made it clear and took the view that on any occasion that an allocation of sales, administrative and other general expenses was not made on the basis of turnover, the amount to be allocated was calculated on the basis of the exporter's available cost accounting data directly related to the sales in question.

incurred by a related subsidiary in the exporter's home market, as already noted above. Therefore, in cases where it is necessary to construct the export price, allowances are made for all costs incurred between importation and resale and for a profit margin.⁹⁴ It may be argued on the Community's part that the cost data handed in by the exporter may be unreliable. However, this methodology in the operation of the anti-dumping system can technically cause artificial inflation or creation of a dumping margin. Therefore, the Community should verify those cost data from the exporter rather than apply antitrades biased methodology.

The second issue is that the normal value established on a weighted average basis is normally compared with export prices on a transaction-by-transaction basis.⁹⁵ Export prices can vary over a anti-dumping investigation period simply because of inflation, volatility of exchange rates, changes in market condition and so on. Thus, it seems to be abuse of anti-dumping laws, if dumping is found to have occurred, in spite of the fact that the pattern of price variation is identical and so the price is identical in the exporter's home market and its exporting market.⁹⁶

Therefore the EC Anti-dumping Regulation should be amended to guarantee equal treatment of sales on the exporter's home market and importing

94. *Colour TV receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p60, *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p7, *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p22, *DRAMs*(Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17, *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p7.

95. Article 2(13) of the Community Anti-dumping Regulation. *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17. *Colour TV receivers* (Korea, China, Malaysia, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p61.

96. Consider a case in which an equal number of sales is made in each market at a price of 10 in the first half, and the same quantity of sales in each market is made at a price of 5 in the second, the normal value established on a weighted average basis is 7.5. Since the export price in the second half is 5, they are dumped by a margin of 50%.

market i.e., individual sales to contemporaneous individual sales, or average export prices to average home market prices over an equivalent period, and equal treatment for any adjustment in both markets. Confronted with these arguments the Community has responded that these issues from the exporter's side confuse two different problems.⁹⁷

The Commission has taken the view that the construction of the export price is one thing and the comparison is quite another; when the domestic and export price have been established, a subsequent allowance is made for differences affecting price comparability when comparing these prices.⁹⁸ However, it is worth pointing out that the price comparison is based on the established normal value and the constructed export price. Therefore, the construction of the export price is a kind of prerequisite for the comparison between normal value and export price. The rule against adjustments for indirect selling expenses of both normal value and export price, therefore, defies all logic and fairness.⁹⁹

It is very clear, according to the GATT Anti-dumping Code,¹⁰⁰ that the construction of the export price is obligatory. Therefore the costs referred to are to be deducted automatically from the resale price of the related parties and only after this is done, do the comparison provisions start to play a role. As mentioned in Article 2(6) of the 1979 GATT Anti-

97. *Housed bearing units* (Japan), Com.Reg.(EEC) No 2516/86, OJ(1986) L 221/16, p17 and 18, *Plain Paper Photocopiers* (Japan), Coun.Reg.(EEC) No 2640/86, OJ (1986) L 239/5, p9 and 10, and *Electronic Typewriters* (Japan), Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, p5.

98. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p11.

99. Ivo Van Bael, "EEC Anti-dumping Law and Procedure Revisited", (1990) 24 *JWT* (No 2), p9. K. Matsumoto & G. Finlayson, "Dumping and Anti-dumping: Growing Problems in World Trade", (1990) 24 *JWT* (No 4), p7. J.-F. Bellis, *supra* note 64, p83.

100. GATT Anti-dumping Code, Article 2(6). This provision provides that '...Allowance for costs, including duties and taxes, incurred between importation and resales, and for profits accruing, should also be made'.

dumping Code, it should be remembered that the purpose of making adjustments to the prices is to effect a fair comparison between the export price and the normal value.

4.1. Levels of Trade and Quantities.

Evolutions in the EC practice in permitting adjustments have been characterised by an increasingly restrictive application of the rules. Although Article 2(9)(a) stipulates the broad principles of fair comparison including due allowance for the differences at different levels of trade, or in different quantities,¹⁰¹ the guidelines set out in Article 2(10) provide that any adjustment to take account of the differences shall be made pursuant to the rules specified in this provision.¹⁰² Thus the Community authorities have broad discretionary power, whether they choose the adjustments for sales at different levels of trade or sales of different quantities in the respective markets.¹⁰³ However, with regard to adjustments for sales at different levels of trade, the few exceptions to the Community policy were made in *Plain Paper Photocopiers*¹⁰⁴,

101. Article 2(9)(a) stipulates that the normal value and the export price shall be compared as nearly as possible at the same time.

102. The adjustments for sales at different levels of trade and sales of different quantities in the respective markets can not be granted unless adjustments for such differences fall in the exhaustive lists in Article 2(10) of the Community Antidumping Regulation.

103. In *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p12, the Commission rejected the argument that the sales made to car manufacturers should be compared to the export sales since the quantities were more comparable to the export sales, and took the view that any fair comparison requires prices to be compared at comparable levels of trade.

104. *Plain paper photocopiers* (Japan), Coun.Reg.(EEC) No 535/87, OJ (1987) L 54/12.

*Printers*¹⁰⁵, *Video Cassette Recorders*¹⁰⁶, and *Compact disc players*¹⁰⁷ determinations. In these determinations, the Commission has accepted that own-brand sales and OEM (Original Equipment Manufacturer) sales are not comparable. As a result, the allegation that the rules on adjustment could have overridden fair comparison requirement makes sense. Therefore, the Community's practice, as codified in Article 2(9) and Article 2(10), is incompatible with the purpose stated in Article 2(6) of the GATT Anti-dumping Code which is to effect a fair comparison. Besides, the EC's administrative practice is incompatible with GATT Code Article 2(6) principle that comparison shall be made 'at the same level of trade, normally at the ex-factory level'.

4.2. Import Charges and Indirect Taxes

Article 2(10)(b) of the Regulation provides that normal value shall be reduced by an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when destined for consumption in the country of origin or export and not collected or refunded in respect of the product exported to the Community.

In accordance with Article 2(10)(b) of the Regulation, there can be the question of whether this import charge which is regarded as a cost can

105. *Serial-Impact Dot-Matrix Printers*, Com.Reg.(EEC) No 1418/88, OJ (1988) L 130/12, p18, and Coun.Reg.(EEC) No 3651/88, OJ (1988) L 317/33, p36.

106. *Video cassette recorders*, Com.Reg.(EEC) No 2684/88, OJ (1988) L 240/5, p8 and p10.

107. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p10. The Commission has generally applied a reduced profit margin where export sales were made to such OEM customers in the Community. In this determination, the Commission applied a profit rate which only corresponded to 30% of that realized on the exporter's brand sales or, if the exporter had no domestic sales, 30% of the average profit made by other exporters.

include anti-dumping duties to the imported product.¹⁰⁸ In practice, as the Community considers anti-dumping duties as a cost, fair comparison between the normal value and the export price is distorted more.

4.3. Conditions and Terms of Sale

Article 2(10)(c) establishes the guideline on adjustment for differences in conditions and terms of sale. As far as differences in conditions and terms of sale are concerned, allowances are granted and limited to those which bear a direct relationship to the sales under consideration. The basic principle is that the deduction shall be made only in respect of directly related costs, for an exhausted list of the expenses. There are transport, insurance, handling, loading and ancillary costs, packing, credit, warranties,¹⁰⁹ guarantees, technical assistance and other after-sales services, and other selling expenses including commissions and sales-men's salaries.¹¹⁰

The possibilities for unfairness included in Article 2 (10)(c) for indirect selling expenses became clear in several consumer branded pro-

108. On the question of additional anti-dumping duty and refund procedure, see chapter 7.

109. In *Colour TV receivers* (Korea, China, Malaysia, Singapore, Thailand), Com.Reg.(EC) 2376/94, OJ (1994) L 255/50, the allowance claimed in respect of these costs were adjusted downwards with the reason that they included costs which were not directly related to the sales, and a claim for the cost of credit was rejected because the Commission considered that these costs were not directly related to the sales under consideration.

110. For salespersons' salaries, a number of allowances claimed have been rejected with the reason that not all salaries claimed concerned salaries of salespersons wholly engaged in direct selling activities. *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17. In *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p23, not only salespersons' salaries but also the amount for transport was reduced since the costs included general travel and communication expenses.

ducts determinations, such as *Electronic Typewriters*,¹¹¹ *Video Cassette Recorders*,¹¹² and *Colour TV receivers*,¹¹³ because such products involve substantial sales operations, for example, marketing, distribution and advertising, in addition to the traditional manufacturing and selling.

In order to determine the export price, the Community considers an export price charged by an exporter, deducting marketing, distributing, advertising and all general expenses. However, in case of consumer branded products, the real price is not the constructed export price but the price charged by the distributor of the imported products. Furthermore, indirect selling expenses for consumer branded products are substantial, often in the order of 15 to 20% of the selling price.¹¹⁴ Therefore, a producer who sells a consumer branded product at exactly the same price in both domestic and export markets, will systematically be credited with a dumping margin because of the indirect selling expenses of his sales organisation in the exporting market for which allowance will be made. For fairer comparison, the Community should give allowance to indirect sales expenses in the exporter's home market, as long as indirect expenses in the exporter's domestic market are greater than those in exporting market.

111. *Electronic typewriters* (Japan), Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1.

112. *Video cassette recorders* (Korea, Japan), Coun.Reg.(EEC) No 501/89, OJ (1989) L 57/55.

113. *Colour TV receivers* (Korea, China, Malaysia, Singapore, Thailand), Com.Reg.(EEC) No 2376/94, OJ (1994) L 255/50, p 62. In this determination, the Commission rejected the claims that normal value should be adjusted to take account of various advertising costs incurred in the exporters' domestic market on the ground that the costs did not correspond to any of the selling expenses as specified in Article 2(10)(c) of the Community Anti-dumping Regulation.

114. J.-F. Bellis, op. cit., *supra* note 64, p83.

4.4. Insignificant Adjustments

Article 2(10)(e) of the Regulation provides that 'claims for adjustments which are insignificant in relation to the price or value of the affected transactions shall be disregarded. Ordinarily, individual adjustments having an *ad valorem* effect of less than 0.5% of that price or value shall be considered insignificant'.

This provision seems neutral because it affects equally (normal) value or (export) price of the affected transactions, even though it is motivated by reasons of administrative convenience. However, closer examination reveals that it can have a major impact on dumping determination, because, in fact, the insignificant adjustment rule does not apply to the constructed export price under Article 2(8)(b), but applies to the normal value only.¹¹⁵ This means that insignificant costs for insurance, loading, unloading and wharfage and so on, will no longer be deducted from the normal value, but an allowance for them will still be made in the constructed export price.¹¹⁶

Needless to say, arbitrary application of insignificant adjustments may have the effect of creating an artificially increased dumping margin.¹¹⁷ Accordingly, Article 2(10)(e) of the Regulation is not compatible with the GATT Anti-dumping Code, which provides that adjustments be made for the 'differences affecting price comparability': the Code does

115. In *Colour TV receivers* (Korea, China, Malaysia, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p61, an allowance for salespersons' salaries for the construction of normal value was rejected because the amount concerned was found to be insignificant.

116. In *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p13, the Commission took the view that in this particular case the allowances in question, even though they were insignificant, taken altogether, had an appreciable effect on the price of the transactions and did not deducted in the constructed export price.

117. J.-F. Bellis, E. Vermulst & P. Waer, *supra* note 48, p29.

not ask that individual adjustment less than 0.5% of that price or value be ignored.

5. Dumping Margin

According to Article 2(14)(a) of the Regulation, dumping margin is defined as the amount by which the normal value exceeds the export price. Therefore, dumping margins are determined by a comparison between the weighted average normal value and the export price based on the transaction-by-transaction method.¹¹⁸ As a result, the dumping margin is equal to the difference between normal value and export price, duly adjusted.¹¹⁹ A single dumping margin is calculated for the whole Community because weighted average margins for each exporter may be established when dumping margins vary.¹²⁰

This transaction-by-transaction method tends to overestimate dumping margin, because negative dumping is regarded by the Commission as not real injurious dumping.¹²¹ Furthermore, the ECJ upheld this view and held that the transaction-by-transaction method is the only method capable of dealing with certain manoeuvres in which dumping is disguised by charging different prices, some above the normal value and some below it.¹²² The

118. Article 2(13) of the Community Anti-dumping Regulation.

119. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p11.

120. Article 2(14)(b) of the Community Anti-dumping Regulation. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p13.

121. This method of the Commission was supported by the ECJ. In Case 240/84, *NTN Toyo Bearing and Others v Council and Commission*, [1987] ECR 1809, at 1854 and 1855, the ECJ held that export prices above normal value are irrelevant to the question of the extent to which export sales below normal value have occurred and, therefore, to the real extent to which dumping has taken place.

122. Case 240/84, *NTN Toyo Bearing Co. Ltd and Others v Council*, [1987] ECR 1809, at 1855, and Case 255/84, *Nachi Fujikoshi v Council*, [1987] ECR 1861, at 1891.

Community authorities enjoy a margin of discretion in the choice of methodologies for the calculation of dumping margin to achieve their policies.¹²³ However, this margin of discretion should be strictly interpreted under the principle of fair comparison.

For the case of any other exporting producer or exporter who failed to reply to the Commission's questionnaire or did not otherwise make itself known, the Commission considered that the highest dumping margin, determined with regard to a producer which had cooperated in the investigation, was appropriate.¹²⁴ In *Radio-broadcast receivers*, however, the Commission calculated dumping margin for non-cooperating exporters on the basis of the weighted average margin of three car radio models most sold for export, of the exporter with the highest dumping margin.¹²⁵ As a result the dumping margin for non-cooperating exporters amounted to 34.4% even though the highest dumping margin for a cooperating company was 29.3%.¹²⁶

If none of the producers from an exporting country nor the importer known to the Commission replied to the Commission's questionnaire,¹²⁷ the

123. Case 256/84, *Koyo Seiko v Council*, [1987] ECR 1899, at 1917, Case 258/84, *Nippon Seiko v Council*, [1987] ECR 1923, at 1967, and Case 260/84, *Minebea Co. Ltd. v Council*, [1987] ECR 1975, at 2007.

124. *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p10. *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p7. In these determinations, the Commission insisted that this is in accordance with consistent practice, and took the view that if such firms should be attributed a dumping margin lower than the highest established for the cooperating companies, it would constitute a bonus for non-cooperation and could lead to circumvention of anti-dumping measures.

125. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p14.

126. *Radio-broadcast receivers* (Korea), Coun.Reg.(EEC) No 2306/92, OJ (1992) L 222/8, p11.

127. *Large aluminium electrolytic capacitors* (Korea), Com.Reg.(EC) No 371/94, OJ (1994) L 48/10, p11. In this determination, the dumping margin for Korean products, when expressed as a percentage of the free-at-Community-frontier price, was 70.6%.

constructed normal value as established on the basis of the facts available¹²⁸ was compared at an ex factory level with the export price as determined on the basis of the facts available¹²⁹, in accordance with Article 7(7)(b) of Regulation (EEC) No 2423/88.

However, it must be noted that the GATT Anti-dumping Code does not deal with the determination of dumping margin. The Code does not provide any methodology for the calculation of dumping margins in cases where normal value and/or export prices vary during the investigation period and is also quiet on the issue of a residual dumping margin for exporters whose exports have not been included in the investigation.¹³⁰ In addition, for a fairer comparison, the export price should be calculated on a weighted average basis, if normal value had to be calculated on a weighted average basis for the investigation period.

6. DETERMINATION OF DUMPING IN KOREA

6.1. Normal Price

Normal price in Korea means the ordinary trade price of identical, homogeneous or similar goods which are consumed in the country exporting them.¹³¹ If goods are not imported directly from the country of origin, but through a third country, the ordinary trade price in the third country

128. Normal value established on the basis of the facts available means that the Commission considers the facts set out in the complaint as the most reasonable basis.

129. The facts available for the export price means the export price of a representative model given in the complaint.

130. M. Koulen, "Some Problems of Interpretation and Impletation of the GATT Code", *Anti-dumping Law and Practice* (J.H. Jackson & E. Vermulst ed.), Harvester Wheatsheaf, Chicago, p370.

131. Article 4(6)(i) of the EDCA.

is considered as the normal price.¹³² However, when sales in the third country do not permit a proper comparison, the ordinary trade price in the country of origin is considered as the normal price.¹³³

In addition to the ordinary trade price, alternative standards used as normal price are export price to a third country¹³⁴ and constructed price.¹³⁵ These alternatives to domestic market price are used as normal price if there is no trade of such identical, homogeneous or similar goods, or if it is impossible to apply the ordinary trade price due to a special market situation.¹³⁶ There is no definition of "a special market situation" in the Act or the Decree. However, where there are no or insufficient sales of such identical etc. goods,¹³⁷ or where transactions occurred between parties which appear to be associated,¹³⁸ or where sales are not profitable, such could be considered as "a special market situation".

The established normal price based on the constructed price corresponds to the average of the domestic market prices of all sales during

132. In this case, in the Community, "the comparable price" actually paid or payable for the like product on the domestic market of the third country is regarded as a normal value instead of "the ordinary trade price" in the third country.

133. Article 4(6)(ii) of the EDCA. "When sales in the third country do not permit a proper comparison" means if the goods are merely transshipped, or there is no production of such identical, homogeneous or similar goods or no price to be deemed as a normal price in the third country.

134. The highest representative price of the prices at which such goods are exported to a third country from the exporting country. Article 4(6)(i) of the EDCA.

135. A price summing up the production cost in the country of origin, management and distribution costs at a reasonable level.

136. Article 4(6)(i) of the EDCA.

137. *Ballbearings* (Thailand), FMA No 1993-10, OG (1993) No 12379, p137. Normal price was established based on the constructed price.

138. *Ibid.* A part was purchased from an associated party. The production cost was adjusted on the basis of the price of the part provided by the petitioner.

the investigation period.¹³⁹ In *Ballbearings*, the constructed price was computed on the basis of the cost of production and reasonable amount of profit plus packing,¹⁴⁰ selling and general expenses. Then direct selling expenses were deducted. In *Glass Fiber*, however, transportation and packing expenses were deducted from the normal price.¹⁴¹

6.2. Dumping Price

Article 4(6)(iv) of the EDCA provides that dumping price is a price actually paid or to be payable at a price lower than a normal price with respect to goods which are imported from foreign countries. If there exists a special relation or compensation agreement between the exporter and the importer or a third person, and it is thereby impossible to rely on the price, the dumping price is the price at which such imported goods have been first resold to an independent buyer,¹⁴² or if there is no resale to such a buyer, the dumping price is the price which conforms to reasonable criteria as prescribed by the MOF.¹⁴³

If there exists a special relation between parties, and there is no resale to an independent buyer, then the dumping price is calculated on

139. *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p 31. However, the Community' normal value corresponds to the weighted average of the domestic market prices which may cause artificial inflation of dumping margin.

140. *Phosphoric Acid* (China) FMA No 1993-6, OG (1993) No 12350, p23.

141. Packing expenses have always been deducted from normal price since *Soda Ash*. *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p184.

142. In Korea, an association or a compensatory agreement between parties concerned has never occurred, so far. However, if the goods are imported by the associated party in Korea, the selling price to an independent buyer is the dumping price, but in the Community, the export price is constructed on the basis of the price to an independent buyer.

143. Article 4(6)(iv) of the EDCA.

the basis of a reasonable criteria by the MOF.¹⁴⁴ In this case, a more precise definition of reasonable criteria is needed for the transparency of the anti-dumping proceeding.

6.3. Comparison of Normal Price and Dumping Price

The dumping price is the price in an invoice.¹⁴⁵ In fact, the export price is adjusted to the ex-factory level in the exporting country for the comparison of normal price and dumping price.¹⁴⁶ In this case, if a physical characteristic, quantity or condition of sale, and difference in taxation have an effect on such a comparison of prices, the MOF can adjust the normal and the dumping price. However, the rules for granting an allowance to take account of differences affecting price comparability should be specified in detail.¹⁴⁷

In order to adjust to the ex-factory level, allowance for the dumping price includes all the costs incurred by the exporter from the moment the product left the factory, i.e.: transport expenses (for conveying the product concerned from the premises in the exporting country to its destination in Korea), insurance, handling, loading and ancillary costs, packing costs for export, and the commission paid in respect of the

144. Article 4(6)(iv) of the EDCA.

145. *Phosphoric Acid* (China), FMA No 1993-6, OG (1993) No 12350, p23, and *Glass Fiber* (USA, Japan, Taiwan), FMA No 1994-57, OG (1994) No 12786, p31.

146. Article 4(6)(v) provides that a comparison between the normal and dumping price is made at the same time and at the same trade level (ordinarily "the ex-factory level") as far as possible. *Phosphoric Acid* (China) FMA No 1993-6, OG (1993) No 12350, p23, *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p184, and *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p31.

147. See, as an instance, Article 10 under the title "Comparison" in the Community Antidumping Regulation, Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1, p5.

sales.¹⁴⁸ However, credit, technical assistance and the salaries paid to salesmen are not usually deducted.¹⁴⁹

If an interested person requests a price adjustment due to a difference in physical characteristic,¹⁵⁰ selling quantity and condition,¹⁵¹ he must prove the fact that such difference has a direct effect on manufacturing cost or market price.¹⁵²

Dumping margins are determined by a comparison between the adjusted average normal price and the adjusted dumping price based on a transaction-by transaction method.¹⁵³ The average normal price means the average of the domestic market price of all sales during the investigation period in the country of origin or exporting country.¹⁵⁴ This method may be not capable of dealing with certain dumping which is disguised by charging different prices, some above the normal value and some below it. However, this method is more close to the market or economic reality.

148. *Phosphoric Acid* (China) FMA No 1993-6, OG (1993) No 12350, p23, *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p184, *Glass Fiber* (USA, Japan, Taiwan), FMA No 1994-57, OG (1994) No 12786, p31.

149. Ibid.

150. In *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p186, the interested person requested a price adjustment due to a difference in physical characteristic, but the investigation authority (OCA) refused to adjust because the interested person did not submit sufficient documentary evidence.

151. Ibid. The investigation authority refused to adjust because of lack of sufficient documentary evidence.

152. Article 4(6)(vi) of the EDCA.

153. *Soda Ash* (China) FMA no 1993-75, OG (1993) No 12606, p185, *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p31.

154. In the Community, normal value is normally established on a weighted average basis, not an average basis. The first paragraph of Article 13 of the Community Antidumping Regulation.

**Chapter 5 : SUBSTANTIVE ASPECTS OF
THE ANTI-DUMPING LAWS -
DETERMINATION OF INJURY**

I. DETERMINATION OF INJURY

1. INTRODUCTION

Under the 1968 Regulation¹ and subsequent Regulations,² anti-dumping measures may only be imposed where the dumping causes or threatens to cause material injury to an established Community industry or materially retards the establishment of such an industry.³ Article VI of GATT includes the principle that the mere presence of dumping practices or a finding of dumping does not automatically result in the adoption of anti-dumping measures.

Different from the 1968 Regulation which had stipulated that the injury must be substantial and the dumping practice must be the principal cause of the injury, current 1988 Regulation⁴ simply provides for "material injury". The injury caused by the dumping practice, however, should be more substantial than the sum total of the injuries caused by all other factors which were harmful to Community industry.⁵ Otherwise, any form of or extent of injury may justify the imposition of anti-dumping measure, because injury has become very easy to establish, as explained below. However, the Community skipped over any obligation concerning the relative

1. Coun.Reg.(EEC) No 802/68, OJ (1968) L 148/1.

2. Coun.Reg.(EEC) No 2011/73, OJ (1973) L206/3, Coun.Reg.(EEC) No 1411/77, OJ (1977) L 160/4, Coun.Reg.(EEC) No 1681/79, OJ (1979) L 196/1, Coun.Reg.(EEC) No 1580/82, OJ (1982) L 178/9, Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1, and Coun.Reg.(EEC) No 1761/87, OJ (1987) L 167/9.

3. See, *supra* note 1, Article 4(1).

4. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

5. Pierre Didier, "EEC Antidumping Rules and Practice", (1980) 17 *CML Rev.*, p359.

importance of injury in its 1979 Regulation⁶ and subsequent amendments. Consequently, any form of allegation of injury may justify the using of anti-dumping measures, because there is no direct or unequivocal definition of what should be meant by this 'material injury' notion. Thus, unless the European Court of Justice gives a more precise ruling, the Commission will retain a very wide field of discretion in this field.

2. LIKE PRODUCT AND COMMERCIAL REALITY

The discussion of which products constitute like products plays an important role in the dumping investigation as well as in the injury investigation. The following discussion will be entirely concerned with the issue of exported products complained of, which are like products sold by domestic producers in the importing country.

The regulation defines the term 'like product', in Article 2(12), to mean a product which is identical, i.e., alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. Thus the definition in the EC regulation is regarded as a literal re-expression of the 1979 GATT Anti-dumping Code.⁷

From the 1979 GATT Code and the current Community's anti-dumping Regulation, two principles can be drawn for the injury investigation. First, the strict standard in order to compare products for "likeness" is whether the products are physically identical. Therefore, mere commercial competitiveness is not sufficient to make products which are not physic-

6. Coun.Reg.(EEC) No 1681/79, OJ (1979) L 196/1.

7. Article 2(2) of the 1979 GATT Anti-dumping Code.

ally identical alike for the purpose of injury determination.⁸ A second principle is that the domestic product alleging the injury has to have characteristics closely resembling, at last, those of the imported products.

This rather narrow definition of like product has merits and demerits for domestic producers. It is easy to make an injury determination if an injury has actually occurred as this definition restrains the range of the relevant industry. This narrow definition does not protect, however, merely commercially competitive products.

Under the Code, anti-dumping duties may not be imposed unless the domestic industry makes a like product. In the absence of such a product, if domestic products under consideration do not have characteristics closely resembling those of the imported product, there is no like product, thus no domestic industry, thus no injury, and thus no case.⁹ While all this is very logical, the Community has not been able to neglect the commercial reality that exporting firms may escape EC anti-dumping duties by bringing 'parts' for EC assembly. In order to deal with this problem without distorting the GATT definition of like product, the Community has not used a 'product definition' methodology but an "origin of goods" methodology. This "origin of goods" method prevents only upstream circumvention, the only circumvention that creates European jobs in the Commun-

8. The 1967 and 1979 GATT Anti-dumping Code have rejected a test based on commercial interchangeability. See, Article 2(2) of the 1979 GATT Anti-dumping Code. It provides that 'the term like product shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration'.

9. S.A. Baker, "Like Products and Commercial Reality", *Anti-dumping Law and Practice* (J.H. Jackson & E. Vermulst ed.), Harvester Wheatsheaf, Chicago, 1990, p288.

ity,¹⁰ because assembly by foreign direct investment could be threatened by the origin rule. This may be particularly the case where multinational firms are being investigated, because more and more firms are engaging in globally integrated manufacturing.

A broad definition of the like product under investigation can solve a lot of problems, but not all of them. Furthermore, narrow and strict definition of like products would not exclude the development of circumvention provisions, as the coverage of components, processed and pin-striped products, should depend on the interpretation of anti-circumvention rules, not on the artificial manipulation of like product concepts. The Commission, therefore, has to apply the 'like product' notion very restrictedly. This does not mean that the Commission fails to notice 'substitutability' of the products concerned, but rather that the Commission regards substitutability as merely one of the factors in an analysis. Therefore, if there are suspicions about sufficient physical similarity, this substitutability may turn the scale.¹¹ In *Colour TV receivers*,¹² the Commission took the view that a distinction between small and larger screen TV sets is no longer permitted because of a high degree of substitutability.

The wording of Article 2(12) of the Regulation theoretically has the possibility that the Community may terminate an investigation based on the non-existence of a like product. In *Outboard Motors*,¹³ for example, the Community did not include Japanese outboard motors above 85 horse

10. See the details in Chapter 6. 'Anti-Circumvention'.

11. See, for example, *Video Cassette Recorders* (Japan, Korea), Com.Reg.(EEC) No 2684/88, OJ (1988) L 240/5, p7, and *Daisy Wheel Printers* (Japan), Com.Reg.(EEC) No 2005/88, OJ (1988) L 177/1, p2.

12. *Colour TV receivers* (Korea, Malaysia, China, Singapore and Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p53.

13. *Outboard Motors* (Japan), Coun.Reg.(EEC) No 1305/87, OJ (1987) L 124/1, p2.

power within the scope of investigation because there had been no European producer of such motors, nor was there strong evidence that such production would be established in the EC. However, it is worth noting that the Commission has attached importance to functional similarity in recent determinations.¹⁴ In *Radio-broadcast receivers*¹⁵ and in *Colour TV receivers*,¹⁶ furthermore, the Commission took the view that there is no clear dividing line because of interchangeability and substitutability of the products, resulting in the definition of a number of categories of like products.¹⁷

There may be criticism on the ground that the European Community did not focus on the real question of whether Community industry could be injured by dumping a wide range of models of a product, including models not produced by Community industry.¹⁸ According to the definition in Article 2(12) of the Regulation,¹⁹ it is possible that Community industry may be injured even though such production is not established in the Community, but that does not make it a like product.

14. *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p13. In this determination, the Commission took the view that DRAM wafers and dice, finished DRAMS, DRAM-modules or 'stack' DRAMS and DRAMS in different variations falling within the different categories have the same technical and physical characteristics and similar uses. It held that even future generation of finished DRAMS fall within the same general category of products because they perform the same basic function and are used for the same basic purpose.

15. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p8.

16. *Colour TV receivers* (Korea, Malaysia, China, Singapore and Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p53.

17. The Commission relied on interchangeability again in *Microdisk* in order to result in the definition of like product. *Microdisk* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p6.

18. W.J. Davey, "An Analysis of European Communities Legislation and Practice relating to Anti-dumping And Countervailing Duties", *Anti-trust and Trade Policies of the EEC* (B. Hawk ed.) 1983, p66-67.

19. Coun.Reg. (EEC) No 2423/88, OJ (1988) L 209/1.

3. COMMUNITY INDUSTRY

The dumped import should cause or threaten to cause material injury to an established industry in the importing country or materially retard the establishment of such an industry in order to trigger the determination of injury and subsequently the imposition of anti-dumping duties. The 1979 GATT Code defines the term industry as 'the domestic producers as a whole of the like product or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.'²⁰ The definition in Article 4(5) of the Regulation is a literal reproduction of Article 4 of the 1979 GATT Anti-dumping Code.

In examining whether the complainants constitute a major proportion of the total Community production of the like product,²¹ the Commission has considered three categories of parties concerned, the Community producers, independent buyers, and parties which are related to the exporters or importers.²² Having excluded the related parties from the Community industry, the complainants have to manufacture more than a certain amount of the remaining total Community output of the like product in order to form a major proportion of the total Community production. However, there is no criterion as to what percentage of the remaining total Community

20. Article 4 of the 1979 GATT Code.

21. The Commission requests and obtains information from all producers in the Community in order to examine whether the complainant constitutes a major proportion of the total Community production of the like product. See, *Microdisks* (Korea, H.K.), Com.Reg.(EEC) No 534/94, OJ (1994) L 68/5, p8.

22. *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p7.

output constitutes a major proportion of the total Community production.²³

There are three exceptions to this standard definition of the domestic industry of the Community, namely, related parties who are related to the exporters or importers, or who are themselves importers of the allegedly dumped products,²⁴ regional industry when the Community is divided into two or more competitive markets, and product lines when the Community production of the like product has no separate identity.²⁵

3.1. Related Parties

According to Article 4(5) of the Regulation, when producers are related to exporters or are importers themselves of the allegedly dumped product, the Community industry may be limited to the rest of the producers. It appears that the mere fact the Community producers are exporters' subsidiaries,²⁶ have links with them,²⁷ or are importers themselves at the same time²⁸ may be sufficient grounds for exclusion. Contrary to the opinion of the group of experts in the 1980 Understanding,²⁹ the

23. Statement by Dr Beseler, then Head of the Commercial Defence Division, DG-I. at the Cefic Antidumping Seminar held in Brussels on 2-3 April 1981, suggesting that a share of production of 25% or more would be regarded as acceptable as a major proportion of the Community production. In practice, however, the Commission has tended to require a share of production at least 70% when examining complaints against imports from Korea. See, *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p7, (80%), *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p14, (75%), *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p18, (80%), and *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p9, (72%).

24. Article 4(5) of the Community Anti-dumping regulation.

25. Ibid, Article 4(4).

26. *Caravans for Camping* (Yugoslavia), Com.Dec.83/428/EEC, OJ (1983) L 240/12, p14.

27. *Electronic Scales* (Japan), Com.Reg.(EEC) No 757/84, OJ (1984) L 80/9, p11.

28. *Textured Polyester Fabrics* (USA), Com.Reg.(EEC) No 1337/81, OJ (1981) L 133/17.

29. GATT BISD (1969), Supp. No. 27 at 33.

Community does not consider it necessary to establish that there should be grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from unrelated producers in order to be deemed to be related.

In addition, there have been some outstanding exceptions for exclusion from Community industry. The first exception is in relation to complaints from Community producers who were importers of the dumped products in the past. The second exception is a number of Japanese-European joint ventures. In the case of the former, Community producers have generally been included in the domestic industry on the ground that they had been forced to be the importers of the dumped products.³⁰ Furthermore, in *Microdisks*,³¹ the Commission regarded complainant producers who imported dumped imports as Community producers, if the level of imports was limited and their own output was temporarily insufficient.

In the latter, a number of Japanese-European joint ventures were regarded as Community industry because of 'the high level of local content in their outputs and their long-term commitment to investment and employment in the Community'.³²

In *DRAMS*,³³ the Commission held that a complainant company which was itself an importer could be considered as part of the Community indu-

30. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p14. In this determination, the Community took the view that as regards the limited imports of car radio from Korea by the Community producer in question, the Community producer took a legitimate measure of self-protection because it is clear that the purpose of the said imports was to remain on the market with a complete range of models or even to secure market segments which would have been lost without sales of the models in question. *Plain paper photocopiers* (Japan), Com.Reg.(EEC) No 2640/86, OJ (1986) L 239/5, p15, and *Printers* (Japan), Coun.Reg.(EEC) No 3651/88, OJ (1988) L 317/33, p38.

31. *Microdisks* (Korea), Com.Reg.(EC) No 534/94, OJ (1994) L68/5, p9.

32. *Video cassette recorders* (Korea, Japan), Com.Reg.(EEC) No 2684/88, OJ (1988) L 240/5, p7.

33. *DRAMS* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p18.

stry, as long as the purchased imported products were not resold on the Community market and its primary interest did not transfer from producing to importing. Then, the Commission insisted that the complainant company in question, Siemens AG, was organised in different product sector groups (i.e. systems, semiconductors, etc.) and purchases made by Siemens' system groups could be considered to be an act of economic self-defence and as such a legitimate and justified business decision. As a result, the Commission offered good protection to some Siemens' groups, i.e. semiconductors groups, and opened the way to import of the allegedly dumped products to other Siemens' groups, i.e. systems. In the same proceedings, one of the complainant companies did not carry out all separate production steps in the Community. The Commission, however, held that the complainant was considered as part of the Community industry because it carried out the major part of its total production in the Community.³⁴ Therefore, the Community seems to regard the major part and the like product as the same products. However, the major part of the total product cannot be identical to the product under consideration.

Furthermore, in *Colour TV receivers*,³⁵ the Commission showed a new approach, that producers whose main core of business lies outside the Community should be excluded from the definition of the Community industry.³⁶ Therefore, the Commission regarded the producers as part of the Community if they were merely supplementing their Community production with an additional activity based on imports.³⁷ The Commission cannot

34. Ibid, p19.

35. *Colour TV receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50.

36. Ibid, p54.

37. If those producers were importers with relatively limited additional production in Community, they should be excluded from the definition of the Community industry.

escape from the criticism that it expanded the scope of the Community industry to producers who are themselves importers of the allegedly dumped imports and/or who are actually not the producers of like products which means products identical to the allegedly dumped product under consideration.

3.2. Regional Industry and Product Lines

Article 4(5) of the Regulation provides that 'in exceptional circumstances the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a Community industry if, (a) the producers within such market sell all or almost all their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community. In such circumstances injury may be found to exist even where a major proportion of the total Community industry is not injured, provided there is a concentration of dumped or subsidised imports into such an isolated market and provided further that the dumped or subsidised imports are causing injury to the producers of all or almost all of the production within such market'.

A regional market could consist of either a group of Member States, one Member state, or a part of a Member state. The necessary degree of isolation and of concentration would make it likely that in practice such a region could only be found in the periphery of the Community.³⁸ In

38. J. Cunnane & C. Stanbrook, *Dumping and Subsidies*, European Business Publications, London, 1983, p71.

Glass, and in *Plasterboard*,³⁹ the Commission has applied the regional industry standard.

Article 4(4) of the Regulation provides that 'the effects of the dumped imports shall be assessed in relation to the Community production of the like product when available data permit its separate identification. When the Community production of the like product has no separate identification, the effect of the dumped imports shall be assessed in relation to the production of the narrowest group or range of production which includes the like product for which *the necessary information* can be found'.

The concept of "Product lines" in this Article does not restrict the range of Community industry; rather, it broadens the range of Community industry as it stipulates that the impact of the dumped products shall be assessed in relation to the production for which the necessary information can be found. The Community, however, is not willing to apply a broad scope of products even though the Community production of the like product has no separate identity. This attitude of the Community has been seen in several cases. For example, in *Louvre Doors*, the Commission stated that 'in the absence of separate identity of the dumped production connecting with Louvre Doors alone, it is not easy to gauge the size of the Community market for such units; whereas, nevertheless, the best information available suggests that the total Community market has remained relatively static....'⁴⁰ However, the Commission's attitude to use

39. *Certain categories of glass* (Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia), Com.Dec.86/36/EEC, OJ (1986) L 51/73, p75, and *Plasterboard* (Spain), Com.Dec.85/209/EEC, OJ (1985) L 89/65, p65. In these determinations, the Commission considered that the complainant producers from Greece and Ireland constituted a Community industry for the drawn glass products and plasterboard respectively.

40. *Louvre Doors* (Malaysia and Singapore), Com.Dec.81/366/EEC, OJ (1981) L 135/34, and *Louvre Doors* (Taiwan), Com.Reg.(EEC) No 88/84, OJ (1984) L 11/13.

of the notion 'the best information available' is not compatible with both the 1979 GATT Code and the Regulation. If available data do not allow separate identification, the Commission must rely on the necessary information for the product line.

4. MATERIAL INJURY

One of the most complex problems in an injury determination is the requirement that the injury should be material. In addition to a finding of the dumped imports, the GATT Code requires that there must be evidence of injury from the dumped imports, but that this need not be the major or the only factor causing injury.⁴¹ The Code also allows the possibility of only a threat of injury.

As expressed from the opinion of Advocate General Warner in the 1979 *Ballbearing* cases, the Commission enjoys considerable discretion in its assessment of injury.⁴²

According to the Regulation,⁴³ there is a special reference to the need to limit the reason of injury to the direct effects of dumped imports and distinguish from volume and prices which are not dumped, or contraction in demand that is unrelated to the dumped import, despite negative impact on Community industry. However, in practice, the European Community has tended to include all imports that affect a particular industry in

41. The 1979 GATT Anti-dumping Code Article 3(4).

42. Opinion of Advocate General Warner in the *Japanese Ballbearings*, case 113/77, [1979] ECR 1212, at 1266. In this opinion, he said that 'the findings were necessarily based in large part on the confidential information supplied to the Commission by the European industry, which the Commission was precluded from disclosing. Moreover, they were by their very nature findings that could only be based on an assessment of complex economic facts, not readily open to judicial review'.

43. Article 4(1) of the Community Anti-dumping Regulation.

arriving at a determination of injury, which obviously biases the results substantially.⁴⁴

Article 4(1) of the Regulation sets up three stages of test whereby a determination of injury to an established Community industry shall be made only if the dumped imports are;

- i) causing material injury, or
- ii) threatening to cause material injury, or
- iii) materially retarding the establishment of a Community industry.

4.1. Actual Material Injury

The term "material injury" is not defined in the GATT Article 6(6) nor in the Regulation, Article 4. However, both Article 3(1) of the GATT Code and Article 4(2) of the Regulation mention three basic factors which are to be considered.

- (a) the volume of dumped imports, in particular whether there has been a significant increase of a like product, either in absolute terms or relative to production or consumption in the Community,
- (b) the prices of dumped imports, in particular whether there has been a significant price undercutting as compared with price of a like product in the Community,
- (c) the consequent impact on the industry concerned.⁴⁵

44. Bellis, "The EC Anti-dumping System", *Anti-dumping Law and Practice* (J.H. Jackson & Ver-mulst ed.), Harvester Wheatsheaf, Chicago, 1989, p89.

45. Article 4(2) of the Community Anti-dumping Regulation.

Although the provisions concerned in both the GATT Code and the Regulation seem to be the same, it is worth pointing out that the Regulation Article 4(2)(c) does not include all the economic factors mentioned in the 1979 Code Article 3(3).⁴⁶ This does not mean that the Commission will not consider the factors in Article 3(3) of the 1979 Code, because the factors mentioned in the Regulation are not intended to be exhaustive. It might be considered, however, that the Community has not regarded those factors as the most important causes of injury. Furthermore, the injury determination in the Community is made on a case-by-case basis and the inevitable variations caused by this practice make it difficult to formulate general rules. Despite this practice of the Community, the mere fact that certain factors are always pointed out, while others are usually disregarded, provides a certain practice.

4.1.1. The Volume of Dumped Imports

As expressed in the provisions concerned, the 1979 GATT Code and the 1988 Community Regulation regard a significant increase of the volume of imports and an increase in market share as the most important test for a finding of injury. It has meaning, however, only with regard to the increase in dumped imports.

If imports and their market share were increased when consumption of the product in question in the Community was stable, or increased while sales by the Community industry fell and its corresponding market share declined,⁴⁷ the increased volume of the dumped imports is justifiable cause for injury findings. In addition, if imports and their correspond-

46. Economic factors, such as productivity, wages, growth and the ability to raise capital or investment, are not mentioned in the Community Anti-dumping Regulation.

47. *Colour TV receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p63.

ing market share were increased, even when Community consumption decreased and as a result both sales and market share of the Community industry declined,⁴⁸ the increased volume of dumped imports is justifiable cause for injury findings.

On the other hand, it can be argued that the Community industry cannot be considered as being injured if it substantially increased its sales volume and market share when Community consumption was increased, even though imports and their market share were increased as well. The Commission, in *DRAMs*, however, quibbled that the Community industry's market share grew by 2.5% (actually 2.8%)⁴⁹ and this growth was below the level that could normally have been expected at a time when domestic consumption rose,⁵⁰ and that an increase in sales and market share is a necessary consequence of the appearance of the European DRAM on the market.⁵¹ However, in *Microdisks*, it should be noted that the Community

48. *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p24.

49. In *DRAMs*, the total Community consumption of DRAMs in 1990 was 150,000 thousand megabits, and the total production of Community producers in 1990 was 45,000 thousand megabits. Therefore, the Community production's market share reached around 33%. However, in its determination, the Commission held that the Community production's market share was around 20% in 1990. This kind of mistake was occurred again in *Microdisks*.

50. *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p10 and 11. In *Microdisks*, the Community consumption of the microdisks concerned increased from 295 million units in 1989 to 656 million units in the investigation period, an increase of 122%, and over the same period, the volume of Community production increased from 31 million units to 87 million units, an absolute increase of 180%, and its corresponding market share increased from 10.5% to 13.3%. Furthermore, its capacity utilization rates went from 49% to 84%.

51. *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p17. This Commission's argument is not easy to prove economically. Unless a producer who enters the market later has a superior product which is clearly differentiated from those of its competitors, it will have a more difficult time gaining a market share initially. If a new manufacturer is producing basically the same product, the only way it can gain a substantial market share initially is through undercutting its competitors' prices.

production increased by 180% with 84% of capacity utilisation rates when its market share reached 13.3% in the investigation period from 10.5% in 1989. This growth can be regarded as the maximum level that could have been expected, since 84% of capacity utilisation means almost full utilisation. As far as Community consumption, volume and market share of the Community and of the dumped imports are concerned, the Community industry should not be considered as being injured in those determinations.

Although a minimal market share, or minimal increase in market share has usually precluded finding of injury, in some determinations, a relatively small market share or small increase therein has also been a reason for injury findings.⁵² It should be noted that the Commission calculates market shares not on an individual producers basis but on a whole country basis, and often accumulates the market share of several exporting countries under investigation.

Furthermore, as noted above, in spite of the fact that there is a special reference to the need to limit the reason of injury to the direct impacts of dumped imports in the Regulation, the Commission generally looks at the total volume of imports. The Commission's practice in this respect can be regarded to be in violation of the Regulation.⁵³

4.1.2. The Prices of Dumped Imports

The prices of dumped imports are not only the basic factors to be examined but are also to be taken into account in determining what kind of remedy should be given to eliminate the injury. In order to assess the pricing behaviour of the exporters, a detailed evaluation of their prices obtained on the Community market during the period of investigation is

52. *Mounted Piezo-Electric Quartz Crystal Units* (Korea, Japan, and the USA), Com.Dec. 80/603/EEC, OJ (1980) L 162/62, p63.

53. This issue will be discussed more detail in part 5 'causation'.

undertaken. This evaluation is carried out on the basis of transaction-by-transaction sales reports by both the exporters and the Community producers, for identical models, covering sales to the first independent purchaser in the Community.⁵⁴

In early determinations, the Commission made its decisions based on a general estimation of the situation without making any special calculation with respect to the level of prices necessary to eliminate injury.⁵⁵

In recent determinations, however, the Commission has relied on two different methods for the purpose of calculating injury margins, which means the amount by which the price of a like product in the Community exceeds the "weighted" average resale price of importing product. First, the Commission usually compares the constructed weighted average resale prices of importing products with the prices of like products in the Community. This method implies also that the negative impact of the resale price of imported products is disregarded, e.g., its injury margin is zero.

Second, in many determinations,⁵⁶ the Commission compares the adjusted resale price of importing product with constructed target price⁵⁷ of the Community product, when the price of the dumped product has depressed or prevented Community price increases.⁵⁸ This method is compatible

54. *DRAMS (Korea)*, Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p19.

55. *Mechanical wrist-watches (the USSR)*, Coun.Reg.(EEC) No 2347/87, OJ (1987) L 213/5, p7. *Ball bearings (Japan and Singapore)*, Com.Reg.(EEC) No 744/84, OJ (1984) L 79/8, p11 and Coun.Reg.(EEC) NO 2089/84, OJ (1984) L 193/1, p4. The position of the Commission in these determinations were that 'having regard to the extent of injury caused, the rates of anti-dumping duty should correspond to the margins of dumping provisionally established'. In other words, a definitive duty, which would eliminate the dumping found, should be imposed.

56. *Hydraulic excavators (Japan)*, Com.Reg.(EEC) No 1877/85, OJ (1985) L 176/1, p3.

57. Target price consists of the full costs of the EC producers, including SGA and a reasonable profit.

58. These two methods will be discussed in detail in part 5, 'causation'.

with the 1979 GATT Code.⁵⁹ Under this approach, however, it is rather easy to make claims of price depression or suppression by a Community producer.

In *DRAMs*, however, the Commission took the view that for all exporters, substantial price undercutting existed, and the sales of *DRAMs* from Korea were made below cost of production. Taking into account the fact that a new producer usually faces large start-up costs, both in terms of sunk costs and in advertising and other related expenses,⁶⁰ and that extensive R&D expenses by Korean producers, covering *DRAMs* three generations ahead of current commercialisation which had nothing to do with the allegedly dumped *DRAMs*, had been allocated to the *DRAMs* sold in the period of investigation, the Commission's argument on price undercutting and sales below costs, as far as the prices of dumped imports of *DRAMs* were concerned, was unreasonable for injury findings.

4.1.3. The Consequent Impact on the Industry Concerned

The factors most often used in the determination of injury are Community production, utilisation of capacity, market share, Community stock, and employment levels, in addition to price depression and suppres-

59. The second paragraph of Article 3(2) of the 1979 GATT Code provides that 'with regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increase, which otherwise would have occurred, to a significant degree'.

60. *DRAMs* manufacturing is a kind of a equipment industry which needs huge start-up costs and R&D expenses. Therefore it must establish itself quickly in the market and gain a share in order to guarantee its viability in the future. This could be a reason why the Commission wanted to protect higher *DRAMs* prices through the anti-dumping measure. The infant industry argument for protecting new companies in less developed or developing countries is based on this notion.

sion. Furthermore the Regulation provides evaluation of relevant economic factors such as profits, return on investment, and cash flow.⁶¹

The Commission has considered that the Community industry suffered material injury which consisted mainly in persistent financial losses resulting from decreased production, decline in market share, capacity utilisation and depressed prices, employment cutback and a decrease in investment.⁶²

However, even though production and capacity utilisation of the Community industry increased, and its sales and market share grew, if Community producers prices fell, their profitability was deteriorated, and the investment in R&D by the Community industry slowed down, the Commission has concluded that the Community industry has suffered material injury.⁶³

4.2. Threat of Material Injury

Article 4(3) of the Regulation sets up the guidelines for a determination of threat of injury. A determination of a threat of injury may only be made where a particular situation is likely to develop into actual injury. In considering whether there is a threat of injury to the Community, the Commission may take into account factors such as the rate of increase of dumped imports into the Community, export capacity in the country of origin or export, and the likelihood that the resulting exports

61. Article 4(2)(c) of the Community Anti-dumping Regulation.

62. *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p24. *Radio-broadcast receivers* (Korea), Com.Reg.(EEC) No 313/92, OJ (1992) L 34/8, p15 and 16. *Audio tapes in cassettes* (Korea, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p14.

63. *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p10 and 11. *DRAMS* (Korea), Com.Reg. (EEC) No 2686/92, OJ (1992) L 272/13, p20.

will be to the Community.⁶⁴

Up to now, the Commission has not usually based an injury finding on threat of injury alone but has found an injury in combination with material injury. Under very exceptional situations such as those which caused severe market disruption during the steel crisis of 1978, protective measures have been imposed on the basis of threat alone.⁶⁵

In *Quartz Crystals*,⁶⁶ the Commission determined that there was injury, or at least a threat thereof, because exports had increased 300% over the previous two years, and there was evidence that exports would double again during the next year. In *Sodium Carbonate*,⁶⁷ on the other hand, the Commission did not accept that there was threat of injury, in spite of the fact that the exporter had recently built and planned new production facilities in some countries, because it was not clear that exports to the Community would be increased significantly through such increased production capacity.

According to the above two determinations, in order to make an injury determination, three issues appear. They are (1) the increase in export will continue; (2) the production capacity in the country of origin or export is not fully used; (3) the exports will be made to the Community excluding non-member countries. But the problem is that these issues are not compatible with Article 3(6) of the 1979 GATT Code, because this Article provides that a determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances, therefore, which would create a situation in

64. Article 4(3)(a) and (b) of the Community Anti-dumping Regulation.

65. J.-F. Beseler & A.N. Williams, *Anti-dumping and Anti-subsidy Law: the European Communities*, Sweet & Maxwell/ICC, London, 1986, p164-5.

66. *Quartz Crystals* (Korea), Com.Dec.80/603/EEC, OJ (1980) L 162/62, p63.

67. *Sodium Carbonate* (the USSR), Coun.Reg.(EEC) No 407/80, OJ (1980) L 48/1, p2.

which the dumping would cause injury, must be clearly foreseen and imminent.

4.3 Material Retardation of the Establishment of Community Industry

As a result of fears of exports from Germany's chemical giants, the US Anti-dumping Act of 1921 provided that injury could be found if dumped imports were retarding or preventing the establishment of domestic industries. This concept was followed in the 1979 Anti-dumping Code and is known as the material retardation standard. Despite its relatively long history, this material retardation standard has been little used.

In *Outboard Motors*,⁶⁸ the Community refused to issue a finding of material retardation. The Commission excluded these types of motors from the scope of investigation because Community industry did not actually produce this type of Motor and it had not made a substantial commitment to commencing production.

5. CAUSATION

In accordance with the 1967 GATT Anti-dumping Code, the original anti-dumping regulation 459/68 of the Community provided that a determination of injury could only be made when the dumped imports were demonstrably the principal cause of such injury. Furthermore, the consequences of dumping had to be weighed against all other factors which, when taken together, might adversely affect the Community industry.

This position of the Community has changed substantially because of

68. *Outboard Motors (Japan)*, Coun.Reg.(EEC) No 1305/87, OJ (1987) L 124/1, p2.

the 1979 GATT Anti-dumping Code which replaced the 1967 Code. Consequently, in accordance with the 1979 GATT Code, Article 4(1) of the Regulation provides in the relevant part that 'determination of injury shall be made only, if the dumped imports are, through the effects of dumping, causing injury'. In addition to Article 4(1) of the Regulation, Article 13(5) also stipulates another aspect of the causation issue. It provides that where a product is imported into the Community from more than one countries, duties shall be levied at an appropriate amount on a non-discriminatory basis on all imports of such product found to be dumped and causing injury.⁶⁹

The Commission does not always separate material injury from causation and it is hard to do. The Commission routinely investigates the volume, prices and consequent impact of non-dumped imports.⁷⁰ However the injury could be caused not by the dumped imports, but by lower or competitively priced non-dumped imports. It should be noted that the purpose of the anti-dumping law is not to provide protection from fairly-traded imports.

The Commission has to examine whether the material injury suffered by the Community industry was caused by the dumped imports and whether other factors might have caused or contributed to that injury.

In examining the effects of the dumped imports, according to the Commission, if the increasing volume and growing market share of the dumped imports coincide with the loss of market share, price erosion, an

69. This issue will be discussed in detail in subsection 5.2 cumulation.

70. See, *DRAMS*, Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p21. The Commission took the view that injury and its causation must be established taking account of all imports from the country concerned. However, determination of injury should be made only if the dumped imports are, through the effects of dumping, causing injury. Therefore, injury and its causation should be established taking account of all dumped imports from the country concerned.

increase in stock volume and the deterioration in the financial situation of the Community industry, the causal link between the dumped imports and the injury suffered by the Community industry is established. In other words, when the increasing volume and growing market share of the dumped imports coincide with any of these negative situations in the Community industry, the causal link is established. The loss of market share⁷¹ and the depression of Community DRAM market prices⁷² combined with the Community industry's increasing financial losses have been considered as indications that dumped imports had considerably contributed to the injurious situation suffered by the Community industry.

The Commission, in addition, has to consider whether factors other than dumped imports, i.e. production overcapacity, imports from other countries, falling exports to third countries by the Community industry, contraction in demand, the effect of non-dumped imports and Community manufactured products, could have caused the injury to the Community industry found.

In *Audio tapes in cassettes*, although the Commission accepted that the effect of non-dumped imports and Community produced cassettes had had a detrimental impact on the Community industry, it took the view that the consequences of the dumped imports are weighed against these other factors, with the reason that the Community industry was already in a weak position caused by the dumped imports and this made it more vulnerable to the effect of competition from non-dumped imports and Community produced cassettes.⁷³ Therefore, if a substantial growth in import volume and a

71. *Colour TV receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L255/50, p65.

72. *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p21.

73. *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p16.

resulting increase in market share, together with substantial price undercutting by the importers were established,⁷⁴ the Commission has concluded that the Community industry could be considered as materially injured, even though factors other than dumped imports had a negative impact on the Community market.

5.1. Margins Analysis.

5.1.1. Introduction

How much anti-dumping duties should be levied is the most important issue throughout the whole anti-dumping proceeding. Thus, in accordance with Article 8(1)⁷⁵ of the 1979 GATT Code, Article 13(3) of the Regulation provides that 'the amount of such duties shall not exceed the dumping margin provisionally estimated or finally established; it should be less if such lesser duty would be adequate to remove injury'. As a result, the amount of anti-dumping duties to be levied to remove injury from the dumped product is as important as the amount of dumping margin.

The Community institutions, therefore, enjoy significant discretion in setting the level of the duty because of the lack of binding rules in GATT and of detailed rules in the EC Regulation. In *Audio Tapes in Cassettes*,⁷⁶ the Commission explained its position as follows: 'the Commission recalls that the very purpose of the Community's anti-dumping legislation is to counteract dumping and material injury caused thereby. There

74. *DRAMS (Korea)*, Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, 21.

75. Article 8(1) of the 1979 GATT Anti-dumping Code provides that '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'.

76. *Audio Tapes in Cassettes (Japan, Korea, Hong Kong)*, Coun.Reg.(EEC) No 1251/91, OJ (1991) L 119/35, p41.

is, however, an additional responsibility on the institutions to avoid measures which can have excessive consequences. Article 13(3) entails an assessment and a forecast of the future effects on the Community market of any anti-dumping measures which by its very nature is judgmental. This assessment, for which the legislation gives no guidance, has to be reasonable and take into account the particularities of each case'.

This lesser duty rule, however, has two critical problems: first, none of the interested parties will know the injury margin that the Commission has found through the investigation, because of the confidentiality of the data; second, anti-dumping duties based on the injury margin are not refundable, because the Community authorities only take into account for refund, the dumping margin, not the injury margin.⁷⁷

5.1.2. Calculation of Injury Margin⁷⁸

The level of the duty is mainly determined by the level of the price undercutting of the weighted average resale price of the dumped imports into the Community or by the level of resale price that would be required to cover the costs of Community producers and provide reasonable profit.⁷⁹ According to Article 4(2)(b), it is required that the respective prices be compared if there is any price undercutting. However, in

77. See, Article 16(1) of the Community Anti-dumping Regulation. This issue will be discussed further in Chapter 7, part 5, 'refund'.

78. Injury margin means the amount which is adequate to eliminate injury from the dumped imports. Where the amount of injury margin is more than that of the dumping margin, the dumping margin is imposed. As far as the amount of the injury margin is less than that of the dumping margin, the antidumping duty is set at the level of the injury margin.

79. J.-F. Bellis, *supra* note 44, p85.

some recent determinations,⁸⁰ the Community compared a target price with the dumped price. This approach seems to have been rather popular with regard to the imported consumer branded electronic products. This practice of the Commission, however, is not compatible with its own Regulation Article 4(2)(b) because the provision stipulates that the price of dumped imports should be compared with the price of a like product in the Community. The price of a like product in the Community should be its actual market price, not a target price.

Nevertheless, the calculation of the injury margin is based on two different approaches. In *Electronic Typewriters*,⁸¹ the Commission declared that an examination of price undercutting was not necessary since the prices realised by the Community producers had been depressed by the prices of the imported products. Before price depression, calculation of injury margin is normally based on comparison between the adjusted weighted average resale prices of the imported products and the price of a like product in the Community. However, if the price of a like product in the Community, has been depressed or suppressed by prices of the imported products, the Commission will construct a target price, consisting of the full costs of the Community producers, including SGA and a reasonable profit.⁸² In this case, the amounts of anti-dumping duty will be calcula-

80. *Electronic typewriters* (Japan), Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, p7. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p19. *Video cassettes and video tape reels* (Korea, H.K.), Com.Reg.(EEC) No 4062/88, OJ (1988) L 356/47, p55.

81. *Electronic typewriters* (Japan), Coun.Reg. (EEC) No 1698/85, OJ (1985) L 163/1, p7.

82. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p15. In this determination, the Commission set a 10% profit margin. Later, the Council decided that a 12% return on sales could be regarded as appropriate, taking account of all relevant economic factors. See, *Compact disc players* (Korea, Japan), Coun.Reg.(EEC) No 112/90, OJ (1990) L 13/21, p30.

ted with the intention of raising Community price to a certain level, namely the target level.

Neither the GATT Code nor the Regulation of the Community would stipulate the target price method, even though price depression is relevant for injury determination.⁸³ Therefore, applying this methodology is not only in violation of the GATT Code and the Community's own Regulation, but also protectionist in character.

It is worth remembering that Advocate General Verloren Van Themaat criticised the target price methodology and stated, 'I do not consider it compatible with the wording of Article 4 or with the market-economic aspect of its background if, for the purpose of that price comparison, the Commission determines a model market price for Community producers on the basis of production costs plus a normal profit margin'.⁸⁴

In order to determine production costs of the Community's producers, the Commission has used three tests⁸⁵ at least: first, the production cost of the most efficient Community producer,⁸⁶ second, the costs of a representative producer⁸⁷ and third, the weighted average cost of pro-

83. The draftman of both bills must have thought that the price of a like product in the importing country should be the comparable actual market price of the import competing producers.

84. Case 53/83, *Allied Corporation v Council (Allied II)*, [1985] ECR 1621, and (1986) 3 CMLR 605, at 619, Opinion of Advocate General Verloren Van Themaat.

85. E. Vermulst & P. Waer, "The Calculation of Injury Margins in EC Anti-dumping Proceedings", (1993) 25 *JWT* (No.6), p18.

86. *Standardized Multiphase Electronic Motors* (Bulgaria, Czechoslovakia, GDR, Hungary, Poland, Rumania, and the USSR), Com.Reg.(EEC) No 3019/86, OJ (1986) L 280/68, p72.

87. *Urea* (Libya, Saudi Arabia, Czechoslovakia, GDR, Kuwait, the USSR, Trinidad, Tobago, and Yugoslavia), Coun.Reg.(EEC) No 3339/87, OJ (1987) L 317/1, p7 and p8. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p14.

duction of all Community producers.⁸⁸ Among those tests, the Commission has given more attention to the weighted average cost of production of all Community producers for the imported consumer branded products.

As demonstrated in *Electronic Typewriters*, the Council considered several factors when assessing reasonable profit for consideration in constructing target prices. In this determination, the Council considered, '... the product life cycle of electronic typewriters, the existence of financial risks when embarking on new research and development programmes, the need to carry out a number of such programmes in order to keep pace with the new development, a continuing level of investment to finance yet more production automation, the cost of financing at normal market rates in the Community and the need of the Community producers to be able to spend an amount on advertising similar to that of the Japanese exporters'.⁸⁹

The Commission institutions have used a relatively high profit margin in the case of the imported consumer branded products, especially from Japan. It has justified its practice of using a higher profit margin (10% to 25%) for these products which have a short economic life span,⁹⁰ since all investments relative to their production have to be recovered over a relatively short period.

It should further be noted that in the large majority of determina-

88. *Electronic Typewriters* (Japan), Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, p7 and p8. *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994), L 68/5, p13. In *Microdisks*, the Commission constructed production costs of the Community's producers based on the production costs of the complainant industry.

89. Ibid, p8. In *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, p19, the Commission considered several factors, such as investment in factory automation, research and development and design of new products, for reason of profit.

90. For instance, Ball bearings have five to ten years, and DRAM has only one to three years economic life span.

tions, no details on profit margins employed were provided other than that they were reasonable and that the basis for calculating profit has varied from a percentage on cost⁹¹ to a percentage on turnover.⁹²

5.1.3. Recent Developments in the Calculation of Injury Margins

In two specific determinations which involved consumer branded electronic products from the Far East, the Commission has shown novel approaches in the calculation of injury margins. In both determinations, the Commission's approach was adopted because foreign producers had caused material injury, even though they had sold their products in the EC at prices higher than those of the Community products.

In *Compact disc players*,⁹³ departing from its previous practice, the Commission did not calculate injury margin based on comparison between the constructed weighted average resale prices of the imported products and the price of a like product in the Community or target price of the Community products. Instead, the Community increased the prices of the imported products by the amount by which the target price exceeded the sales prices of the directly competitive Community products. In the provisional determination of *Compact Disc Players*,⁹⁴ the position of the Commission was expressed as follows: 'In order to allow the Community industry to proceed to these necessary price increase to remove the injury, the prices of the directly competing models have also to increase by

91. *EPROMs* (Japan), Coun.Reg.(EEC) No 577/91, OJ (1991) L 65/1, p14.

92. *Aspartame* (Japan, USA), Coun.Reg.(EEC) No 1391/91, OJ (1991) L 134/1, p5. *Microdisks* (Korea, H.K.), Com.Reg.(EEC) No 534/94, OJ (1994) L 68/5, p13.

93. *Compact Disc Players* (Japan and Korea), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5, and Coun.Reg.(EEC) No 112/90, OJ (1990) L 13/21.

94. *Ibid*, OJ (1989) L 205/5, at 20.

the same amount. All significant models of each exporter were thus allocated an amount of the necessary increase to remove the injury suffered by the most directly competitive Community-produced models'. The Community Institutions' basic position to regarding removal of injury was that the Community industry should be put in a position where prices could be increased to profitable levels without loss of sales volume.⁹⁵

Therefore, foreign exporters may have injury margins imposed even though they did not undercut the prices of the EC products and, furthermore, they sold their products at prices higher than any target prices set by the Community. What this means is that foreign exporters cannot decide their sale prices: the Community does, instead. The injury margin calculation based on the hypothesis that domestic products can be injured even by relatively higher-priced imported products will not provide individual justice, at least, to those exporters who have been setting prices higher than the target prices of Community products and thus can not be regarded as injury causing dumpers.⁹⁶

In *Audio tapes in cassettes*,⁹⁷ the Community has tried to remedy the injury in forms of a loss of sales and a reduced profitability.⁹⁸ For the purpose of this remedy, the Community introduced a three steps calculation of injury as follows:

1) First, the Commission calculated a target market share as well as a target profit for the Community industry by calculating the profit as the total amount of target profit, and a reasonable turnover for the

95. *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p13. *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p18.

96. E. Vermulst & P. Waer, *supra* note 85, p23.

97. *Audio tapes in cassettes* (Japan and Korea), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p17, and Coun.Reg.(EEC) No 1251/91, OJ (1991) L 119/35, p45.

98. *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, p13.

Community industry which could have been realised if its capacity had been fully utilised;⁹⁹ then,

2) the global profit shortfall as well as price depression caused by the reduction of the turnover of the Community industry was calculated to determine the amount by which the prices of the Community products should be raised; and then,

3) the Commission determined that foreign exporters should increase their prices by the same rates in order to enable the Community industry to raise its price by this amount.¹⁰⁰

Furthermore, the individual contributions of the foreign producers to the causation of the injury had to be taken into account sufficiently through the introduction of a price factor and a volume factor. The reason for introducing these new elements was the fact that the prices of the Community industry had not been significantly undercut by the major exporters to the Community, and therefore a traditional target price calculation would have not worked effectively.

In this injury calculation, the Community relied on turnover on sales, which is not calculated on the basis of the actual turnover but on a theoretical ideal turnover of full production and sales.¹⁰¹ Moreover, the Community distributes total injury between the individual exporters based on Article 4(2)(a) of the Regulation which is limited to the general determination of whether injury has been caused.

As has been seen above, the Community authorities have retained much discretion in the calculation of injury margins and changed methodologies for calculation frequently so that it is almost impossible to

99. A turnover in full capacity utilization is not a reasonable but a maximum turnover.

100. *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p18.

101. *Ibid.*

predict what method is going to be applied. Therefore, if the Commission relies on totally different methodologies in the calculation of injury margin in different cases, interested parties should be given the relevant data, in order to compare the results under different calculation methodologies.

5.2. Cumulation

Cumulation is prescribed by the GATT Anti-dumping Code and the Regulation. In accordance with Article 8(2) of the GATT Code,¹⁰² Article 13(5) of the Regulation provides that 'where a product is imported into the Community from more than one country, duty shall be levied at an appropriate amount on a non-discriminatory basis on all imports of such product found to be dumped and causing injury, other than imports from those sources in respect of which undertakings have been taken'. Therefore, it seems to be compulsory to cumulate under the 1979 Code and the Regulation for several exporting countries. At the first glance, it is logical to cumulate because the total of the dumped imports cause injury to the Community industry of a like product. In addition, in *Propan-I-ol*¹⁰³ the Commission stated that 'the Commission is of the opinion that it is appropriate to cumulate the factors of injury caused by several exporters from one particular country, since a possible exclusion from an anti-dumping measure would grant the other exporters of the same country a competitive disadvantage for the future, which is not the object of an

102. Article 8(2) of the GATT Anti-dumping Code provides that when an antidumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury.

103. *Propan-I-ol*, Com.Dec.84/229/EEC, OJ (1984) L 106/55, p58.

anti-dumping proceeding'. Thus, the Community seems to cumulate the injury caused by several exporters from one exporting country as well.

There are, however, at least two significant problems. First, at variance with the 1979 GATT Code, the Regulation stipulates to cumulate dumped imports of several suppliers from more than one country, but not of several exporters from one particular country.¹⁰⁴ Second, even though the GATT Code and the Regulation stipulate that 'duty shall be levied on all imported products found to be dumped and causing injury', the Commission cumulates the factors of injury. That is, it could have imposed a duty on a non-discriminatory basis as an easy catch-all provision relative to all other imports, without any serious examination into dumping and causing injury to the domestic industry. Therefore, only after it has been proved that imported products are dumped and causing injury to the domestic industry of the like product, should a duty on a non-discriminatory basis be taken into account.¹⁰⁵ Since *Iron or steel coil for re-rolling*, the fact that the effect of the dumped imports concerned on the Community industry has to be assessed jointly seems to be an established

104. Article 8 of the 1979 GATT Anti-dumping Code provides that 'if several suppliers from one or more countries are involved, anti-dumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury...'

105. The Commission, however, delivered different criteria from the above determination in *Iron or steel coil for re-rolling* (Argentina, Brazil, Canada and Venezuela) Com.Dec. No 2182/83/ECSC, OJ (1983) L 210/5, p5. The Commission stated that 'in analysing whether cumulation was appropriate in each case, the Commission considered whether the dumped imports were a contributory factor to material injury sustained by the Community industry'. This means that cumulation is not an automatic matter, but rather depends on fulfillment of a number of conditions. In other words, first it must be proved that dumped imported products are causing injury, then cumulation can be considered.

practice of the Community Institutions.¹⁰⁶ It has been the standard practice of the Community institutions to cumulate imports from several countries when the imported products and the like product of the Community industry meet the following criteria: interchangeability of end-uses, simultaneous competition on the Community markets, similarity of channels of distribution, and finally, not negligible scale of volumes imported.¹⁰⁷

However, some questions remain. If the scale of the volume imported is negligible, and as a result its market share is too small to cause material injury, even though most of the above-mentioned criteria were satisfied, should the negligible imports be cumulated with imports from other countries? The Community Institution took the view that imports from Turkey should not be cumulated because its market share amounted only to 1.5% and exports from Turkey had been declining.¹⁰⁸ However, in an other determination, imports from Korea were cumulated with the reason that Korea's share is above the level that can be considered *de minimis*.¹⁰⁹ Therefore, the imports from Korea were not considered negligible. Before the Commission, however, decided whether the exporting country's market share in the Community could be considered *de minimis*, it should have set the criteria for *de minimis*, otherwise it can be accused

106. *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p24. *Colour TV receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p63.

107. *Ibid*, *Colour TV receivers*, p63. *Microdisks* (Korea, H.K.), Com.Reg. (EC) No 534/94, OJ (1994) L 68/5, p9.

108. *Ibid*, *Colour TV receivers*, p63.

109. *Microdisks* (Korea, H.K.), p9. In *Microdisks*, products imported from Korea had 2.4% of the Community market and exports from Korea had been declining as well.

of discretionary behaviour in favour of the Community industry.¹¹⁰ Furthermore, it is worth noting that this decision came after the Uruguay Round Anti-dumping Code was adopted in December 1993.¹¹¹

Cumulation may cause serious discrimination among dumping importers. It would not be rational to expect that parallel cheap exporters who are not included in a given dumping investigation would be willing to adjust their own prices upwards just because others' prices are adjusted as a result of dumping duties. If these dumping proceedings include only a few of the many cheap suppliers, the latter may extend their market share at the expense of exporters charged with dumping earlier.

5.3. Technical Dumping

There may be three different situations to which an alignment defence, known as technical dumping, could be applied. First, exporters set their prices at the level prevailing in the market of the importing country. In this case it can be argued that competitively priced products at the prevailing level of the importing country's market prices cannot cause injury unless they have a price depressing or suppressing effect.

Second, exporters set their prices at the level of other low

110. *Fibre Building Board* (a number of East-European Countries), Com.Reg.(EEC) No 1633/82, OJ (1982) L 181/19, p22. The Commission excluded Bulgaria because of its low market share of 0.2 to 0.7%, stating that protection measures were not necessary.

It is worth noting, however, that an anti-dumping duty was imposed on imports from Romania whose market share was only 0.8%.

111. According to Article 5(8) of the 1994 GATT Anti-dumping Code, the volume of dumped imports shall normally be regarded as negligible if the volume from any particular country represents less than 3% of market share. Commission, *Proposal for a Council Decision concerning the conclusion of the results of the Uruguay Round of Multilateral Trade Negotiation (1986-1994)*, COM (94) 143 final.

priced, but non-dumped imports. In this situation, if the volume of the non-dumped imports is clearly larger and the prices lower than those of the dumped imports, it is not the dumped imports which cause injury, but the non-dumped imports. Besides, in this case imposition of anti-dumping duties would not protect domestic producers but simply increase the market share of the non-dumping producers at the expense of the dumping producer.

Third, exporters set up their prices to other, dumped imports. In other words, smaller exporters are forced to align their prices to the prices of their more powerful competitors.

From these three situations, it is questionable whether dumped imports at prices which make the foreign product competitive with the importing countries' product are regarded to be unfair. The Community has seldom recognised technical dumping on the ground that competitively priced imports may nevertheless cause injury because of their price depressing or suppressing effects.¹¹²

Furthermore, only a few cases have been terminated on the basis that the dumped imports did not undercut Community prices¹¹³ and in some cases¹¹⁴ a determination either of no injury or not in the Community interest or both has been issued, because the prices of the dumped imports were in fact higher than the prices of the non-dumped imports; therefore

112. *Studded-welded Link Chain* (Spain and Sweden), Com.Dec.80/783/EEC, OJ (1980) L 231/10, p11. *Sodium Carbonate* (USA), Com.Reg.(EEC) No 3018/82, OJ (1982) L 317/5, p6. In *Sodium Carbonate*, the European Commission noted that whereas resale prices of imported sodium carbonate in general were below those prevailing in the market concerned, albeit in part only marginally, they nevertheless prevented intended price increases and led to price depression.

113. *American Xanthan Gum*, Com.Dec.83/493/EEC, OJ (1983) L 268/60, p61, and *Codeine*, Coun.Dec.83/9/EEC, OJ (1983) L 16/30, p32.

114. *Saccharin and its salts* (China, Korea and the USA), Com.Dec.83/626/EEC, OJ (1983) L 352/49, p50 and *Unwrought nickel* (the USSR), Coun.Reg.(EEC) No 2907/83, OJ (1983) L 286/29, p30.

imposition of anti-dumping duties was likely to lead to a shift in market share from the dumping exporters to the non-dumping exporters, and this shift in market share could have had an even worse effect in terms of injury to the Community producers.

6. DETERMINATION OF INJURY IN KOREA

6.1. Similar Goods and Domestic Industry

The term "identical, homogeneous or similar goods" (hereinafter referred to as "similar goods") is defined as goods which are identical, i.e., identical in all respects including physical characteristics, quality, and consumer recognition,¹¹⁵ even though it is not defined by the Korean Customs Act or its Enforcement Decree.

From the Korean rules, therefore, three principles can be drawn for the injury investigation: identification in all respects, the same function and substitutability.¹¹⁶ Mere commercial competitiveness is not sufficient for the purpose of injury determination. In judging "similarity", the KTC decides on the basis of physical and chemical characteristics, major production processes, use, substitutability, distribution routes, recognition from the customers or the producers, and common features of production equipment or producers.¹¹⁷

115. Article 2 of the Administrative Ordinance of Anti-dumping duty and Countervailing duty, FMA No 1992-18 ('92.12.31). In the absence of such goods, another product which bears the same function, and has characteristics and components so similar that substitutability is possible.

116. Ibid.

117. *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p188, *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p194, and *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p34.

However, this definition of "similarity" is such that an investigation may be terminated based on the non-existence of similar goods. In *Printing Plate*, 0.4mm printing plate was not included in the scope of investigation because there was no Korean producer of such a producer during the investigation period nor was there strong evidence that such goods were substitutable for or competed with the other, 0.25mm or 0.30mm, printing plates.¹¹⁸

The dumped import should cause or threaten to cause material injury to an established domestic industry or materially retard the establishment of such an industry in the importing country in order to trigger the determination of injury. The Decree defines the term "domestic industry", in Article 4(2)(ii), to mean all domestic producers of goods identical, homogeneous or similar to the imported goods concerned, or a group of domestic producers accounting for a considerable portion of the gross domestic output.¹¹⁹ There are two issues in this standard definition of the Korean domestic industry : a considerable portion of the gross domestic output and related parties.

In examining whether the petitioner constitutes a considerable portion of the gross domestic output, there is no criterion as to what percentage of the remaining total output constitutes a considerable portion.¹²⁰ If the petitioner is the only producer and constitutes the whole quantity of the domestic production, the petitioner is regarded as the

118. *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p194. In *Glass Fiber*, 3 allegedly dumped goods were excluded from the scope of investigation for the same reason and the KTC determined that there was no evidence that those 3 goods had caused injury materially retarding the establishment of such an industry. *Glass Fiber* (USA, Japan, Taiwan), FMA No 1994-57, OG (1994) No 12786, p36.

119. Article 4(2)(ii) of the EDCA.

120. In the author's opinion, it has to be over a simple majority, at least, in order to be constituted a considerable portion.

domestic industry.¹²¹

According to Article 4(2)(ii) of the Decree, when producers have a special relation with exporters and importers of such imported goods, producers importing them are excluded from the scope of the domestic industry. Therefore, if the domestic producers are exporters' subsidiaries, or are importers themselves at the same time, they may not be considered as the domestic industry. So far, in the most of the determinations, domestic producers have not had a special relation with exporters, nor have they imported the dumping goods.¹²² However, in *Fiber Glass*, 2 out of 3 domestic companies which were regarded as the domestic industry were not included in the scope of the domestic industry because they were themselves importers of the dumped goods and had a special relation with the exporters.¹²³ Given that a number of Japanese-European joint ventures were regarded as Community industry, this determination shows that the KTC applies a more strict interpretation of the definition of the domestic industry.

121. *Ballbearings* (Thailand) FMA No 1993-10, OG (1993) No 12379, p137 and 138, *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p188 and *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p195.

122. *Phosphoric Acid* (China) FMA No 1993-6, OG (1993) No 12350, p22, *Ballbearings* (Thailand) FMA No 1993-10, OG (1993) No 12379, p137, *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p188, and *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p195. In the first two determinations, the KTC determined that the petitioners which were themselves importers were part of the domestic industry, because the quantity of imports was minimal.

123. *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p37. In this determination, Lucky Owens Corning Co. Ltd. imported 26.6% of domestic needs and had a special relation with Owens Corning Fiberglass Co. in USA and ASAHI Co. in Japan in the form of joint venture.

6.2. Material Injury etc.

In cases where the importation of foreign goods for sale at a price lower than the normal price causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry, a duty may be imposed on the goods concerned in an amount equal to or less than the dumping margin.¹²⁴ Therefore, the dumped imports have to cause material injury, or threaten to cause material injury or materially retard the establishment of a domestic industry in order to impose an anti-dumping duty.

The term "material injury" is not defined in the Act or in the Decree. However, the KTC must be based on substantial evidence including the quantity of imported dumping goods, the price of dumped goods, actual situation (economic factors) of a domestic industry, and their substantial or potential effect on a domestic industry, in order to determine material injury etc.¹²⁵

In Korea, however, most of the domestic industries in injury findings have been the start-up industries. In *Phosphoric Acid*,¹²⁶ a domestic producer was planning to produce from the end of 1992 but production was delayed until Sep. 1992 because of dumped imports. In *Ballbearings*,¹²⁷ and in *Printing Plate*,¹²⁸ domestic producers started to supply in the second half of 1989. In *Glass Fiber*,¹²⁹ a domestic producer commenced its commercial production in April 1992. Therefore, the KTC had

124. Article 10(1) of the Korean Customs Act.

125. Article 4(7)(1) of the EDCA.

126. *Phosphoric Acid* (China) FMA No 1993-6, OG (1993) No 12350, p24.

127. *Ballbearing* (Thailand) FMA No 1993-10, OG (1993) No 12379, p138.

128. *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p195.

129. *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p37.

to decide whether a domestic industry concerned was an established industry or in the process of establishment, in the abovementioned determinations. An industry in the process of establishment is defined as one which does not have reasonable profit or reach break-even point after commencing commercial production; this includes the industry under construction of production facility after substantial investment activity.¹³⁰ As a result, all the above-mentioned domestic industries were regarded as industries in the process of establishment, because they had neither achieved reasonable profit nor reached the break-even point.

Next, the KTC examines whether the establishment of a domestic industry was materially retarded by the dumped imports. Therefore, to the KTC, the examination of the actual market situation (economic factors) is the most important test for a finding of injury. In *Printing Plate*, the KTC determined that the Korean industry's production, sales volume and market share were increased¹³¹ but this growth was below the level that could normally have been expected at a time when domestic consumption was rising and was a necessary consequence of its appearance on the market.¹³² Furthermore, the domestic industry had operated at a deficit during the investigation period because its sales volume was too small and price was depressed.¹³³ In all the above-mentioned investigations, prices of domes-

130. *Ballbearings* (Thailand) FMA No 1993-10, OG (1993) No 12379, p138, *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p195, and *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p37.

131. Compared to the volume of domestic consumption, domestic production or its sales volume was very small.

132. *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p197.

133. Ibid, p198. *Ballbearings* (Thailand) FMA No 1993-10, OG (1993) No 12379, p140, *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p39. In *Glass Fiber*, average sales price of domestic goods was below production cost because the imported goods were selling not only below the average sales price of domestic goods, but also at less than the normal price.

tic goods fell, their profitability deteriorated, and R&D investment by the domestic industry was slowed down, even though their production and capacity utilisation rate increased and their sales and market share grew. As a result, the KTC determined that the establishment of a domestic industry was materially retarded.

If imports and their market share increased while the domestic industry's sales volume and market share decreased and the domestic industry had been operated at a deficit,¹³⁴ the increased volume of dumped imports is justified as a reason for injury findings.

6.3. Causation

According to Article 10(1) of the Korean Customs Act, if the dumped imports cause injury to a domestic industry, an anti-dumping duty may be imposed. Therefore, the KTC examines the impact of the dumping goods on a domestic industry through domestic price and sales volume.¹³⁵ In *Printing Plate*, the KTC determined that determination of injury shall be made, if the dumped imports are one of the causes of injury, and though they need not to be the principal or significant cause of such injury.¹³⁶

In examining of the effects of dumped imports, according to the KTC, if such imports were sold at a lower price than the selling price of similar domestic products, and if the selling price of similar domestic products were less than the cost of production, the causal link between

134. *Phosphoric Acid* (China) FMA No 1993-6, OG (1993) No 12350, p24.

135. *Phosphoric Acid* (China) FMA No 1993-6, OG (1993) No 12350, p25, *Ballbearings* (Thailand) FMA No 1993-10, OG (1993) No 12379, p140, *Printng Plate* (Japan) FMA No 12606, p199, and *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p40.

136. Ibid, p199. It should always be borne in mind, however, that determination of injury should be made only if the dumped imports are, through the effects of dumping, causing injury.

the dumped imports and the injury suffered by the domestic industry is established.¹³⁷ Furthermore, if the increased volume and growing market share of the dumped imports coincided with the loss of market share, price erosion and deterioration in the financial situation of the domestic industry, the causal link is established.¹³⁸

The KTC has to consider whether factors other than dumped imports, i.e. exchange rate fluctuation¹³⁹ and imports from other countries,¹⁴⁰ could have caused the injury to the domestic industry. So far, there has been no case where factors other than dumped imports have caused a detrimental impact or injury to the Korean industry.

In addition to Article 10(1) of the Korean Customs Act, there could be another aspect of the causation issue, i.e., cumulation. However, cumulation is neither prescribed by the Act or the Decree nor established by practice. In *Fiber Glass*, however, the KTC held that if a product is imported into Korea from more than one country, and if imported products compete with each other and with domestic goods, the impact of imports should be evaluated cumulatively.¹⁴¹ The gist of this finding indicates

137. *Ballbearings* (Thailand) FMA No 1993-10, OG (1993) No 12379, p141, *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p200, and *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p40. In these determinations, the KTC held that the consequent impact of the dumped imports can be seen more clearly through the effect on the price rather than the effect on the quantity of imported dumping goods when the domestic industry is in the process of the establishment.

138. *Phosphoric Acid* (China), FMA No 1993-6, OG (1993) No 12350, p25, and *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p190.

139. In *Ballbearings* (Thailand), however, factors other than dumped imports, e.g. exchange rate fluctuation had improved Won-based sales and profit because of the devaluation of the Won (Korean currency). *Ballbearings* (Thailand) FMA No 1993-10, OG (1993) No 12379, p141.

140. In *Soda Ash*, the KTC held that Soda Ash from America did not cause injury, because of the difference in distribution channel.

141. *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p39.

that the cumulation requirement is met whenever: (1) goods are imported from more than one country; and (2) imports compete with each other and with domestic goods.¹⁴² This is in violation of Article 8(2) of the GATT Anti-dumping Code, because duty should not be imposed if the imported goods are not dumped, even if they are imported from more than one country and compete with each other. First of all, there should be a provision for cumulation. Furthermore, it must always be borne in mind that only after proving that imported goods are dumped and causing injury to the domestic industry of the similar goods, should duty be imposed on all imported goods from more than one country found to be dumped and causing injury.

142. The KTC held that substitutability and similarity of channels of distribution etc. are examined in order to evaluate whether imported goods compete with each other and with domestic goods.

II. THE INTERESTS OF THE COMMUNITY

1. INTRODUCTION

Once a complaint is lodged, the Commission, whether dumping and injury caused therefrom is found or not, should terminate the proceeding either with the acceptance of price undertakings by the exporters or imposition of anti-dumping duties on them, or without protective measures where no dumping or injury is found or the complaints is withdrawn or where the Commission arrives at the conclusion that the interest of the Community¹⁴³ does not require a continuation of the proceeding. In accordance with GATT rules,¹⁴⁴ a provisional anti-dumping duty or a definitive anti-dumping duty should be imposed in the Community where preliminary examination or the facts as finally established show that there is dumping and injury caused therefrom, and the interests of the Community call for Community intervention. Therefore, it is not enough to impose anti-dumping duty that dumping and injury caused therefrom is found; the interests of the Community should call for Community intervention.¹⁴⁵

143. The Community interests test is very common in the Community's approach towards protective measures concerned with foreign trade including anti-dumping and countervailing duties, safeguard measures (Article 15 of Council Regulation No. 288/82) or measures pursuant to the new instrument (Article 9 and 10 of the Council Regulation No. 2641/84).

144. Article 8(1) of the GATT Anti-dumping Code provides that the decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled are decisions to be made by the authorities of the importing country or customs territory. Therefore, it may be interpreted that the authorities in the importing country or customs territory have discretion to decide whether or not to impose antidumping duty.

145. Article 11(1) and 12(1) of the Community Anti-dumping Regulation.

2. THE CONCEPT OF COMMUNITY'S INTERESTS

In the Community's Anti-dumping Regulation, however, no definition of the interests of the Community has been found. According to the Commission's Guide to European Communities' Anti-dumping and Countervailing Legislation, 'Community interests may cover a wide range of factors of which the most important are the interests of consumers and users of the imported product and the need to have regard to the competitive situation within the Community market.' It seems that the Commission equated the interest of the consumers and users with the interest of the Community industry. In assessing the Community interest, however, one basic principle of which the Commission has taken account is that putting an end to distortions of competition arising from unfair commercial practices, and thus re-establishing open and fair competition on the Community market, is fundamentally in the interest of the Community.¹⁴⁶

Recently, the Community interests test has become an increasingly important aspect in the implementation of the Community's anti-dumping policy and it is taken into account before the application of anti-dumping measures. For example, the short term benefits of low prices for industrial users and consumers, are weighed against the injurious effects of the dumped imports in terms of the industrial and social costs of the contraction or elimination of firms, sectors or whole industries.¹⁴⁷

It seems that Community authorities have equated the interests of the Community with the interests of the Community industries, especially

146. *REWS* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20, p26. *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p22. *Pocket flint lighters* (Korea, Japan, China and Thailand), Com.Reg.(EEC) No 1386/91, OJ (1991) L 133/20, P26. *Audio tapes in cassettes* (Korea, Japan, H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p17.

147. Commission, *11th Anti-dumping Report (1992)*, Com. (93) 516 final, p4.

the interests of the complainant industry.¹⁴⁸ Compared with the interests of consumers or user industries, the Community has given more weight to the interests of the complainant industry, stating that in the long term it is in the consumers' or users' interests to ensure that a viable Community industry does not disappear, has competitive power, and is prevented from the declining so that the Community does not become dependent upon external sources of supply, and the availability of choice is maintained.¹⁴⁹ The Council stated that it would in the end be in the consumers' interests to grant protection to the Community industry because any advantage to the consumers in being supplied with dumped products might later disappear owing to reduced competition when the Community industry had to give up its production.¹⁵⁰

There has been, however, significant change in the Community's attitude to interpret the interests of the Community. In DRAMs,¹⁵¹ the Community authority considered that the maintenance of a strong and viable Community DRAM industry was important for strategic reasons, i.e., the Commission considered that in view of the central function of the DRAM industry as the technology driver for the semiconductor industry in particular and the electronics industry in general and as a key component in the information processing and telecommunication equipment industry, a

148. This attitude is supported by Article 15(2) of the Anti-dumping Regulation which provides that the Commission shall publish a notice, within six months prior to the end of the five years period, of the impending expiry of the measure in question and inform the Community industry known to be concerned.

149. *Typewriters* (Japan), Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, p9, *Natural magnesite(dead-burned)* (China and N. Korea), Com.Reg.(EEC) No 3531/82, OJ (1982) L 371/25, p27, *Photocopiers* (Japan), Coun.Reg.(EEC) No 537/87, OJ (1987) L54/12, p 28, and *Synthetic fibres of polyester* (Korea), Com.Reg.(EEC) No 1956/92, OJ (1992) L 197/25, p31.

150. *Radio-broadcast receivers* (Korea), Coun.Reg.(EEC) No 2306/92, OJ (1992) L 222/8, p13.

151. *DRAMs* (Korea), Com.Reg. (EEC) No 2686/92, OJ (1992) L 272/13, p23.

viable and strong Community DRAM industry was of the utmost importance, not only for technological reasons but also for the electronics and the information processing and telecommunication equipment industry as a whole in the Community. As a result, the scope of the interests of the Community which were considered to be equated with the interests of the Community industries concerned would have been interpreted to expand to the downstream industries.¹⁵²

3. THE APPLICATION OF THE INTERESTS REQUIREMENT

The Community interests test has become an increasingly important aspect in the implementation of the Community's anti-dumping policy, although one can argue that 'in many cases, once dumping and injury are found and measures are likely to give relief to the complainant industry, there is a presumption that such measures would be in the Community interests'.¹⁵³

The role of the Community interests test could be considered to have grown, to the extent that the procedures for dumping investigation and injury finding have become progressively judiciary.

There are very few cases in which the proceeding has been terminated based on the fact that it is not in the interests of the Community to impose any measures even though dumping and injury caused thereby were

152. In *Audio tapes in cassettes*, the Commission took the same view and held that this demise would negatively influence the Community production of raw materials and other related magnetic goods. See, Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p17.

153. J. Bourgeois, "EC Antidumping Enforcement-selected second generation issues", 1985, *For-dham Corp.L.Inst.*, 563, at 589.

found.¹⁵⁴ As a result, the Community interests test has been regarded as playing a minor role in anti-dumping determinations. This test has also been used to adjust the remedy. In *Hydraulic excavators*,¹⁵⁵ the Community authority determined that it was not in the Community interests to accept undertakings in the light of present trade relations with Japan. Thus, the Council finally imposed definitive duties instead of acceptance of undertaking. It may be questioned, upon which requirements among the dumping, injury finding and the Community interests, the level of the duty should be based. According to Article 11(1) and 12(1) of the Anti-dumping Regulation, only when Community intervention is called for, is the Community interest considered. Therefore, it seems to be more reasonable to interpret that once Community intervention has been decided, the level of duty should be based on the dumping and injury margin.¹⁵⁶

4. CONFLICT OF INTERESTS

The anti-dumping policy is used as a measure to protect domestic

154. *Aluminium*, Com.Dec.84/103/EEC, OJ (1984) L 57/19 (termination), p22. In this determination, the Council took account of the fact that, since the opening of the investigation, prices both worldwide and on the Community market had increased considerably. Moreover, the price trend indicated no significant reduction in market prices in the foreseeable future. The Council therefore concluded that it was not in the Community's interests to take protective action.

155. *Hydraulic excavators* (Japan), Coun.Reg.(EEC) No 1877/85, OJ (1985) L 176/1, p4. In *Glycin* (Japan), Coun.Reg.(EEC) No 2322/85, OJ (1985) L 218/1, p3, the Council determined that it was considered in the interests of the Community to impose protective anti-dumping duties which could not fully eliminate the injury determined to have been suffered by the main Community producer. Thus the Council took protective anti-dumping duty less than the dumping margin and less than necessary to alleviate the injury.

156. See, C. Stanbrook, *The Impact of Community Interests and Injury Determination on Anti-dumping Measures in the EEC*, (1985) Fordham Corp. L. Inst., 623 at 631.

import-competing producers, but from the viewpoint of consumers,¹⁵⁷ and import-using industries, it might be argued that the introduction of protective measures would not be in the Community interest, because it would make them less competitive;¹⁵⁸ while exporting industries¹⁵⁹ might face retaliation by trading partners.¹⁶⁰ Thus, although the Anti-dumping Regulation has stipulated generally that the interests of the Community must be considered before the imposition of anti-dumping duties, as has been seen, this provision does not automatically guarantee that the interests of consumers of imported products and import-competing domestic products are taken into account seriously in the implementation of anti-dumping policy.

157. *Audio tapes in cassettes* (Korea, Japan and H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L313/5, p17, *Video cassette recorders* (Korea and Japan), Com.Reg.(EEC) No 2684/88, OJ (1988) L 240/5, p15, and *Typewriters* (Japan), Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, p9. In *Audio tapes in cassettes*, the Commission stated that 'as far as the consumers are concerned, it should be pointed out that they have no right to continue to take advantage of the effect of unfair trade practices. Anti-dumping duties are designed to prevent the disappearance of the Community industry and to preserve the choice of consumers.'

158. In *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p23, the Commission stated that it would not be acceptable that advantages gained in the past through unfair trade practices could be invoked as a justification for not taking the necessary steps to re-establish a fair trading situation. In *Audio tapes in cassettes* (Korea, Japan and H.K.), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, p17, the Community took the view that the elimination of unfair competition should eventually lead to the strengthening of competitive condition.

159. *Deep freezers* (USSR), Coun.Reg.(EEC) No 29/87, OJ (1987) L 6/1, p3. The ECJ held that the Council's decision to take protective measures was adequate even though the imposition of anti-dumping duties would have an adverse effect on the Community's own export to the Eastern European Countries, which could take retaliatory measures, see, case 294/86 and 77/87, *Technointorg v Commission and Council*, ECR [1988] 6077, at para 23.

160. In *Deep freezers*, the importer argued that the protective anti-dumping measures have an adverse effect on its own exports under offset agreements with Eastern European countries. The Council, however, rejected this argument because of the difficulties facing Community production of deep freezers.

In the absence of the Community interests provision, consumer interests can be seriously taken into account by participation in anti-dumping proceedings on the side of foreign suppliers or domestic importers. It should be noted, however, that if a provision on a public interest in general does not exist or if it is practically applied only in rare circumstances, the participation of consumers in anti-dumping proceedings can have only a much narrower purpose, because the public interest is not taken into account in investigation during routine anti-dumping proceedings. All that matters is whether dumping has caused or threatens to cause material injury to import-competing domestic producers. In addition, consumers may be reluctant to get involved.¹⁶¹

If a public interest provision exists, participation by consumer representatives is essential, because the decision to invoke the public interest provision or to consider an override may be influenced decisively by the evidence and argument that is submitted during the anti-dumping proceeding. Therefore, the participation of organised consumer groups or representatives could be very useful. In spite of the fact that, as discussed above, the interest of the Community is protected by the Community Anti-dumping Regulation, anti-dumping measures are deemed to be employed as instruments of commercial defence to protect the interests of import-competing producers which are treated as identical with the interests of the Community.

161. Because participation in anti-dumping proceedings on the side of foreign suppliers or domestic importers of dumped products might do harm their business reputation, or they may fear to antagonise their domestic suppliers on whom they mainly depend and who will remember at times of short supply. Furthermore, consumers are not well organised enough to regard participation in anti-dumping proceedings as profitable, even if their intervention on the side of importers could affect the outcome.

Chapter 6 : ANTI-CIRCUMVENTION SYSTEMS

1. BACKGROUND AND SITUATION IN KOREA

In 1987, the European Community amended its anti-dumping legislation, Regulation 2176/84,¹ to adopt a distinct procedure enabling it to counter what it perceived to be circumvention of anti-dumping duties on finished products through the importation of parts and materials for use in the assembly or production of like finished production through the setting up of the so-called 'screwdriver plants' in the Common Market. These new rules were contained in Council Regulation (EEC) No 1761/87² and are presently incorporated into Council Regulation (EEC) 2423/88.³

The new anti-circumvention rules, however, establish a rule of origin specially designed for anti-dumping purposes and have a discriminatory effect against related or associated parties with exporters whose products are subject to an anti-dumping duty.⁴ It must be feared even in some Member States of the EC that foreign investment in the EC may be hampered by this new legislation.⁵

The Community rules on certain forms of diversion should comply with the GATT Anti-dumping Code because the Community's anti-dumping rules were adopted in accordance with Article VI of the GATT and the GATT Anti-

1. Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1.

2. Coun.Reg.(EEC) No 1767/87 amending Coun.Reg. No 2176/84, OJ (1987) L 167/9.

3. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

4. Article 13(10)(a) of the Community Anti-dumping Regulation provides that Definitive anti-dumping duties may be imposed on products that are introduced into the commerce of the Community after having been assembled or produced in the Community, if the value of parts used in the assembly operation and originating in the country of exportation of the product subject to anti-dumping duty exceeds the value of all other parts used by at least 50%.

5. Japan's Trade Minister, Hajime Tamura, said at the time of adoption of the 'part amendment' that the application of the anti-circumvention legislation could 'seriously affect' the investment plans of many Japanese companies in Europe. See *Agence Europe*, 26 June 1987, p9.

dumping Code.⁶ Article VI of the GATT is concerned with trading between countries and does not deal with the possibility of imposing anti-dumping duties on products manufactured within importing countries.⁷ Furthermore, a GATT panel, instituted at the request of Japan in 1988 to scrutinise the GATT-consistency of the EC's parts Amendment,⁸ communicated its finding to the EC and Japan on March 22, 1990.⁹ As has been reported, the GATT panel has ruled that the measures taken pursuant to the EC provision violate GATT rules.¹⁰

The most popular methods for evading or circumventing anti-dumping duties can be divided into two categories, namely circumvention related to the product scope of the anti-dumping measures and circumvention related to product from a certain country. However, there is no provision in the

6. Preamble of the Community Anti-dumping Regulation.

7. Article VI of the GATT defined dumping as where products of one country are introduced into the commerce of another country at less than the normal value of the products.

8. During the period between the adoption of Article 13(10) in 1987 and the communication of the GATT Panel Report in 1990, eight proceedings under Article 13(10) have been initiated and resulted in the imposition of duties: *Electronic scales*, Coun.Reg.(EEC) No 1021/88, OJ (1988) L 101/1; *Electronic typewriters*, Coun.Reg.(EEC) No 1022/88, OJ (1988) L 101/4; *Hydraulic excavators*, Com.Dec.88/225/EEC, OJ (1988) L 101/24; *Plain paper photocopiers*, Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36; *Ball bearings*, Com.Dec. 89/57/EEC, OJ (1989) L 25/90, *Video cassette recorders*, Coun.Reg.(EEC) No 501/89, OJ (1989) L 57/55; *Dot-matrix printers*, Coun.Reg.(EEC) No 3042/89, OJ (1989) L 291/52.

9. GATT, Report by the Panel, *EEC-Japan, Regulation on imports of parts and components* (hereinafter referred to as the "*GATT Panel Report*"), reproduced by R.M. Bierwagen, *GATT Article VI and the Protectionist Bias in Anti-dumping Laws*, Kluwer Law and Taxation Publishers, Deventer and Boston, 1990, pp237-246, (hereinafter referred to as "*R.M. Bierwagen*"). The summary of the GATT Panel's findings which follows is based on this publication.

10. In subsection 6.1 of the GATT Panel Report, the Panel said that the duties imposed by the EEC under Article 13(10) of the Council Regulations Nos 2176/84 and 2423/88 on products assembled or produced within the EEC by enterprises related to Japanese manufacturers of products subjected to anti-dumping duties are inconsistent with Article III:2, first sentence, and are not justified by Article XX(d) of the General Agreement.

GATT Anti-dumping Code regarding approved measures against circumvention. If the disciplinary legal system is no longer appropriate to defend its objectives, one of the very clear alternatives is to redefine the disciplinary legal measures in legislation. Therefore, some of the leading countries in international trade have depended on unilateral measures. The European Community, for instance, enacted a Regulation¹¹ against the circumvention of anti-dumping duties by sub-assembly dumping.

Basically, there are some problems involved. First, given that the Community anti-dumping rules were adopted in accordance with Article VI of the GATT, anti-dumping duties should be imposed where dumping is established and injury is caused by reason of dumped imports.¹² Dumping of the components will not be established even though the conditions¹³ are satisfied. Therefore, the imposition of duties should not be allowed in cases where dumping is not established.

Second, it could be argued that any exception to the GATT gives a justification to impose anti-circumvention duties, where the imposition of duties is not allowed because dumping is likely but not established in accordance with Article VI of the GATT.¹⁴

Third, the EC anti-circumvention rules apply only where assembly in the European Community is performed by related parties. As a result, where independent Community manufacturers assemble or independent Community producers benefit from 'dumped' components no duties are imposed.¹⁵

11. Coun.Reg.(EEC) No 1761/87, OJ (1987) L 167/9.

12. Preamble of the Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1, p2, states that such assembly or production is considered 'likely' to lead to circumvention of the anti-dumping duties.

13. The three sub-paragraphs of Article 10(a) of the Community Anti-dumping Regulation.

14. This issue will be dealt in sub-title 4. Compatibility with GATT rules.

15. *photocopiers* (Japan), Coun.Reg.(EEC) No 535/87, OJ (1987) L 54/12, paras. 50, where one Community producer produced an added value of 20-35% with regard to low volume copiers.

Consequently, the Community authorities treat the same category of cases differently even though they should not, and the discriminatory treatment is prohibited by Article 13(5) of the same Regulation.¹⁶

Finally, it is questionable whether anti-circumvention rules should be permitted to enlarge the coverage of an order to parts or new products without making a separate injury determination as to the parts or new products. In this case, it must be recalled that anti-dumping duties should be imposed only to injurious dumped imports.

There is no anti-circumvention provision in the Korean Customs Act or in its Enforcement Decree.¹⁷ As a result of the Country's trade liberalisation policy, one of the main issues is to protect the domestic industry concerned in Korea, because imports are increasing rapidly. Anti-dumping measures have been regarded as the most efficient measure for the protection of the domestic industry concerned,¹⁸ and they will be applied more frequently than before.¹⁹ Therefore, it could be predicted that foreign producers or exporters will try to avoid or circumvent the anti-dumping duties by exporting parts and components and assembling them in

16. Article 13(5) of the Community Anti-dumping Regulation provides that where a product is imported into the Community from more than one country, duty shall be levied on a non-discriminatory basis on all imports of such product found to be dumped and causing injury.

17. There is no anti-circumvention determination in Korea, either.

18. In case of *Phosphoric Acid*, 89.3% of the total quantity of imports was from China in 1992. However, it decreased to 68.1% in 1993 when the anti-dumping duty started to be imposed, and 46.8% in 1994. In case of *Soda Ash*, 12.5% of the total quantity of imports was from China in 1993. However, it reduced to 4.6% in 1994 because of the antidumping duty. See, Seoul Shinmun, '*Imports restraint effect of anti-dumping duties*', Jan. 25, 1995, p18.

19. Until recently, Korea has 'suitably' taken care of the dumping lawsuit cases taking into consideration the trading friction, but in the future, it is planned to positively utilize the anti-dumping system as a political means in preparation of the settlement of Uruguay Round negotiations and opening domestic market. See, Joong-ang Il Bo (Korean Daily Newspaper), '*Decision Regarding the Dumping of Imported Polyacetal*', Feb. 26, 1991, p17.

Korea. That is why an anti-circumvention measure needs to be prescribed in the Korean rules. From this viewpoint, an analysis of the Community's anti-circumvention system is pertinent because the Community's anti-circumvention rules themselves and its practice could be a kind of legislative model.²⁰

1.1. Foreign Investment in the EC

The anti-circumvention rules of the Community stipulate that products which are introduced into the commerce of the Community after having been assembled or produced in the Community may become subject to definitive anti-dumping duties when three conditions are met.²¹ This means that anti-dumping duties would be imposed on products which would be classified as a 'made in Europe' by anti-circumvention rules. First of all, this is clearly inconsistent with the EC Treaty, in which anti-dumping measures were allowed to apply to products originating in EC Member countries only during the transitional period before the completion of the European Union.²²

If one of the main purposes of the anti-dumping measures would lead to increased European production, there is no reason why the condition of increased European production should be limited only to those who are not related to a company found to be dumping. In addition, in many cases,

20. Sharp increase in Korean direct investment in the Community is another reason to require an analysis on the Community's anti-circumvention system.

21. Article 13(10)(a) of the 1988 Regulation, Council Regulation (EEC) No. 2423/88, OJ (1988) L 209/1. Three conditions are a related EC producer to an exporter of the like product subject to duties, commencing or increasing of its production after the opening of the anti-dumping investigation, and a maximum content requirement. Those conditions will be discussed in more detail.

22. See, Article 91(1) of the EEC Treaty.

foreign companies established manufacturing plants in Europe long before there was any hint of possibility of an anti-circumvention action. The difficulty therefore arises of how to distinguish action with intent of circumvention from honest business behaviour and how to protect honest and fair business behaviour against misuse of anti-circumvention provisions for protectionist purposes. Not only Member States but also the EC has created legal certainty on the part of companies investing in Europe. Sudden changes in the law may lead to ambiguity and unfairness, because an operation which has been a legitimate part of the European industry on the basis of the former law can not suddenly become an operation designed to circumvent anti-dumping duties. This change in law may be construed as proof that the promises of the EC authorities promoting foreign investment are unreliable. Furthermore this may be connected to the freezing of future investment decisions in Europe, because such investment might be regarded as circumvention.

1.2. Input²³ and Sub-Assembly Circumvention.²⁴

When an anti-dumping duty is imposed on certain products, the foreign producers or exporters can avoid or evade the anti-dumping duties by exporting raw or semi-finished products; the buyer in the importing country then processes these raw or semi-finished products and sells them in

23. When raw or intermediate materials or products, such as steel wire, are sold below their home market price, then used in the manufacture of an end-product and then exported, it is defined as input (downstream) dumping.

24. When components of an end-product, such as the circuit boards and colour picture tubes for a colour television set, which need only minor assembling operations are dumped and then assembled, it is defined as sub-assembly (upstream) dumping. See, R.M. Bierwagen, *supra* note 9, p53.

his country or exports to a third country.²⁵ It should be remembered that there are no rules governing input dumping in the present GATT Code. According to the Committee on Anti-dumping Practices, it has been clearly indicated that 'the General Agreement was clear that there was no such thing as 'secondary dumping'. If one applied the normal GATT test, namely the domestic price in the country of exportation, then the conclusion...was that there was no dumping. The fact that certain inputs had been dumped would not lead to the conclusion that, as far as the final product was concerned, there had not been normal conditions of trade. The test of cost of production would also lead to a no dumping conclusion because there was nothing abnormal in the fact that producers used imports they could buy in the normal market under normal market condition even if these normal conditions implied dumping. The investigating authorities had to calculate production costs on the basis of the real costs for the producer. In these circumstances the reply was clear - at least under the General Agreement and the Code - there was no dumping and nothing could be done about it.'²⁶

When anti-dumping measures are applied not on parts or sub-assemblies, but on a finished product, the foreign producer or exporter who

25. It was suggested that an injured country should be permitted to impose anti-dumping duties against an intermediate refining and exporting country whose manufacturers are taking advantage of the cost benefits of accepting dumped raw material. It should be remembered that such duties could be imposed only when dumping is established. See, Shi-Ling Hsu, *'Input Dumping and Upstream Subsidies: Trade Loopholes Which Need Closing'*, (1986) 25 CJTL, p153.

26. GATT, Analytical Index, Notes on the Drafting, Interpretation and Application of the Articles of the General Agreement, at VI-3 (1984), reproduced in E. Vermulst & P. Waer, "Anti-Diversion Rules in Anti-dumping Procedures: Interface or Short-Circuit for the Management of Interdependence?", (1990) *Mich.J.Int'l L.* (vol. 11), p1125. Input dumping is beyond the scope of this thesis, because, in the Community's anti-dumping regulation, there is no provision to rule on input dumping.

wants to avoid or evade the anti-dumping duties can move upstream and start exporting parts which can be assembled into the finished product in the importing country²⁷ or in a third country; the finished product can be exported to the importing country later.²⁸ This circumvention conduct has been rather popular in practice²⁹ and has been mainly targeted by the EC. Dumping of sub-assemblies is likely to occur if there are markets for the finished product and for parts respectively, and when the finished product is subject to anti-dumping duties and the parts of this product are exported and assembled in the importing country or in a third country. The European Community is the first to enact a Regulation against the circumvention of anti-dumping by sub-assembly dumping, which will be discussed later in this thesis.³⁰

1.3. New Generation Products.

An exporter has tried to avoid or evade the imposition of anti-dumping duties on his products by making some functional alterations to it so that his products no longer fall within the classification of the product subject to the anti-dumping duties.

In GATT rules, this situation is governed by the 'like product' definition. It seems clear that minor product alterations, for example the difference between a passenger car and the same car with a radio,

27. This is dealt in sub-title 2. The EC's approach toward circumvention.

28. This will be discussed in sub-title 3. Production in third countries.

29. See, *supra* note 8.

30. There may be conflict of interests, namely producers or importers of a finished product enjoy cheap inputs, but they have tried to lobby against cheap competing finished products through import restrictions. Consumer interests are equated with cheap products, but may be overridden by other interests as well. All these issues are deeply involved in high unemployment in the West.

cannot be judged to be different 'like products'.³¹

New generation products, however, raise serious 'like product' questions. A compact disc player which is compared to a record player should be regarded as a 'new generation' product because they have different appearance, use and different technology. In the case of semiconductors, however, it is questionable whether a 16 K Dynamic Random Access Memory(DRAM) chip and a 16 M DRAM chip are still categorised as 'like product'.³² The issue of new generation product should be dealt in the definition of the "like product", because the Community anti-circumvention rules apply only to products that are introduced into the commerce of the Community after having been assembled in the Community.³³

2. THE EC'S APPROACH TOWARD CIRCUMVENTION

2.1. Background

On June 22, 1987, the Council of the European Community adopted Regulation 1761/87,³⁴ amending Regulation 2176/84 by introducing a new article 13 paragraph (10) which is now incorporated in Regulation 2423/88. Article 13(10) provides that definitive anti-dumping duties can be imposed on products that are introduced into the commerce of the Community after having been assembled or produced in the Community. Therefore, this test

31. In case of most consumer branded products, the new and old series will normally not be regarded to be different 'like products' requiring a completely different new investigation of dumping.

32. With respect to current density and future density DRAMs, all densities of DRAMs including future densities are one like product. See, *DRAMs (Japan)*, Coun.Reg.(EEC) No 2112/90, OJ (1990) L 193/1, p2, and *DRAMs (Korea)*, Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p15.

33. Article 13(10) of the Community Anti-dumping Regulation.

34. Coun.Reg.(EEC) No 1761/87, OJ (1987) L 167/9.

is applied only for decoding anti-circumvention of anti-dumping duties through production within the EC.³⁵

In order to impose anti-dumping duty on the circumventing parts, three cumulative prerequisites³⁶ should be satisfied:

First, the assembly must have been carried out by a party related or associated with exporters subject to anti-dumping duties. Second, the EC assembly operation must have been started or substantially increased after the opening of the anti-dumping investigation. Third, the volume of parts or materials used in the assembly operation and originating in the exporting country subject to the anti-dumping duty must exceed the value of all other parts or materials used by at least 50%.³⁷

In applying this provision, account will be taken of the circumstances of each case, and, *inter alia*, of the variable costs incurred in the assembly or production operation and of the research and development carried out and the technology applied within the Community.³⁸ Based on this paragraph, the Community authorities enjoy the margin for discretion to consider the circumstances of each case, including the variable costs, the research and development, and the technology.

In addition, the third paragraph of Article 13(10)(a) stipulates that parts or materials suitable for use in the assembly or production of such products and originating in the country of exportation of the product subject to the anti-dumping duty can only be considered to be in free circulation in so far as they will not be used in an assembly or produc-

35. Therefore, in the EC, circumvention of anti-dumping duties through production in third countries has been governed by the existing rules, such as rules of origin and customs classification.

36. First paragraph of Article 13(10)(a) of the Community Anti-dumping Regulation.

37. These conditions are discussed in title 2.2. in this chapter.

38. Second paragraph of Article 13(10)(a) of the Community Anti-dumping Regulation.

tion operation. In addition, products assembled or produced in the Community shall be declared to the competent authorities before leaving the assembly or production plant for their introduction into the commerce of the Community.³⁹ This declaration is equivalent to the normal request for release for free circulation referred to in Article 2 of Council Directive 79/623/EEC.⁴⁰

The rate of anti-dumping duty for products assembled or produced in the Community must not apply to the total value of the assembled product but only to the cif value of the parts or materials imported from the country of the related or associated foreign producer.⁴¹ However, the GATT Panel declared that the anti-circumvention duties on the finished products subject imported parts and materials indirectly to an internal charge and that they are consequently contrary to Article III:2, first sentence⁴² because like parts and materials of domestic origin are not subject to any corresponding charges.⁴³ In addition, the amount of duty collected shall not exceed the amount which is required to prevent circumvention of the anti-dumping duty.⁴⁴

39. Ibid, Article 13(10)(b).

40. Council Directive 79/623/EEC on the harmonization of provisions laid down by law, or administrative action relating to customs debt, OJ (1979) L 179/32.

41. Article 13(10)(c) of the Community Anti-dumping Regulation.

42. Article III:2, first sentence of the GATT provides that the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

43. Sub-paragraph 5.9. of the GATT Panel Report.

44. Article 13(10)(c) of the 1988 Regulation.

2.2. Conditions For Imposing Anti-Circumvention Duty.

2.2.1. The Assembly and Production Carried Out By Related or Associated Party To An Exporter Subject To Anti-dumping Duties.⁴⁵

In spite of the fact that Regulation 2423/88 states in several cases the concept of a related party or a associated party,⁴⁶ there is no clear concept of a related party or an associated party and those concept have yet to be defined by the Commission practice. Furthermore, the distinction between 'related parties'⁴⁷ and 'associated parties' is somewhat ambiguous.⁴⁸ Nevertheless, it has been approved that anti-circumvention rules are applicable to independent parties as well as to related or

45. *Ball bearings*, Coun.Reg.(EEC) No 2089/84, OJ (1984) L 193/1, *Electronic typewriters*, Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, *Hydraulic excavators*, Coun.Reg.(EEC) No 1877/85, OJ (1985) L 176/1, *Electronic scales*, Coun.Reg.(EEC) No 1058/86, OJ (1986) L 97/1, *Plain paper photocopiers*, Coun.Reg.(EEC) No 535/87, OJ (1987) 54/12, *Dot-matrix printers*, Coun.Reg.(EEC) No 3651/88, OJ (1988) L 317/33, and *Video cassette recorders*, Coun.Reg.(EEC) No 501/89, OJ (1989) L 57/55.

46. Article 2(7) and (8)(b) on normal value and export price, and Article 4(5) on the definition of Community industry for injury purpose. See Chapter 4 and 5.

47. GATT Doc. No. ADP/M/5, Annex II(1981) states that companies can be considered to be related when one controls the other or when both jointly control or are controlled by a third party, provided there are grounds for believing that the effect of the relationship is such as to cause the domestic producers to behave differently from those domestic producers who are not related. See, Article 1(2), Coun.Reg.(EEC) No 1224/80, *on the valuation of goods for customs purposes*, OJ (1980) L 134/2.

48. Companies can be regarded to be associated when there is a contractual arrangement between them. In *Nachi Fujikoshi Corp. v. Council* [1979] ECJ 1363 and 1375, Council insisted that undertaking which are 'associated in business' means not only undertakings which are interconnected, but those which maintain other contractual or non-contractual relationship which create a special link, regardless of the relationship created by the very fact of the purchase or sale transaction.

associated parties. In the *Electronic scales*,⁴⁹ a Dutch company which was not a subsidiary of an exporter subjected to anti-dumping duties was regarded as being associated because it had 'substantial capital links and close economic and commercial relations with a Japanese exporter'.

Furthermore, it should be noted that anti-dumping duties may be imposed on products made in the Community, even if the related or associated foreign company has never exported the product. In the *Electronic typewriters*,⁵⁰ for instance, even though Matsushita had never exported complete electronic typewriters to the Community, a duty was imposed on its assembly operations, i.e., the residual duty which applied to Japanese products.⁵¹

49. *Electronic scales* (Japan), Coun.Reg.(EEC) No 1021/88, OJ (1988) L 101/1, p1. Definitive duties were imposed by Coun.Reg.(EEC) No 1058/86, OJ (1986) L 97/1, and one exporter concerned challenged the Council Regulation before the Court. Case C-191/86, *Tokyo Electric Co. Ltd v Council*, not yet reported.

50. *Electronic typewriters* (Japan), Coun.Reg.(EEC) No 1022/88, OJ (1988) L 101/4, p7.

51. Definitive duties were imposed by Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, and all companies in this determination appealed to the ECJ for annulment. Case 56/85, *Brother Industries Ltd v Commission* [1988] ECR 5655, Case 250/85, *Brother Industries Ltd v Council* [1988] ECR 5683, Joined cases 277 and 300/85, *Canon Inc. and Others v Council* [1988] ECR 5731, Case 301/85, *Sharp Corporation v Council* [1988] ECR 5813, Case 260/85, *TEC v. Council* [1988] ECR 5855, and Joined cases 273/85 and 107/86, *Silver Seiko Ltd and Others v Council* [1988] ECR 5927. Application against the Commission was dismissed and application for an order suspending the final duties was denied.

2.2.2. Starting Up or Substantial Increase

After the Opening of Anti-dumping Investigation.⁵²

The start or increase in assembly or production may very well happen after the imposition of a definitive anti-dumping duty.⁵³ Furthermore, there is neither a clear definition of 'substantial increase', nor any legal guidelines.

In *Photocopiers*,⁵⁴ both canon assembly operations in Bretagne and Giessen had shown 30% increase in production. But increase in production in Giessen followed a period of small increase (4.6%) in production. Nonetheless, the Community stated that it would not be reasonable to consider the respective increase at the canon plants as constituting less than substantive increase.⁵⁵

In *Ball bearings*,⁵⁶ both companies, NSK Bearing Ltd in UK which is

52. *Electronic scales*, Coun.Reg.(EEC) No 1021/88, OJ (1988) L 101/1, p1, *Electronic typewriters*, Coun.Reg.(EEC) No 1022/88, OJ (1988) L 101/4, p5, *Hydraulic excavators*, Com.Dec.(EEC) 88/225/EEC, OJ (1988) L 101/24, p25, and *Dot-matrix printers*, Coun.Reg.(EEC) No 3042/89, OJ (1989) L 291/52, p53. In these determinations, the companies concerned started their assembly operations after the initiation of original anti-dumping investigations.

53. In *Plain paper photocopiers*, Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36, p37, two companies of nine companies concerned, Olivetti and Develop, and in *Ball bearings*, Com.Dec. 89/57/EEC, OJ (1989) L 25/90, p90, all companies referred to in this determination had assembled PPCs independently prior to the initiation of the original anti-dumping investigations.

54. *Plain paper photocopiers*, Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36, p37. Definitive duties was imposed by Coun.Reg.(EEC) 535/87, OJ (1987) L 54/12. Most companies in this determination brought actions against Council before the ECJ. Case C-171/87, *Canon Inc. v Council*, [1992] ECR I-1237; Case C-172/87, *Mita Industrial Co. Ltd v Council*, [1992] ECR I-1301; Case C-174/87, *Ricoh v Council*, [1992] ECR I-1335; Case 175/87, *Matsushita Electric Co. Ltd v Council*, [1992] ECR I-1409; Case C-176/87, *Konishiroku Photo Industry Co. Ltd v Council*, [1992] ECR I-1493; Case C-177/87, *Sanyo Electric Co. Ltd v Council*, [1992] ECR I-1535; Case C-178/87, *Minolta Camera Co. Ltd v Council*, [1992] ECR I-1577; and Case C-179/87, *Sharp Corporation v Council*, [1992] ECR I-1635.

55. *Ibid*, p38.

56. *Ball bearing (Japan)*, Com.Dec.89/57/EEC, OJ (1989) L 25/90, p90.

related to Nippon Seiko KK and NTN Kugellagerfabrik in Germany which is related to NTN Tokyo Bearing Co. Ltd., were found to have established assembly or production plants for ball bearings in the Community prior to the opening of the relevant anti-dumping investigation and, for both these plants, it was claimed that no substantial increase in quantities assembled had occurred since the date of the initiation of the proceedings. It was, however, established that, at both plants, the volume of ball bearings assembled increased by more than 24% in the year following the opening of the original investigation, and that, if the subsequent year were used as the basis, the increases in both cases were found to be more than 40% for the two year period. These increases followed a period of relative stability in production from 1980 to 1983 inclusive, during which the number of ball bearings produced over the four year period increased by only 2.3% in one case and not at all in the other. Thus, it could have been regarded as substantial increase in production under Article 13(10)(a).⁵⁷

A major concern on this point is that a decision to start or increase in production requires planning or substantial lead time prior to the opening of such proceedings.⁵⁸ Even if it is true that these 'starting' or 'substantial increase' conditions to a certain degree protect long-standing foreign investment in the Community, they could bring on a

57. Ibid, p91.

58. It is not easy to determine when an assembly operation begins. See, Case C-26/88, *Brother Int'l GmbH v. Hauptzollamt Giessen*, [1989] ECR 4253, at 4278, for an interpretation of Article 6 of Regulation 802/68. In its judgment, the Court held that the mere assembly of previously manufactured parts originating in a country differet from that in which they were assembled is sufficient to confer on the resulting pproduct the origin of country in which assembly took place, provided that such assembly represents the decisive production stage during which the use to which the component parts are to be put becomes definite and the goods in question are given their specific qualities.

freezing of a *bona fide* investment decisions to commence or augment production in Europe because of a fear that such expansion or establishment might be regarded as circumvention.⁵⁹

2.2.3. More Than 50% of the Value of Parts or Materials⁶⁰
Originating in the Exporting Country.

This condition which imposes 'buy-European' or a maximum content requirement is perhaps the core factor of the anti-circumvention rules, because according to Article 13(10)(a), subparagraph 3 of the Regulation, if parts or materials which are used in the assembly or production operations, originating in the country of exportation of the product account for less than 60% of the total value of those in the finished products, this provision will not apply.⁶¹ In *Dot-matrix printers*, the anti-dumping duty was not extended to some printers assembled in the Community because the weighted average value of Japanese parts or materials was found not to exceed the value of all other parts or materials used by at least 50%.⁶²

59. R.M. Bierwagen, *GATT Article VI and the Protectionist Bias in Anti-dumping Laws*, Kluwer Law and Taxation Publishers, Denver & Boston, 1990, p68.

60. Value of parts and materials from the country of export is determined on an 'into-EC-factory', duty paid basis. This includes freight and all related costs incurred in delivering the product to the factory concerned which is located in the Community. See, *Electronic typewriters*, OJ (1988) L 101/4, at 5, *Electronic scales*, OJ (1988) L 101/1, at 2, and *Plain paper photocopiers*, OJ (1988) L 284/36, at 38.

61. If the weighted average value of parts originating in the country of exportation of the product were found to be less than 60%, it is considered inappropriate to extend the anti-dumping duty to the product. See, *Electronic scale*, Coun.Reg.(EEC) No 1021/88, OJ (1988) L 101/1, p2. *Electronic typewriters*, Coun.Reg.(EEC) No 1022/88, OJ (1988) L 101/4, p5. *Hydraulic excavators*, Com.Dec.88/225/EEC, OJ (1988) L 101/24, p25. *Plain paper photocopiers*, Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36, p37. *Ball bearings*, Com.Dec.89/57/EEC, OJ (1989) L 25/90, p91. It has been, therefore, referred to as the 60/40 provision.

62. *Dot-matrix printers*, Coun.Reg.(EEC) No 3042/89, OJ (1989) L 291/52, p53.

If producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'Community industry' may be interpreted as referring to the rest of the producers.⁶³ However, in *Photocopiers*,⁶⁴ in spite of the fact that one complainant (Rank Xerox's UK assembly plants) added only between 20 and 35% to the value of the total product in the Community, it was considered part of the Community industry.⁶⁵ As a result, the Community has applied stricter rules to a subsidiary of a foreign supplier even if they had more European content than products sold by companies which had brought the anti-dumping complaint.⁶⁶ Strictly speaking, 50% of the total value must be of Community or third country origin in order for the product not to be included in the anti-circumvention proceeding.

This condition contains very delicate problems because of the necessity of deciding the origin of the parts or materials. EC practice in deciding origin of parts or subassemblies manufactured in the EC has varied significantly.

In some determinations,⁶⁷ the Commission decided origin depending on producers of the parts or subassemblies. If the producer who is under

63. Article 5 of the Community Anti-dumping Regulation.

64. *Plain paper photocopiers*, Coun.Reg.(EEC) No 535/87, OJ (1987) L 54/12, p. In this determination, the Commission decided to include EC producers in the categories of the Community industry not relying on origin rules or parts requirement, but rather on ambiguous reasons such as the foreign investor's or their related parties' intentions to increase local value-added or their long-term contribution to investment and employment in the Community.

65. *Plain paper photocopiers* (Japan), Coun.Reg.(EEC) No 535/87, OJ (1987) L 54/12, para. 55.

66. The Commission took the view that the operations by the complainant were not substantially increased (by only 4%) after the opening of the anti-dumping investigation. See, *Photocopiers*, Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36, p37, para. 8.

67. *Electronic scales*, Coun.Reg.(EEC) No 1058/86, OJ (1986) L 97/1, and Coun.Reg.(EEC) No 1021/88, OJ (1988) L 101/1, p2. *Hydraulic excavators*, Coun.Reg.(EEC) No 1877/85, OJ (1985) L 176/1, and Com.Dec.88/225/EEC, OJ (1988) L 101/24, p25.

investigation or related to such producer manufactured the parts and subassemblies, and if the value of sub-parts was included in the value of parts or subassemblies, the cost of this 'in-house' assembly, i.e. assembly by the company under investigation, is not to be included in the value of parts or materials.⁶⁸

This position of the Community was changed significantly in *Photocopiers*.⁶⁹ In this determination, however, the Commission granted a request to include in-house cost of production of certain sub-parts in the value of other parts or materials based on 'destruction theory'.⁷⁰ The acceptance of costs of production was followed in the *Ball bearings*⁷¹ and the *Printer*⁷² proceedings.

It may be argued whether the Community is consistent in valuation on the treatment of 'cost of assembly' of parts from various sources. In particular, as has been discussed above, sub-assembly costs included in parts from the exporting country have been treated very differently from sub-assembly costs in the value of parts sourced in-house or from independent suppliers in the EC or in some cases third Countries.

68. *Electronic scales*, Coun.Reg.(EEC) No 1021/88, OJ (1988) L 101/1, p2. However, if the producer who is an independent producer manufactured the parts or materials, and if the parts and material had acquired European origin in the production process, the whole parts would be treated as European.

69. *Plain paper photocopiers*, Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36, p38.

70. If a part could be dismantled without destroying any of the sub-parts, according to this theory, it was considered to be subassembly. If, however, in dismantling a part, one or more sub-parts would be destroyed, it would be regarded as a single part, thus 'in-house' assembly costs would be included in the value of parts or materials.

71. *Ball bearings*(Japan), Com.Dec.89/57/EEC, OJ (1989) L 25/90, p91.

72. *Serial-Impact Dot-Matrix Printers* (Japan), Coun.Reg.(EEC) No 3042/89, OJ (1989) L 291/53, p53.

2.2.4. Other Relevant Circumstances.

Regarding the consistency of the approaches of the Community authorities, the wide discretion conferred upon them is worthy of attention, because this discretionary power is involved in several crucial parts of the Regulation. The Regulation should define some concepts in more details, for example, when parties are to be considered as related or associated, and what is meant by substantial increase in production.

In applying those three conditions, account shall be taken of additional factors, according to the second paragraph of Article 13(10)(a) of the Regulation.

In assessing other circumstances, one of the additional factors which has been frequently argued by the foreign investor accused of 'screwdriving' and to which the Community authorities may give favourable treatment, is that it was impossible to find sources of supply in the Community which could guarantee quality.⁷³ The Community, however, has not accepted this claim on the grounds that 'this assertion appears to confuse the distinct issue of quality and technical specifications since Community producers of PPCs of comparable quality to those of the companies concerned source their parts in the Community and have proved that it is not indispensable to use parts predominantly of Japanese origin'.⁷⁴

As to the labour market in the EC, the effect on companies under investigation is regarded to be negative on the grounds that the companies investigated only carry out assembly operations, whereas the Community producers normally have an integrated, in-depth production which requires

73. *Plain paper photocopiers* (Japan), Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36, p39, and *Electronic typewriters* (Japan), Coun.Reg.(EEC) No 1022/88, OJ (1988) L 101/4, p6.

74. *Plain paper photocopiers* (Japan), Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36, p39.

There may be some exceptional cases, for example, all European producers of microwave ovens currently depend on imports from Japan or Korea for the major part, the magnetron.

more personnel. Furthermore, the increased sales of assembled products result in decreased sales by the Community producers, causing a net loss of employment in the Community.⁷⁵

If carrying out of research and development or transferring technology is claimed by the companies under investigations, it can be expected that the Community authorities may decide not to apply the anti-circumvention rules.⁷⁶ The claim of technology transfer, however, has been rejected on the ground that the amount of technology transferred was minimal and related merely to assembly.⁷⁷ From 1987 to 1989, the Community relied on this importing country circumvention as a main issue to apply a maximum local content requirement until a GATT panel ruled in 1990 that this EC's 60/40 rule violated GATT rules.⁷⁸

75. *Electronic scales* (Japan), Coun.Reg.(EEC) No 1021/88, OJ (1988) L 101/1, p2, and upheld by *Plain paper photocopiers* determination, Ibid, p39.

76. In most anti-circumvention determinations, R&D activities and technology transfer were denied by the Community authorities. See, *Electronic scales* (Japan), Coun.Reg.(EEC) NO 1021/88, OJ (1988) L 101/1, p2. *Electronic typewriters* (Japan), Coun.Reg.(EEC) No 1022/88, OJ (1988) L 101/4, p7. *Plain paper photocopiers* (Japan), Coun.Reg.(EEC) No 3205/88, OJ (1988) L 284/36, p 39. *Dot-matrix printer* (Japan), Coun.Reg.(EEC) No 3042/89, OJ (1989) L 291/52, p54.

77. *Electronic typewriters* (Japan), Coun.Reg.(EEC) No 1022/88, OJ (1988) L 101/4, p6, and upheld by the *Plain paper photocopiers* determination, Ibid, p39.

78. Sub-paragraph 6.2. of the GATT Panel Report. The Panel report concluded that the decision of the EEC to suspend proceeding under Article 13(10) conditional on undertakings by enterprises in the EEC to limit the use of parts or materials originating in Japan in their assembly or production operations, was inconsistent with Article III:4 and not justified by Article XX(d) of the General Agreement.

3. PRODUCTION IN THIRD COUNTRIES

3.1. Introduction

One of the basic questions is what criterion should be used, in determining dumping and imposing anti-dumping duties to country of export or country of origin. Depending on Article 2(3)⁷⁹ of the GATT Code, country of origin and country of export have not necessarily coincided. From the viewpoint of anti-circumvention, it seems that there are very delicate problems. First of all, Article 2(3) of the GATT Code is an exception to its Article 2(1)⁸⁰. Therefore the concept of dumping should be redefined if there are alternatives in normal value. If the exporting country is the only criterion, anti-dumping duties are easily evaded by selecting a low normal value exporting country.

3.2. Third Country Production

A foreign producer or exporter might avoid the imposition of anti-

79. Article 2(3) of the GATT Anti-dumping Code provides that 'in the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export'. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

80. Article 2(1) of the GATT Anti-dumping Code provides that 'for the purpose of this code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another country is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'.

dumping duties simply by moving its manufacturing plant to and exporting from a third country which is free from an anti-dumping duty or is covered by significantly lower anti-dumping duties. Therefore, this third country production may put the foreign producer in a advantageous position to cope with any future dumping investigation even though it cannot be a permanent shelter.

The most controversial patterns of third country production are cases in which the producer in third country simply assembles parts originating in the country subject to anti-dumping duties. In this case, it can be argued that products from third country should be subjected to anti-dumping duties without conducting a separate dumping investigation.⁸¹

A maximum imported content requirement in Article 13(10) (a) of the Regulation in fact plays an important role as a rule of origin specially designed for the purpose of imposing anti-circumvention duties as well.⁸² One of the objectives of rules of origin in international trade law, is to decide where is the real place of production of certain products. Indeed, anti-dumping duties do only apply to products exported from certain countries listed in the anti-dumping law. Foreign producers or exporters will therefore try to avoid or evade the imposition of anti-dumping duties simply by production in and then exporting from certain third countries

81. In *Colour TV receivers*, Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p57, the Commission took the view that the CTVs assembled in Turkey were treated for the purpose of establishing the normal value, as if they had been produced in Korea by the Korean producer.

82. Fulfilment of those conditions provided in Article 13(10)(a), however, does not guarantee an automatic imposition of anti-circumvention duties, because the first paragraph of this provision stipulates that definitive anti-dumping duties may be imposed, not shall be imposed, even if more than 60% of the parts or materials value is originating in the exporting countries. For this reason, the EC authorities enjoy the discretion not to impose anti-circumvention duties. These discretionary factors, as discussed already, are listed in the other relevant circumstances which is provided in the third paragraph of Article 13(10)(a).

which are not covered by the imposition of an anti-dumping duties. Then, for the purpose of the implementation of anti-dumping measures, a certain product will be analysed by rules of origin.⁸³

According to Article 13(7) of the Regulation, in the absence of any special provisions to the contrary adopted when a definitive or provisional anti-dumping duty was imposed, the rules on the common definition of the concept of origin shall apply. Thus the Community authorities have relied on the origin rules⁸⁴ provided in Regulation 802/68.⁸⁵

3.3. Origin in the Context of an Anti-dumping Law

Article 5 of Council Regulation 802/68⁸⁶ provides that: a product in the production of which two or more countries concerned will be regarded as originating in the country in which the last substantial process or operation that is economically justified is performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of man-

83. In intra-Community trade, the problem of certain products' origin arises only where a product from a particular country is subject to a quota in one member state and the Commission may authorise that member state to take necessary protective measures, including limitation of free circulation in the Community, in accordance with Article 115 of the EEC Treaty.

84. Origin rules can be divided into two broad parts: preferential and non-preferential rules of origin. The preferential rules of origin serve to decide whether preferential treatment to imports from certain third countries provided in the trading arrangement is applicable, while in other cases, the non-preferential origin rules apply. As a result, origin rules of the Community apply to its external trade with countries without preferential trading arrangement such as Japan, the United States and Korea.

85. Council Regulation (EEC) No. 802/68, OJ (1968) L 148/1, as amended by Council Regulation (EEC) No. 1318/71, OJ (1971) L 139/6.

86. Coun.Reg.(EEC) No 802/68 *on the Common Definition of the Concept of the Origin of Goods*, OJ (1968) L 148/1.

ufacture.

Article 6 of Council Regulation 802/68⁸⁷ containing an anticircumvention provision provides that: any process or work in respect of which it is established, or in respect of which the facts as ascertained justify the presumption, that its sole object was to circumvent the provisions applicable in the Community or the Member States to goods from specific countries shall in no case be considered, under Article 5, as conferring on the goods thus produced the origin of the country where carried out.

One of the main objects of provisions quoted above is to make sure that origin is not bestowed by operations which are designed to circumvent the anti-dumping provisions applicable in the Community to product from certain countries. Furthermore according to those provisions, which are very different from a maximum content requirement in the anti-dumping law, any product originating in production that is not a screwdriving operation will most likely be regarded as a product 'made in Europe'.

In some determinations,⁸⁸ the Community has been willing to commence a new anti-dumping proceedings in order to decide whether products from the exporting country really had that exporting country's origin. In two determinations, *Ball bearings*⁸⁹ and *Electronic typewriters*,⁹⁰ the Commission terminated anti-dumping proceedings, stating that the operations carried out in Thailand and Taiwan were not sufficient to confer Thai or Taiwanese origin, although the ball bearings or electronic typewriters referred to were shipped from such countries to the Community. Especial-

87. Ibid.

88. *Small screen colour televisions* (Korea), Coun.Reg.(EEC) No 1048/90, OJ (1989) L 107/56, and *Audio tapes in cassettes* (Korea, Japan and H.K.), Coun.Reg.(EEC) No 1251/91, OJ (1991) L 119/35.

89. *Certain ball bearings* (Thailand), Com.Dec.85/158/EEC, OJ (1985) L 59/30 (termination).

90. *Electronic typewriters* (Taiwan), Com.Dec.86/193/EEC, OJ (1986) L 140/52 (termination).

ly, ball bearings from Thailand were not conferred Thai origin within the meaning of Commission Regulation No.1836/78.⁹¹

In *Electronic typewriters* from Taiwan, Brother in Brother International GmbH challenged against this decision⁹² indirectly, and the Court, supporting the position of the Commission, held that 'the assembly is sufficient to confer on the resulting product the origin of the country in which assembly took place, if from a technical point of view and having regard to the definition of the goods in question such assembly represents the decisive production stage during which the use to which the component parts are to be put become definite and the goods in question are given their specific qualities'.⁹³

Therefore, if the product has not acquired third country origin in the assembly process, it continues to have the origin of the genuine exporting country, and then any anti-dumping duties applicable to the producer in genuine exporting country will be applied to the product coming from a third country.⁹⁴

91. Com.Reg.(EEC) No 1836/78 *concerning the determination of the origin of ball, roller or needle roller bearings*, OJ (1978) L 210/49. The Commission has also enacted certain product-specific Regulations under Regulation 802/68. These regulations define more precisely the criteria for origin in the case of the specific products concerned. These regulations include: Com.Reg.(EEC) No 37/70, OJ (1970) L 7/6 (spare parts); Com.Reg.(EEC) No 288/89, OJ (1989) L 33/23 (integrated circuits).

92. Brother challenged this decision directly on the basis of Article 173(2) of the EEC Treaty. This direct action, however, was declared inadmissible by the Court. Case 229/86, *Brother Industries LTD and Others v Commission* [1987] ECR 3757, at 3762.

93. Case C-26/88, *Brother International GmbH v. Hauptzollamt Giessen*, ECR [1989] 4253, at 4283.

94. In *Colour TV receivers* (Korea, Malaysia, China, Singapore, Thailand), Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50, p57, the Commission repeated this view and took the view that the CTVs assembled in Turkey were treated as if they had been produced in Korea by the Korean producer, because all the sets produced by this Turkish company and exported to the Community were found to be of Korean origin.

4. COMPATIBILITY OF THE EC ANTI-CIRCUMVENTION RULES WITH GATT PROVISIONS

4.1. General Developments

In 1988, after a series of anti-circumvention determinations on Japanese products, a GATT Panel⁹⁵ was instituted at the request of Japan in order to scrutinise the GATT-consistency of the EC anti-circumvention rules.

The Panel examined the GATT compatibility of:

- (1) the imposition of duties under Article 13(10);
- (2) the acceptance of undertakings under Article 13(10);
- (3) Article 13(10) itself; and
- (4) the non-publication of criteria for accepting part undertakings and the administration of the rules of origin for parts and materials.⁹⁶

95. The Panel members were J. Greenwald (USA, chairman), T. Grosser (New Zealand) and C. Thomas (Canada). See, Trade Policy: The European Commission's Objection to the Conclusion of the GATT Panel on the "Screwdriver" Aspect of the Anti-dumping Policy, *Agence Europe* No 5235, at 7 (Apr. 13, 1990).

96. The Panel held that the issue of whether the administration of the anti-circumvention provision is consistent with Article X is no longer relevant because the anti-circumvention duties and the acceptance of parts undertakings are inconsistent with Article III:2 and 4, and not justifiable under Article XX(d). See, subparagraph 5.27. of the GATT Panel Report.

On 22 March 1990, the GATT Panel communicated to the Community and Japan⁹⁷ that it had found that the EC anti-circumvention measures taken under Article 13(10) were in violation of GATT. Therefore, in this thesis, each of the above issues will be examined in the light of the provisions of the GATT, and then GATT compatibility of the anti-circumvention rules in the light of the exception in the GATT will be discussed.

4.2. The Imposition of Anti-Circumvention Duties

4.2.1. Are Anti-circumvention Duties, Customs Duties?

The issue argued with regard to the anti-circumvention duties, was whether the anti-circumvention duties could be considered to be *either* duties imposed on or in connection with importation within the meaning of Article II:1(b)⁹⁸ or internal taxes within the meaning of Article III:2⁹⁹

97. E. Vermulst, "Commercial Defence Actions and Other Int'l Trade Developments in the European Communities II: 1 July 1989 - 30 June 1990", 2 *EJIL* (1990), p167. The Community blocked the adoption of the Panel Report at the GATT Council meeting of April 3, 1990. However, the Community lifted its blockade to the adoption of the Panel Report in the GATT Council meeting of May 16, 1990. See, E. Vermulst & P. Waer, *supra* note 26, p1183.

98. Article II:1(b) of the GATT provides that the products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

99. Article III:2 of the GATT provides that the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

of the GATT.¹⁰⁰

The Panel made clear that the anti-circumvention duties, based on Article 13(10),¹⁰¹ are imposed not on imported parts or materials but on the finished products assembled in the Community, and not imposed conditional upon the importation of a product or at the time or point of importation.¹⁰² As a result, the anti-circumvention duties are not regarded as customs duties. However the Community argued that the anti-circumvention duties should be regarded as customs duties with the reason that the purpose of these duties is to eliminate circumvention of anti-dumping duties on finished products and that they are identical in nature to anti-dumping duties.¹⁰³

The Panel disagreed. The Panel determined that the relevant fact, according to the text of Article I, II, III and the Note to Article III, is not the policy purpose attributed to the charges but, rather, whether the charge is due on importation or at the time or point of importation. Therefore, the policy purpose of the charge is not relevant to determining the issue of whether the charge is imposed in connection with importation within the meaning of Article II:1(b).¹⁰⁴

The basic objective underlying Article II and III, namely that discrimination against products from other Contracting parties should only take the form of ordinary customs duties imposed on or in connection with importation and not the form of internal taxes, could not be achieved, because the Community treats imported parts and materials subject to anti-

100. Subparagraph 5.4. of the GATT Panel Report.

101. Article 13(10) of the Community Regulation provides that definitive anti-dumping duties may be imposed on products that are introduced into the commerce of the Community after having been assembled in the Community.

102. Subparagraph 5.5. of the GATT Panel Report.

103. Ibid.

104. Subparagraph 5.6. of the GATT Panel Report.

circumvention duties as not being 'in free circulation'.¹⁰⁵ Therefore, the anti-circumvention duties are not levied 'on or in connection with importation' and consequently do not constitute customs duties within the meaning of Article II:1(b).¹⁰⁶

4.2.2. If not, Could the Anti-Circumvention Duties be
Justifiable under Article XX(d)¹⁰⁷?

The EC argued that anti-circumvention duties are not anti-dumping duties, but measures designed to prevent circumvention of anti-dumping duties, and therefore, Article 13(10) is necessary within the meaning of Article XX(d).¹⁰⁸ In other words, adoption or enforcement of anti-circumvention measures is necessary to secure compliance with the Council Regulation No 2423/88 and the regulations imposing definitive anti-dumping duties on the importation of the finished products which are not inconsistent with the provisions of this Agreement.

However, in order for an anti-circumvention measure to be justified by Article XX(d), it must secure compliance with laws and regulations¹⁰⁹

105. Third paragraph of Article 13(10) of the Community Anti-dumping Regulation.

106. Sub-paragraph 5.8. of the GATT Panel Report.

107. Article XX(d) of the GATT provides that ...'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices'.

108. Subparagraph 5.11. of the GATT Panel Report.

109. Laws and regulations include only the individual regulations imposing definitive anti-dumping duties because the general anti-dumping regulation of the Community does not establish obligations that require enforcement. See, sub-paragraph 5.18. of the GATT Panel Report.

that are not inconsistent with the provisions of the GATT.¹¹⁰ As a result, in order to be justified by Article XX(d), the anti-circumvention measure is to secure compliance with laws or regulations, namely the individual regulations imposing definitive anti-dumping duties. It could not be established, however, that the anti-circumvention duties 'secure compliance with' obligations under the Community anti-dumping regulations, for two reasons.

First, the text of Article XX(d) merely covers measures to secure compliance with laws or regulations, or measures designed to prevent actions that would be illegal under laws or regulations, and not with their objective.¹¹¹

Second, the qualification 'to secure compliance under laws and regulations, should be construed to mean not 'to ensure the attainment of the objectives of the laws and regulations' but 'to enforce obligations under laws and regulations'.¹¹² Therefore, the Community would be permitted to act inconsistently with the GATT whenever such inconsistency is necessary to ensure that the obligations which the Community may impose consistently with the GATT, under its laws or regulations, are effectively enforced. However, the anti-circumvention duties, i.e. measures, do not serve to enforce the payment of anti-dumping duties, i.e. laws and regulations which are not inconsistent with the GATT. Therefore, the anti-circumvention duties could not be justified under Article XX(d) of the GATT.¹¹³

110. Subparagraph 5.14. of the GATT Panel Report.

111. Subparagraph 5.16. of the GATT Panel Report.

112. Subparagraph 5.17. of the GATT Panel Report.

113. Subparagraph 5.18. of the GATT Panel Report.

4.3. Acceptance of Undertakings

During the period between the adoption of Article 13(10) in June 1987 and the establishment of the Panel in October 1988, investigations under Article 13(10) resulted in the imposition of duties on products assembled in the Community in eight cases, and in the acceptance of undertakings in seven cases which led to the revocation of the duties initially imposed.¹¹⁴ These undertakings related to changes in the sourcing of parts and materials used in assembly operations in the Community.¹¹⁵ Therefore, it could be argued whether the acceptance of undertakings to limit the use of imports parts and materials is inconsistent with Article III:4 of the GATT.¹¹⁶

The panel suggested that not only requirements which an enterprise is legally bound to carry out, but also those which an enterprise volun-

114. *Electronic typewriters*, Coun.Reg.(EEC) No 1329/88, OJ (1988) L 123/31, Com.Dec. 88/300/EEC, OJ (1988) L 128/39, Com.Dec.88/387/EEC, OJ (1988) L 183/1, Com.Dec.88/387/EEC, OJ (1988) L 183/39, Coun.Reg.(EEC) No 2329/88, OJ (1988) 203/1 and Com.Dec.88/424/EEC, OJ (1988) L 203/25, *Electronic scales*, Com.Dec.88/398/EEC, OJ (1988) L 189/27, Coun.Reg.(EEC) No 2735/88, OJ (1988) L 244/1, Coun.Reg.(EEC) No 502/89, OJ (1989) L 58/1, *Plain paper photocopiers*, Com.Dec.88/638/EEC, OJ (1988) L 355/66, *Dot-matrix printers*, Com.Dec. 89/543/EEC, OJ (1989) L 291/57, and Com.Dec.89/596/EEC, OJ (1989) L 340/25.

115. *Dot-matrix printers (Japan)*, Com.Dec.899/543/EEC, OJ (1989) L 291/57, p58 and 59, the Commission accepted the undertakings because the weighted average value of Japanese parts or materials was found not to exceed the value of all other parts or materials used by at least 50%, and therefore, the change in the sourcing of parts and materials of assembly operations in the Community was sufficient.

116. Article III:4 of the GATT provides that the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

tarily accepts in order to obtain an advantage from the government¹¹⁷ constitute requirements within the meaning of Article III:4 of the GATT.¹¹⁸

Therefore, the decisions of the Community to suspend proceedings under Article 13(10) conditional on undertakings by enterprises in the Community to limit the use of parts or materials originating in Japan in their assembly operations are inconsistent with Article III:4 of the GATT.¹¹⁹

4.4. Article 13(10) Itself

It could be argued whether the anticircumvention provision itself violates the Community's obligations under the GATT, if all measures taken under Article 13(10) are inconsistent with GATT. It should be noted, however, that the anti-circumvention provision does not mandate the imposition of duties or other measures by the Community authorities: it merely authorises the Community authorities to take certain actions. Therefore, legislation merely giving the executive authorities the possibility to act inconsistently with GATT provision, cannot constitute a violation of that provision.

As a result, the Panel concluded that although it would be desirable if the Community were to withdraw Article 13(10), the Community would meet its obligation under the GATT if it were to cease to apply the anti-

117. The consequence of not offering an undertaking, or of withdrawing an existing undertaking, can be the continuation of procedures that may lead to the imposition of the anti-circumvention duties, according to Article 10 (1) and (6) of the Community anti-dumping regulation.

118. Subparagraph 5.21. fo the GATT Panel Report.

119. Ibid.

circumvention provision in respect of contracting parties.¹²⁰

5. CONCLUSION

The Community applies different sets of rules to production operations within the Community¹²¹ and production operations in third countries¹²² in order to prevent diversion operations. As a result, products which are manufactured in the Community and for which the Community origin certificates have been obtained may nevertheless fail the maximum imported content requirement.¹²³

In addition, not only the anti-circumvention duties imposed by the Community under Article 13(10) of the Community anti-dumping regulation on products assembled within the Community by the related party to the exporter of products subjected to anti-dumping duties,¹²⁴ but also the decisions of the Community to suspend proceedings under Article 13(10) conditional on undertakings by companies in the Community to limit the use of parts or materials originating in exporting countries in their assembly, are inconsistent with the first sentence of Article III:2, and not justified by Article XX(d) of the GATT.¹²⁵

Nonetheless, the Community stated that it would not amend its anti-circumvention rules until it saw the outcome of the talks on dumping and circumvention on the Uruguay Round trade talks.¹²⁶ However, it has failed

120. Subparagraph 5.26. of the GATT Panel Report.

121. Article 13(10) of the Community Anti-dumping Regulation.

122. Coun.Reg.(EEC) No 802/68, *on the Common Definition of the Concept of the Origin of Goods*, OJ (1968)L 148/1.

123. Article 13(10)(a) of the Community anti-dumping regulation.

124. Subparagraph 6.1. of the GATT Panel Report.

125. Subparagraph 6.2. of the GATT Panel Report.

126. Dullforce, "EC Defers to Screwdriver Ruling", *Financial Times*, May 17, 1990, p4.

to reach consensus on the anti-circumvention issue and the concept of "like product" was not changed in the Uruguay Round.¹²⁷ It remains to be seen whether the Community will amend its anti-circumvention provisions in its 1988 anti-dumping regulation. Whether or not it does so, it should always be remembered that anti-dumping duties can only be imposed where dumping and resulting injury is established, and finding of dumping and resulting injury with regard to a finished product cannot be extended to its parts and subassemblies unless there has been a separate determination that the parts are actually dumped and thereby have caused injury to the domestic production of the "like product", i.e., the parts in the importing country.¹²⁸

127. Commission, *Proposal for a Coun.Dec. concerning the conclusion of the results of the Uruguay Round of Multilateral Trade Negotiations* (1986-94), COM(94) 143 final.

128. GATT, Report by the Panel, *EEC-Japan, Regulation on imports of part and components*. E. Vermulst & P. Waer, *supra* note 26, p1186. R.M. Bierwagen, *supra* note 9, p 62-65.

Chapter 7 : RELIEF AND REVIEW SYSTEMS

I. RELIEF

The Anti-dumping Regulation provides three types of relief which may be ordered by Community authorities: undertakings, provisional anti-dumping duties, and definitive anti-dumping duties. In 1994, the Community had 151 measures in force. Of 151 measures, 128 were in the form of duties and 23 in the form of undertakings.¹ Of all measures in force 57, or 37.7% of the total, were imposed against the state trading countries including China with 26 measures. The other countries most involved were Japan with 16 measures, Republic of Korea with 12 and Turkey with 8.

1. UNDERTAKINGS

Undertakings are offers from importers or exporters of dumped products and concern revision of prices or cessation of exports to the extent that the Commission is satisfied that either the dumping margin or the injurious effects of the dumping are eliminated.²

During recent years imposition of anti-dumping duties has been adopted more frequently, even though undertakings have played a very

1. Commission, *13th anti-dumping report (1994)*, COM(95) 309 final, p7, (hereinafter referred to as "anti-dumping report"). It is worth bearing in mind that these measures only affect 0.71% of total imports to the Community although substantial in relation to numbers of investigations.

2. This definition of undertakings does not include voluntary restraint agreements between the Community and exporting country government, or between industries. An analysis of these agreements is beyond the scope of this thesis.

important role in the Community Anti-dumping proceedings.³ It is well demonstrated by the fact that the Commission did not terminate any investigations solely on the acceptance of price undertakings in 1992. However, some cases were terminated by the acceptance of undertakings as well as imposition of duties simultaneously.⁴ Not only in 1992, but also in 1988, no investigations were concluded by the acceptance of price undertakings. This does not mean, however, that undertakings were not accepted at all. If certain exporters refuse to co-operate during the investigation, it is also the practice of the Community to apply duties in respect of all imports from a specific country and to exclude from the duty those imports from exporters who have co-operated in the investigation and have offered an acceptable price undertaking.⁵

1.1. The Procedural Aspects of an Undertaking

The Community authorities enjoy a wide discretion in this field of undertakings because they may terminate the investigation without the imposition of duties only where the Commission considers that the undertakings offered by the exporters are acceptable.⁶ It should be noted that even though in the determination in *Plain paper photocopiers*, the Council declared that it is the Community's traditional practice not to accept

3. During the period 1988-1991, a total of 123 investigations were concluded. Among them 65 investigations were concluded by imposition of definitive duties, while only 17 investigations were concluded by acceptance of price undertaking.

4. *Thermal paper*, Coun.Reg.(EEC) No 729/92, OJ (1992) L 81/1, and *Ferro-silicon*, Coun.Reg.(EEC) No 3642/92, OJ (1992) L 369/1.

5. In *Oxalic acid* (Korea and Taiwan), Com.Dec.88/353/EEC, OJ (1988) L 160/63, p63, and Coun.Reg.(EEC) No 2089/88, OJ (1988) L 184/1, p2, price undertakings were accepted from exporters even though the investigations were concluded by the imposition of definitive duties.

6. Article 10(5) of the Community Anti-dumping Regulation.

undertakings from importers, however, it did not respect its own traditional practice in *Outboard motors*.⁷ In *Technointorg*, the Court, citing the *Ballbearing* case,⁸ confirmed that Article 10 gives the Commission discretion to accept or reject undertaking.⁹

The termination of an investigation as a result of an undertaking offered should be decided in conformity with the procedure provided for in Article 9(1), as have discussed above.¹⁰ However, for the termination of a proceeding with an acceptance of undertaking, the Commission should know the existence of dumping and injury caused thereby. Therefore, undertakings are likely to be negotiated after on-the-spot verification by the Community authorities, even though they are offered during the course of an investigation. Furthermore, it is the Commission's practice to make a final determination that dumping has caused injury to a industry in the Community before it accepts an undertaking. The acceptance of undertakings does not always lead to the termination of the investigation because if the undertaking is accepted, the investigation of injury shall nevertheless be completed if the Commission, after consultation, so decides or if a request is made by exporters representing a significant percentage of the trade involved. In such a case, if the Commission, after consultation, makes a determination of no injury, the undertaking shall automatically lapse. However, where a determination of no injury is due mainly to

7. In *Plain paper photocopiers* (Japan), Coun.Reg.(EEC) No 535/87, OJ (1987) L 54/12, p29, the Commission rejected undertakings offered by importers although it accepted undertakings from importers in *Outboard motors* (Japan), Coun.Reg.(EEC) No 1305/87, OJ (1987) L 124/1, p3.

8. Case 240/84, *NTN Tokyo Bearing v Council*, ECR [1987] 1809.

In this case, the Court decided that undertakings were not a satisfactory solution to be sufficient and considered the Commission's reasons given for rejecting price undertaking to be effective.

9. Case 294/86 and 77/87, *Technointorg v Commission and Council*, ECR[1988] 6077, at 6117.

10. Article 9(1) of the Community Anti-dumping Regulation. See, Chapter 3, subsection 3.5.

the existence of an undertaking, the Commission may require that the undertaking be maintained.¹¹

Undertakings may be suggested by the Commission, but the fact that such undertakings are not offered or an invitation to do so is not accepted, shall not prejudice consideration of the case.¹²

Reversing the Commission's previous practice,¹³ it made it clear in 1984 in *Sodium carbonate*¹⁴ that it would no longer accept undertakings from companies, so called prospective exporters, that were not involved in dumping or had not exported during the investigation period because of difficulty in determining an appropriate export price for prospective exporter, difficulty or impossibility of determining the volume of any future exports, and an unreasonable administrative burden on the investigative authorities which would impede expeditious termination of an anti-dumping investigation. However, in *Video cassette and video tape reels*,¹⁵ the Council, considering the problem of companies which started or would start exporting video cassette to the Community after the end of the investigation period, noted that the Commission was ready to initiate without delay a review proceeding whenever the exporting company could show the Commission, and supply to that sufficient evidence, that it was a prospective exporter. This means that the Commission has changed its prac-

11. Article 10(4) of the Community Anti-dumping Regulation.

12. Article 10(3) of the Community ~~Anti~~-dumping Regulation.

13. *Acrylic fibres* (USA), Coun.Reg.(EEC) No 2275/84, OJ (1984) L 209/1, p2.

14. In *Sodium carbonate* (USA), Coun.Reg.(EEC) No 3337/84, OJ (1984) L 311/26, p26-7, the Commission stated that on previous occasions where non-exporters offered undertakings in respect of possible future exports to the Community, these undertakings were accepted or refused on the merits of each case. This practice has been reviewed and it has been concluded that, in general, undertakings from potential exporters should not be accepted.

15. *Video cassette and video tape reels* (Korea and Hong Kong), Coun.Reg.(EEC) No 1768/89, OJ (1989) L 174/1, p6.

tice regarding acceptance of undertakings from prospective exporter.

1.2. Withdrawal or Violation of Undertakings

The Commission may terminate the investigation without imposing provisional or definitive anti-dumping duties where acceptable undertakings are offered. The Commission, however, may require any party from whom an undertaking has been accepted to provide, periodically, information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertaking.¹⁶ And where an undertaking has been withdrawn or where the Commission has reason to believe that it has been violated and where Community interests call for such intervention, it may, after consultation and after having offered the exporter concerned an opportunity to comment, apply provisional anti-dumping duties forthwith on the basis of the facts established before the acceptance of the undertaking.¹⁷

1.3. Merit and demerit of Undertakings

Price revision undertakings which normally should increase export prices to the Community are to be consummated in successive steps over a number of months and imply the predictable dumping margin plus the expected rise in manufacturing costs in the country of origin.

Price revision undertaking is more favourable than anti-dumping duty for exporters because the former is advantageous in that the benefit of

16. Article 10(5) of the Community Anti-dumping Regulation.

17. Article 10(6) of the Community Anti-dumping Regulation.

the price increase accrues to the exporter, whereas the price increment result from the latter goes into the Community's coffers rather than those of the exporter. According to Article 13(6), undertakings can be limited to a certain region, whereas dumping and injury is established on a regional basis. In this case, the Commission should give exporters an opportunity to offer undertakings in respect of the region concerned.¹⁸ If an adequate undertaking is not given promptly or is not fulfilled, a duty may be imposed in respect of the Community as a whole.¹⁹

A demerit may be found in the requirement to submit regular reports to the Commission showing compliance. Undertakings have a direct effect on the price for the exported product, whereas an anti-dumping duty's effect on the price is less immediate. Furthermore, a definitive duty can be imposed while an undertaking is still in force,²⁰ because decisions to accept undertakings shall be subject to review; moreover, the investigation should be re-opened where the circumstances so require.²¹

From the viewpoint of the Commission, termination of proceedings as a result of accepting undertakings means that the matter is solved short of a finding of dumping and injury and the Community industry can get a quick protection. Undertakings also present the demerit that they may be difficult and administratively burdensome to monitor, and for products which come in different models or versions, which evolve rapidly, it may

18. In *Plasterboard (Spain)*, Com.Dec.85/209/EEC, OJ (1985) L 89/65, p66, injury was assessed on a regional basis, namely in Ireland only; and this was the first time the regional criteria were applied in Community investigations.

19. Article 13(6) of the Community Anti-dumping Regulation.

20. Case 256/84, *Koyo Seiko Ltd v Council and Commission*, ECR (1987) 1899, at 1916, para. 12. The Court held that the fact that the undertakings entered into by Koyo Seiko in 1977 were still in force when the Commission decided to initiate the review, was consistent with the provisions of Article 14.

21. Article 14(1) and (2) of the Community Anti-dumping Regulation.

be difficult to formulate an effective undertaking. Furthermore, undertakings can play a detrimental role to consumers, because of their inflationary influence.

2. IMPOSITION OF ANTIDUMPING DUTIES

2.1. General Principles

Anti-dumping duties should be imposed by Regulation.²² Such Regulation should indicate in particular the amount and type of duty imposed, the product covered, the country of origin or export, the name of the supplier, if practicable, and the rationale on which the Regulation is based.²³

The amount of such duties should not exceed the dumping margin provisionally estimated or finally established; it should be less if such lesser duty would be adequate to remove the injury.²⁴

2.1.1. Dumping Margin

In accordance with Article 8(1) of the GATT Anti-dumping Code,²⁵ Article 13(3) of the Anti-dumping Regulation provides that the amount of the duty should not be more than the dumping margin if such lesser duty would be adequate to remove the injury. As a result, it has become the Commission's practice to compare the Community prices²⁶ with either the

22. Article 13(1) of the Community Anti-dumping Regulation.

23. Ibid, Article 13(2).

24. Ibid, Article 13(3).

25. Article 8(1) of the GATT Anti-dumping Code provides that it is desirable that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

26. The prices at which the products under investigation are sold in the Community.

actual prices of domestic products or with target prices²⁷ for domestic products, as discussed above. Therefore, when the injury margin is lower than the dumping margin, the anti-dumping duty is set at the level of the injury margin.

2.1.2. Retroactive Anti-dumping Duties

In accordance with the Article 11 of the GATT Anti-dumping Code,²⁸ the Anti-dumping Regulation of the Community recognises authorisation of the imposition of retroactive duties, providing that the Council may decide to apply the definitive anti-dumping duties to products which were imported not more than 90 days prior to the date of application of provisional duties. Retroactive duties may be imposed where the Council determines that there is a history of dumping which caused injury or that the importer was or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and that the injury is caused by sporadic dumping to such an extent that, in order to preclude it recurring, it appears necessary to impose an anti-dumping duty retroactively on those imports, or that an undertaking has been violated.²⁹

Even though it has become incrementally routine for complainants to supplicate for imposition of retroactive duties,³⁰ no retroactive anti-dumping duties have been imposed up to the present.

27. The prices calculated on the basis of full cost of production plus a reasonable profit.

28. Article 11(1) of the GATT Anti-dumping Code provides that anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 8 and paragraph 1 of Article 10, respectively, enters into force.

29. Article 13(4)(b) of the Community Anti-dumping Regulation.

30. *Video Cassette Tapes*, 88/C 212/03, OJ (1988) C 212/11, and Com.Reg.(EEC) No 4026/88, OJ (1988) L 356/47, p47.

2.1.3. Prospective Exporters

A practice that was not predicted when the GATT Anti-dumping Code was formulated, concerns the treatment of new exporters of like products, who not only were not covered in the original anti-dumping investigation but also have not exported during the investigated period. In the Community, the Commission generally investigates all the exporting companies known to it through on-the-spot verification. As a result, individual rates of duty are made for each exporting company investigated. Furthermore, the highest individual rate of duty determined in the original anti-dumping investigation is applied to potential exporters who have not exported anything to the Community yet. Therefore, prospective exporters have been treated in a very discriminatory fashion as a result of the *Sodium carbonate* determination³¹ in 1984. In this determination, as discussed above,³² the Commission declared that it would not accept undertakings from potential exporters any more. Moreover the Commission, stating that 'if they begin to export to the Community, it may be appropriate to apply Article 14 and Article 16 of the Regulation', does not permit them to apply for a review unless they have exported and paid the highest duty to the Community.

Theoretically, prospective exporters may try to make some sales, get refunds and apply for a review, later. However, practically, it is unlikely to be successful as a result of the protectionist tilt in the refund procedure.³³

31. *Sodium carbonate*, Coun.Reg.(EEC) No 3337/84, OJ (1984) L 311/26, p26-7. The position of the Commission was consistently applied in the *Electronic typewriters*, Com.Reg. (EEC) No 3649/84, OJ (1984) L 335/43, p47, and Coun.Reg.(EEC) No 1698/85, OJ (1985) L 163/1, p10, and *Hydraulic excavators*, Com.Reg.(EEC) No 595/85, OJ (1985) L 68/13, p16, and Coun.Reg.(EEC) No 1877/85, OJ (1985) L 176/1, p4.

32. See, *supra* note 14 in this Chapter.

33. See, refund procedure in subsection 5 in section II review systems.

Moreover, the Commission's practice on the prospective exporter is incompatible with the GATT rule which stipulates that when an anti-dumping duty is imposed in respect of any product, such anti-dumping duty should be collected in each case, on a non-discriminatory basis on imports of such products from all sources found to be dumping and causing injury.³⁴ Therefore, a source of imports which has never exported a certain product to the Community, should not be subject to imposition of anti-dumping duties. In addition, it should not be regarded to have been found to be dumped and causing injury. It should be noted that the amount of anti-dumping duty must not exceed the margin of dumping.³⁵ Therefore, in case of prospective exporters, no margin of dumping has been established because they have never exported to the Community. For the reasons described above, the legality of any practice of imposing the highest rate of individual duty determined in the original anti-dumping investigation, on companies which have never exported the product, is very questionable.

2.2. Provisional Duties³⁶

The European Parliament, in its resolution on the Community's anti-dumping activities,³⁷ considered that once a preliminary determination of dumping and injury has been established, provisional duties should normal-

34. Article 8(2) of the 1979 GATT Anti-dumping Code.

35. Ibid, Article 8(3).

36. In 1994, 25 provisional anti-dumping duties were imposed as a result of anti-dumping investigation, compared to 16 in 1993 and 18 in 1992. Among them, 3 provisional duties were imposed on products imported from Korea, *Electrolytic capacitors*, Com.Reg.(EC) No 371/942, OJ (1994) L 48/10, *Microdisks*, Com.Reg.(EC) No 534/94, OJ (1994) L 68/5, and *Colour TV Receivers*, Com.Reg.(EC) No 2376/94, OJ (1994) L 255/50.

37. The European Parliament, *Resolution on the Community's anti-dumping activities*, OJ (1982) No C 11/37, p39.

ly be imposed unless the defendant offers a satisfactory price undertaking. This view has become the Commission's practice³⁸ and is currently incorporated in the Regulation which stipulates that where preliminary examination shows that dumping or a subsidy exists and that there is sufficient evidence of injury caused thereby and the interest of the Community calls for intervention to prevent injury being caused during the proceeding, the Commission, acting at the request of a Member state or on its own initiative, shall impose a provisional anti-dumping duty. In such cases, release of the products concerned for free circulation in the Community shall be conditional upon the provision of security for the amount of the provisional duty, definitive collection of which shall be determined by the subsequent decision of the Council under Article 12(2).³⁹ Fluctuations in the number of provisional duties imposed⁴⁰ up to the present do not mean that the Commission's approach to these measures keeps changing. The reason is that the Commission is always prepared to impose provisional duties when the circumstances so require.

The Commission shall take such provisional action after consultation or in cases of extreme urgency, after informing the Member States. In this latter case, consultations shall take place 10 days at the least after notification to the Member States of the action taken by the Commission.⁴¹

Where a Member state requests immediate intervention by the Commission, the Commission shall within a maximum of five working days of receipt of the request, decide whether a provisional anti-dumping duty

38. Commission, *7th anti-dumping report*, COM (90) 229 final, p4.

39. Article 11(1) of the Community Anti-dumping Regulation.

40. 18 provisional anti-dumping duties were imposed in 1992, compared to 19 in 1991, 23 in 1990 and 10 in 1989.

41. Article 11(2) of the Community Anti-dumping Regulation.

should be imposed.⁴²

The Commission shall forthwith inform the Council and the Member States of any decision taken under this Article. The Council, acting by a qualified majority, may decide differently. A decision by the Commission not to impose a provisional duty shall not preclude the imposition of such duty at a later date, either at the request of a Member state, if new factors arise, or on the initiative of the Commission.⁴³

Provisional duties shall have a maximum period of validity of four months. However, where exporters representing a significant percentage of the trade involved so request or, pursuant to a notice of intention from the Commission, do not object, provisional anti-dumping duties may be extended for a further period of two months.⁴⁴

Any proposal for definitive action, or for the extension of provisional measures, shall be submitted to the Council by the Commission not later than one month before expiry of the period of validity of provisional duties. The Council shall act by a qualified majority.⁴⁵

After expiration of the period of validity of provisional duties, the security shall be released as promptly as possible, to the extent that the Council has not decided to collect it definitively.⁴⁶

42. Article 11(3) of the Community Anti-dumping Regulation.

43. Ibid, Article 11(4).

44. Ibid, Article 11(5).

45. Ibid, Article 11(6).

46. Ibid, Article 11(7).

2.3. Definitive Action⁴⁷

Different from provisional duties, which are imposed by the Commission, definitive duties as final action are under the Council's exclusive power even though it imposes definitive duties based on a Commission's proposal after consultation with the Advisory Committee. Therefore, the Regulation stipulates that where the facts as finally established show that there is dumping during the period under investigation and injury caused thereby, and the interests of the Community call for Community intervention, a definitive anti-dumping duty shall be imposed by the Council, acting by qualified majority on a proposal submitted by the Commission after consultation.⁴⁸

In *Shovels*,⁴⁹ however, not the Council but the Commission decided that it was not necessary to collect the provisional duty, since no imports of shovels had been made below the undertaking price, after the imposition of the provisional duty.

Where a provisional duty has been applied, the Council shall decide, irrespective of whether a definitive anti-dumping duty is to be imposed, what proportion of the provisional duty is to be definitively collected. The Council shall act by qualified majority on a proposal from the Commission.⁵⁰

The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there has been dumping

47. In 1994, 19 definitive anti-dumping duties were imposed as a result of anti-dumping investigations. Among them, 2 definitive duties was imposed on imports from Korea. *Electrolytic capacitors*, Coun.Reg.(EC) No 1384/94, OJ (1994) L 152/1, and *Microdisks*, Coun.Reg.(EC) No 2199/94, OJ (1994) L 236/2.

48. Article 12(1) of the Community Anti-dumping Regulation.

49. *Shovels* (Brazil), Com.Dec.84/632/EEC, OJ (1984) L 330/28.

50. Article 12(2)(a) of the Community Anti-dumping Regulation.

and injury. For this purpose, injury shall not include material retardation of the establishment of a Community industry, nor threat of material injury, except where it is found that this would, in the absence of provisional measures, have developed into material injury.⁵¹

The Council may suspend the duty temporarily, where it considers that further investigation is needed. In *Synthetic fibres of polyester*,⁵² the anti-dumping duty which was imposed in 1988⁵³ was suspended for a period of five months with regard to fibrefill. During that period, the Council asked the Commission to carry out a further investigation into the allegations of the existence of shortages of fibrefill. Since the investigation showed that the allegations of a shortage were unfounded, the suspension was terminated. Furthermore, the Council, based on an undertaking by one of the exporters on whom definitive duties have been imposed already, may set out the duty imposed differently. In *Certain electronic typewriters*,⁵⁴ the Council, based on an undertaking from Kyushu Matsushita which removed the conditions justifying the anti-dumping duty to typewriters assembled in the Community, corrected the duty imposed.

51. Article 12(2)(b) of the Community Anti-dumping Regulation.

52. Commission, *Notice regarding the anti-dumping proceeding concerning synthetic fibres of polyesters*, OJ (1989) No C 119/15.

53. *Synthetic fibres of polyester*, Coun.Reg.(EEC) No 3946/88, OJ (1988) L 348/49, p54. In this determination, the Council stated that the application of the definitive anti-dumping duty should be suspended for fibrefill for a period of five months as from the entry into force of this Regulation, working on the supposition that a review might lead to different findings.

54. *Certain electronic typewriters*, Coun.Reg.(EEC) No 1329/88, OJ (1988) L 123/31, p31, Coun.Reg.(EEC) No 2076/88, OJ (1988) L 183/1, and Coun.Reg.(EEC) No 2329/88, OJ (1988) L 203/1. See also Coun.Reg.(EEC) No 1022/88, OJ (1988) L 101/4. In these determinations, the Council stated that Regulation (EEC) No 1022/88 extending the anti-dumping duty to certain electronic typewriters assembled in the Community should be amended to the extent it concerned Canon Bretagne, Kyushu Matsushita, and Sharp, based on the undertaking accepted.

2.4. An Additional Anti-dumping Duty

(Anti-absorption Duties)⁵⁵

The Community's Anti-dumping Regulation contains a novel provision to provide that anti-dumping duties should not be borne by the exporters but by the importers and/or customers. It means that the Community forces the exporters to pass the anti-dumping duties on to customers.⁵⁶ This entirely new Article 13(11)⁵⁷ is interpreted to provide the Community authorities with increased powers to deal with the situation where the exporters, in whole or in part, either directly or indirectly have borne the anti-dumping duties imposed instead of raising the price. As a result, an additional anti-dumping duty may be imposed to compensate for the amount borne by the exporter. This means that the additional duty cannot be higher than the original anti-dumping duty.⁵⁸

In response to a complaint from any party directly concerned who

55. Since the possibility for these Article 13(11) reviews was incorporated into the Community Anti-dumping Regulation in 1988, 6 such reviews have been initiated, 2 in 1994 and 4 in 1991, including *Silicon metal* determination of which was concluded in 1992, when an additional duty was imposed on imports of Silicon metal from China. *Silicon metal* (China), Coun.Reg.(EEC) No 1607/92, OJ (1992) L 170/1.

56. It is worth remembering that if the exporters were to bear the anti-dumping duty, and if there were no anti-absorption duties in the Community, the exporters would have to suffer financially in their management in order to maintain cheap export price, after the imposition of anti-dumping duties, the Community could get anti-dumping duties revenue, and consumers could still enjoy cheap imported products without inflation pressure. Then, the investigation could be re-opened as a result of review. If the exporters increased the export price, their competitiveness would be weakened.

57. Different from the anti-circumvention rules, the provision does not provide that the provisions of this Regulation concerning investigation, procedure, and undertakings apply to all questions arising under this paragraph.

58. Article 13(11)(a). When the dumping has increased significantly, the Commission should initiate a review proceeding.

submits sufficient evidence showing that the duty has been borne by the exporter, the Commission must initiate investigation and the exporters and importers concerned should be given an opportunity to comment.⁵⁹ A provisional and definitive duty can be imposed as an additional duty.⁶⁰ During the investigation, Article 7(7)(b) applies.⁶¹

Up to the present, the Commission has initiated 6 investigations,⁶² 2 in 1994 and 4 in 1991, under this new rule. It should be noted, however, that the possibility of using this measure is increasing. Furthermore, this rule would be likely to play a conclusive role to force the exporters to raise prices more than they did before. However, it is questionable whether this anti-absorption rule is compatible with the GATT rules, because the GATT rules permit imposition of an anti-dumping duty only where there is dumping which causes injury.⁶³ Therefore, it should be noted that application of additional anti-dumping duty without examination of dumping and injury is inconsistent with GATT rules.

2.4.1. Conditions for Bearing the Anti-dumping Duty

Insofar as the results of the investigation show that the absence of the resale price increase to the first independent buyer of the product subject to the anti-dumping duty by an amount corresponding to the anti-dumping duty is not due to a reduction in the costs and/or profits of the importer for the product concerned, then the absence of such price increase shall be considered as an indicator that the anti-dumping duty has

59. Article 13(11)(b) of the Community Anti-dumping Regulation.

60. Ibid, second paragraph of the Article 13(11)(b)

61. Ibid, Article 13(11)(d).

62. Commission, *11th anti-dumping report* (1992), COM(93) 516 final, p70, and *13th anti-dumping report* (1995), COM(95) 309 final, p46.

63. See, Article VI(1) of the GATT.

been borne by the exporter.⁶⁴ In respect of the imposition of an additional anti-dumping duty, two factors are to be considered; the resale price to the first independent buyer and the costs and profits of the importer. In the case of the resale price, it is almost impossible to examine whether there is a price increase or not, if new models are introduced, and so, there is no previous resale price. In addition, the exporter can argue that a price increase as a result of an anti-dumping duty imposed is avoided by a reduction in the distribution cost and/or a reduction of profits of the related importer.⁶⁵ In *Silicon metal*,⁶⁶ the Commission determined that all or part of the anti-dumping duty had been borne by the exporters concerned on the ground that following the imposition of a provisional anti-dumping duty on imports of silicon metal from China,⁶⁷ the import price at Community borders (the cif price before payment of customs duties and anti-dumping duty) of silicon metal from China fell considerably. Therefore, by reducing their prices for export to the Community after imposition of an anti-dumping duty, the exporters had borne the anti-dumping duty. The organisation representing user industries, however, argued that the quality of the product concerned justified a lower price and the decrease in the import price of silicon metal from China could be linked to an overall trend in the market for

64. *Ibid*, first paragraph of Article 13(11)(a) and 13(11)(c), read jointly.

65. In the case of the unrelated importer, the anti-dumping duty can be borne by lowering export price. As a result, the duty-paid export price for the unrelated importers remains the same, irrespective of imposition of the anti-dumping duty. In this case, the Commission would compare the original export price with the export price after the imposition of final duty to determine whether the duty has been borne by the exporter.

66. *Silicon metal* (China), Coun.Reg.(EEC) No 1607/92, OJ (1992) L 170/1, p2-3. In this determination, since the decrease in the import price as a percentage of the amount of anti-dumping duty has been calculated at 178% after the imposition of a provisional duty, the anti-dumping duty has been borne completely.

67. *Silicon metal* (China), Com.Reg.(EEC) No 720/90, OJ (1990) L 80/9.

imports of the product concerned into the Community. The Commission did not accept those arguments on the grounds that the alleged difference in quality could not justify the considerable decrease in the export price since this did not constitute a new fact, and furthermore, examination of the customs statistics clearly revealed a considerable price decrease in the imported products from China, while the import price of the metal from other countries had remained stable over the same period.

2.4.2. Retroactivity of the Additional Duty

According to the third paragraph of Article 13(11)(b), the additional duty may be imposed retroactively. Moreover the Article, providing that the additional duty may be imposed on products in relation to which the obligation to pay import duties under Directive 79/623/EEC has been incurred after the imposition of the definitive anti-dumping duty, sets the precise moment at which the additional duty can be imposed. Therefore, the additional duty can be imposed retroactively to the goods released for free circulation in the Community, from the moment the duty began to be borne by the exporter.⁶⁸ It may be debated, however, whether retroactivity could be applied back earlier than the adoption of the new rule. In *Silicon metal*, the Council stated that the amount of absorption of duty is calculated on the basis of the difference between the import price during the period of the initial investigation (1 Jan. to 31 Dec. 1988), and the import price during the period following imposition of a provisional anti-dumping duty (1 Apr. 1990 to 30 Sep. 1991).⁶⁹

It should be noted that it seems questionable whether the retroactive application of the additional anti-dumping duty is compatible with

68. The third paragraph of Article 13(11)(b).

69. *Silicon metal* (China), Coun.Reg.(EEC) No 1607/92, OJ (1992) L 170/1, p2.

GATT rules. According to Article 11(1) of the GATT Anti-dumping Code, the retroactive application of anti-dumping duty is accepted in only two situations; retroactive collection of provisional duty⁷⁰ or in cases of sporadic dumping.⁷¹ Retroactivity of the additional anti-dumping duty is nothing to do with these situation mentioned above.

2.4.3. Application of the Additional Duties in the Context of Anti-circumvention Duties

Where anti-dumping duty on imported products is increased by the additional duty, and where an anti-circumvention duty is already imposed on the products which were assembled in the Community by related parties, it seems to be reasonable to recalculate the amount of the anti-circumvention duty, because the amount of anti-circumvention duty is recalculated in proportion to the increase in the additional duty. It is questionable, however, whether anti-circumvention duty can be increased pursuant to the additional duty only, if there is no increase in the price of the products assembled in the Community after imposition of anti-circumvention duty. In this regard, one can argue that the additional anti-dumping duty should be applied as long as the anti-dumping duty has been borne by the exporter.⁷² As a result, anti-circumvention duty should be recalculated if the prices of the products assembled in the Community have not increased in

70. Article 11(1)(i) of the 1979 GATT Anti-dumping Code provides that where a final finding of injury is made or, in case of a final finding of threat of injury, where the effect of the dumped imports would have led to a finding of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures have been applied.

71. Article 11(1)(ii)(b) of the GATT 1979 Anti-dumping Code provides for cases where the authorities determine that the injury is caused by sporadic dumping to such an extent that, in order to preclude it recurring, it appears necessary to levy an anti-dumping duty retroactively on those imports.

72. Article 13(11)(b) of the Community Anti-dumping Regulation.

spite of the imposition of anti-circumvention duty.

It could, however, be argued that anti-circumvention duty could be increased with the application of the additional duty only, for prevention of circumvention of the duty imposed on imported products. The reason is that the anti-circumvention duty has, as its original purpose, prevention of circumvention. Therefore, the additional duty could not be applied to the products assembled in the Community so long as the anti-dumping duty has not been circumvented.

Taking into account both argument above, recognising the special function of anti-circumvention duties, it is more reasonable to discourage attempts to apply measures in Article 13(11) to duties imposed by Article 13(10).

3. RELIEF SYSTEMS IN KOREA

3.1. Undertakings⁷³

An exporter of the product under consideration, during the course of an investigation, can offer an undertaking under Article 10(3) of the Act,⁷⁴ presenting his intention in writing.⁷⁵ Since 1989, however, under-

73. From 1986 to 1993, 15 investigations were initiated. Of these 15 investigations, only 2 investigations were concluded by the acceptance of undertakings. *Dicumyl Peroxide* (Japan, Taiwan), April 15, 1986, and *Alumina Cement* (France), Sep. 2, 1988. KIEP, *Policies related to Trade in Korea*, p202. At the time of writing, it is not possible to get original documents of these two because access to documents is not allowed.

74. Article 10(3) of the Act provides that if an investigation is initiated or if provisional measures are taken, the exporter of the goods concerned or the Minister of Finance (hereinafter referred to as "Minister") may offer an undertaking in which prices are revised or exports are ceased or reduced to the extent that injury caused by dumping is eliminated.

75. Article 4(11)(i) of the EDCA.

takings have never been offered. The Korean authority, i.e. the Ministry of Finance, enjoys a wide discretion because it may accept an undertaking which offers an immediate revision of price,⁷⁶ or a cessation of export⁷⁷ or reduction of the volume of export below a certain level, in terms as determined after consultation with the Minister,⁷⁸ and may not accept an undertaking where it is deemed difficult to secure the fulfilment of the undertaking,⁷⁹ and may offer the undertaking to the exporter specified.⁸⁰

When undertakings are offered, the contents of such undertakings should be notified to the chief of administration concerned, the investigation authorities, and interested persons.⁸¹ The Minister may not accept or offer undertakings before the report on the result of a preliminary investigation or the letter of resolution on a preliminary determination are submitted.⁸² When accepting undertakings or notifying the acceptance of the undertakings, the Minister may require the exporter to provide, periodically, data relevant to the fulfilment of such undertakings, and to permit verification of the said data.⁸³ Non-compliance with such requirements or non-fulfilment of the undertaking accepted should be construed as a violation of the undertaking, and the Minister may continue to take measures for preventing dumping.⁸⁴ If the undertaking is accepted, the investigation should be suspended or terminated, and the provi-

76. *Dicumyl Peroxide* (Japan, Taiwan), and *Alumina Cement* (France). See, KIEP, p202.

77. *Dicumyl Peroxide* (Japan, Taiwan). Ibid.

78. Article 4(11)(ii) of the EDCA.

79. Article 4(11)(iv) of the EDCA.

80. Article 4(11)(v) of the EDCA.

81. Article 4(11)(iii) of the EDCA.

82. Article 4(11)(vi) of the EDCA. It means that for the termination of a proceeding with an acceptance of undertakings, the Minister should know the existence of dumping and injury therefrom.

83. Article 4(11)(vii) of the EDCA.

84. Article 4(11)(ix) and (x) of the EDCA.

sional measures already taken should be cancelled.⁸⁵ However, the acceptance of the undertaking does not always lead to cancellation of the provisional measure already taken, because the provisional anti-dumping duty paid may be not refunded if it is confirmed that material injury, etc. has occurred.⁸⁶ Even though there is no material injury etc., if it is judged that a determination of no material injury etc. is due to the existence of an undertaking, the undertaking is required to be maintained.⁸⁷

3.2. Imposition of Anti-dumping Duties

3.2.1. Provisional Duties

Concerning those goods on which an investigation is initiated, if sufficient evidence is found to lead to the belief that the goods are imported for dumping and that material injury etc. has resulted therefrom, and if deemed necessary to eliminate injury that may occur during the investigation period, a provisional anti-dumping duty is imposed or a security is ordered, even before the completion of investigation.⁸⁸ The provisional measure, when the preliminary investigation is terminated, may be taken not less than 60 days after the initiation of the preliminary investigation.⁸⁹ The maximum validity period of the provisional measure

85. Article 10(4) of the Korean Customs Act.

86. Article 4(11)(viii) of the EDCA.

87. Article 4(11)(x) of the EDCA. When the provisional measure is withdrawn, the provisional anti-dumping duty paid should be refunded and the offered security should be released.

88. Article 10(2) of the Korean Customs Act.

89. Article 4(10)(i) of the EDCA.

is 4 months.⁹⁰ When a security is offered, it should be more than the amount of the provisional anti-dumping duty.⁹¹

3.2.2. Definitive Anti-dumping Duties

If the importation of foreign goods for sale at a price lower than the normal price cause material injury etc., and if it is deemed necessary to protect the domestic industry concerned, a duty may be imposed in an amount equal to or less than dumping margin.⁹² The anti-dumping duty is imposed on each exporter⁹³ based on a fixed rate of anti-dumping duty or a fixed standard import price.⁹⁴ So far, all definitive anti-dumping duties have been imposed on the basis of a fixed rate.⁹⁵

The anti-dumping duty to an exporter who is not subject to investigation should be imposed on the basis of the rate of anti-dumping duty applicable to an exporter who is subject to investigation, or the rate of the anti-dumping duty which is equal to the weighted average of the standard import price, or standard import price.⁹⁶ When the anti-dumping duty is imposed by specifying an exporting country and when a new exporter of

90. Article 4(10)(ii) of the EDCA. However, where exporters representing a significant proportion of the trade of such goods so request, this period may be prolonged for a further period of 2 months.

91. Article 4(10)(iv) of the EDCA.

92. Article 10(1) of the Korean Customs Act.

93. The exporter who exports during the period of investigation and submits materials, but is not subject to investigation is included. A proviso of Article 4(9)(ii) of the EDCA.

94. Article 4(9)(i) of the EDCA. A fixed standard import price means that the price adds the cost concerned with import to the adjusted normal price. Article 4(9)(iv) of the EDCA.

95. *Phosphoric Acid* (China) FMA No 1993-6, OG (1993) No 12350, p25, *Ballbearings* (Thailand) FMA No 1993-10, OG (1993) No 12379, p141, *Soda Ash* (China) FMA No 1993-75, OG (1993) No 12606, p183, *Printing Plate* (Japan) FMA No 1993-76, OG (1993) No 12606, p191, and *Glass Fiber* (USA, Japan, Taiwan) FMA No 1994-57, OG (1994) No 12786, p27.

96. Article 4(9)(ii) of the EDCA.

the exporting country who exports after the period of investigation has a special relation with the exporter who is subject to the anti-dumping duty, the anti-dumping duty is imposed on the basis of the rate of anti-dumping duty or the standard import price applied to the latter.⁹⁷

In cases where the amount of the anti-dumping duty on the goods imported during the period for which the provisional measures were in effect, is equal to or exceeds that of the provisional duty, such provisional duty becomes the amount of the anti-dumping duty.⁹⁸ Furthermore, when security is offered, the amount of the anti-dumping duty imposed retroactively during the period for which the provisional anti-dumping duty was in effect, should not exceed the amount equivalent to the provisional anti-dumping duty.⁹⁹

II. REVIEW SYSTEMS

1. INTRODUCTION

Under the Community's Anti-dumping legislation, the Regulations and Decisions imposing anti-dumping duties and Decisions accepting price undertakings could be subject to administrative reviews and judicial review.¹⁰⁰ According to the Community Anti-dumping Regulation, the review could be held either at the request of a Member state or on the initiative

97. Article 4(9)(iii) of the EDCA.

98. Article 4(13)(i) of the EDCA. If it is the other way around, the provisional anti-dumping duty which is equivalent to the difference should be refunded.

99. Article 4(13)(ii) of the EDCA.

100. There is no special provision in the Community Anti-dumping Regulation for judicial review. As a result, the general provisions of the EEC Treaty, for example Article 173 and Article 177, apply. This will be discussed in detail in subsection 4 of this chapter.

of the Commission. It should be held where an interested party so request.¹⁰¹ Article 15, furthermore, provides that anti-dumping duties and price undertakings should automatically be terminated after five years from the date on which they entered into force unless this "sunset review" demonstrates that they should remain in force.¹⁰²

Under Article 14, exporters who were not included in the original anti-dumping investigation because they did not export during the investigation period, but have become subject to anti-dumping measures, may request administrative review as well.¹⁰³ Article 13(11) provides for the administrative review of anti-dumping duties where the exporters bear the anti-dumping duty thus reducing the export price and increasing the dumping margin.¹⁰⁴

2. Administrative Review (Article 14 Review)

According to Article 14 of the Community Anti-dumping Regulation, regulations imposing anti-dumping duties and decisions to accept undertaking should be subject to review, in whole or in part, where warranted.¹⁰⁵

101. 16 out of a total of 27 review investigations which were initiated in 1992 were under Article 14 reviews. See, Commission, *11th anti-dumping report* (1992), Com.(93) 516, final. The period over 1990 to 1994, a total of 69 reviews have been initiated under Article 14. Among them, 26 measures were repealed and 42 were allowed to continue. Commission, *13th anti-dumping report* (1994), COM(95) 309 final, p46.

102. 23 out of a total of 37 review investigations which were initiated in 1992 were under Article 15 reviews. Among them 18 measures were allowed to expire automatically, and 5 measures were continued in an amended form. Commission, *13th anti-dumping report*, COM(95) 309 final, p46.

103. 1 of the 37 review investigations which were initiated in 1994 was regarded as a "prospective exporter" review. See, subsection 2.1.3. of section I. Relief.

104. See, subsection 2.4. of section V. Relief.

105. Article 14(1) of the Community Anti-dumping Regulation.

A review may be held either at the request of a Member state or on the initiative of the Commission. A review should be held where an interested party so requests and submits evidence of changed circumstances sufficient to justify the need for such review, if at least one year has elapsed since the conclusion of the investigation. Where warranted by the review, the anti-dumping measures should be amended, repealed or annulled by the Community authorities competent for their introduction.¹⁰⁶

2.1. Conditions for the Initiation of an Administrative Review

In order to initiate Article 14 review, two requirements should be met. The first requirement for Article 14 review is that sufficient evidence of changed circumstances to justify the need for such review is submitted, while the GATT Anti-dumping Code requests just positive information substantiating the need for review.¹⁰⁷ Compared with the GATT requirements, the Community procedure has stricter requirements to meet, although the Commission has accepted a wide variety of grounds as evidence of changed circumstances, including increased dumping,¹⁰⁸ absence of dumping,¹⁰⁹ increased injury,¹¹⁰ change in exchange rates,¹¹¹ and viola-

106. Second paragraph of Article 14(1) and 14(3) of the Community Anti-dumping Regulation.

107. Article 9(2) of the GATT Anti-dumping Code provides that the investigating authorities shall review the need for the continued imposition of duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.

108. *Ballbearings*, 88/C 159/01, OJ (1988) C 159/2.

109. *Ballbearings*, Coun.Reg.(EEC) No 3528/87, OJ (1987) L 336/1, p1.

110. *Acrylic fibres (Mexico)*, 88/C 117/04, OJ (1988) C 117/3.

111. *Acrylic fibres*, Ibid.

tion of an undertaking.¹¹² Furthermore, even if an interested party has submitted evidence of changed circumstances, review is not automatically granted in the Community anti-dumping system because the Commission enjoys a margin of discretion in deciding whether requests for review are sufficient to justify the need for such review. Therefore, Article 9(2) of the GATT Anti-dumping Code providing "positive information substantiating the need for review" could be a good model to decrease administrative discretion in this field.

Even if an administrative review is granted, the outcome of the review procedure is unlikely to be able to remedy the changed circumstances because the review procedure usually takes almost as long as the original proceeding according to Article 14(2) of the Anti-dumping Regulation providing that the investigation for review should be re-opened in accordance with Article 7. In practice, it depends on the circumstances of the case, whether the review may bring about a entirely new proceeding. In *Ballbearings*,¹¹³ the review proceeding was restricted to a particular party, because the application for review only concerned the individual situation of that party.

Up to the 1979 Anti-dumping Regulations,¹¹⁴ the above mentioned submission of sufficient evidence was the only requirement for requesting a review. It could be argued, however, that a party which is reluctant to

112. *Copper sulphate*, Com.Reg.(EEC) No 2386/88, OJ (1988) L 205/68, p68. An anti-dumping proceedings may be re-opened where the Commission has reason to believe that undertaking has been violated, according to Article 10(6) of the Anti-dumping Regulation. In *Chemical fertilizer (USA)*, OJ (1988) C 2/2, the Commission based its action on Article 10(6) and Article 14 because an exporter who had offered an undertaking had withdrawn the undertaking and simultaneously submitted a request for a review.

113. *Ballbearings*, Coun.Reg.(EEC) No 3528/87, OJ (1987) L 336/1, p1.

114. Coun.Reg.(EEC) No 3017/79, OJ (1979) L 339/1, and Coun.Reg.(EEC) No 1781/79, OJ (1979) L 196/1.

co-operate in an investigation will request a review as soon as a protective measure has been made. Thus, since the 1982 Anti-dumping Regulation¹¹⁵ and in the subsequent Regulations,¹¹⁶ a review is only held at the request of an interested party, provided that at least one year has elapsed since the conclusion of the investigation.¹¹⁷ However, this provision could also be criticised in that it makes no sense to prospective exporters. Thus, in *Video cassettes and video tape reels*,¹¹⁸ the Commission stated that it was prepared to waive this requirement in case of prospective exporters affected by an anti-dumping duty.

When a review is initiated on the Commission's own initiative, however, the above-mentioned requirements are not applied. The Commission does not have to establish sufficient evidence of changed circumstances nor does it have to respect the one year lapse period. Furthermore, the Commission has reviewed anti-dumping proceedings relying on changed circumstances in general,¹¹⁹ consequences of a judgment of ECJ,¹²⁰ incorrect findings in the preliminary investigation,¹²¹ and certain procedural problems.¹²²

115. Coun.Reg.(EEC) No 1580/82, OJ (1982) L 178/9.

116. Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1, Coun.Reg.(EEC) No 1761/87, OJ (1987) L 167/9 and Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

117. Second paragraph of Article 14(1) of the Community Anti-dumping Regulation.

118. *Video cassettes and video tape reels* (Korea and Hong Kong), Coun.Reg.(EEC) No 1768/89, OJ (1989) L 174/1, p6.

119. *Orthoxylene* (Puerto Rico, USA), OJ (1982) C 124/2.

120. *Video cassettes and video tape reels* (Korea, Hong Kong), note 89 supra.

121. *Electronic typewriters* (Japan), 85/C 149/03, OJ (1985) C 149/3, p3.

122. *Video cassettes and video tape reels* (Korea, Hong Kong), note 89 supra.

3. The "Sunset" Review (Article 15 Review)

Since the 1984 Anti-dumping Regulation,¹²³ anti-dumping duties and undertakings automatically lapse after five years from the date on which they entered into force or were last modified or confirmed. This is the so-called "sunset" review. The Commission should, after consultation, publish a notice of the impending expiry of the measures in question within six months prior to the end of the five year period.¹²⁴ If an interested party shows that the expiry of the measure would lead again to injury or threat of injury,¹²⁵ the Commission should, after consultation, publish a notice of its intention to carry out a review of the measure prior to the end of the relevant five year period.¹²⁶ The intention of the review should be published within six months after the end of the relevant five year period, otherwise the measure should lapse automatically at the end of that six month period.¹²⁷

Where the review of a measure under Article 14 is in progress at the end of the relevant five year period, the measure shall remain in force pending the outcome of such review. A notice to this effect shall be published before the end of the relevant five year period.¹²⁸ However, where anti-dumping duties and undertakings automatically lapse under this Article, the Commission shall publish a notice to that effect in the *Official Journal of the European Communities*.¹²⁹

This so called "sunset" provision is a significant improvement over

123. Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1.

124. Article 15(2) of the Community Anti-dumping Regulation.

125. *Hardboard* (Romania, Brazil and Sweden), Com.Dec.89/377/EEC, OJ (1989) L 176/51.

126. Article 15(3) of the Community Anti-dumping Regulation.

127. *Ibid*, second paragraph of Article 15(3).

128. *Ibid*, Article 15(4).

129. *Ibid*, Article 15(5).

prior legislations¹³⁰ because it sets the period of validity of anti-dumping measures. Before the 1984 Regulation, anti-dumping duties or undertakings had remained in force endlessly, far beyond the needs of Community industry.

This provision, providing a five-year period for automatic expiry of anti-dumping measures, guarantees legal certainty. According to the GATT rules, however, anti-dumping measures should remain in force only as long as, and to the extent necessary to counteract injurious dumping.¹³¹ Thus it is more desirable that anti-dumping measures should lapse even before the five years period, if they have counteracted injurious dumping.

4. JUDICIAL REVIEW

4.1. INTRODUCTION

The Commission stated in its Explanatory Memorandum¹³² accompanying its proposal to amend the 1984 Community anti-dumping legislation¹³³ that it was necessary to define more precisely certain rules because of 'relatively vague principles' contained in the Community anti-dumping legislation which may possibly fall within the competence of the proposed court

130. Coun.Reg.(EEC) No 459/68, OJ (1968) L 93/1, Coun.Reg.(EEC) No 2011/73, OJ (1973) L 206/3, Coun.Reg.(EEC) No 1411/77, OJ (1977) L 160/4, Coun.Reg.(EEC) No 1681/79, OJ (1979) L 196/1, and Coun.Reg.(EEC) No 1580/82, OJ (1982) L 178/9.

131. Article 9(1) of the GATT Anti-dumping Code.

132. Commission, *Proposal for a Coun.Reg.(EEC) amending Regulation (EEC) No 2176/84 on protection against dumped or subsidized imports from countries not members of the European Economic Community*, COM(88) 112 final, pl.

133. Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1.

of first instance.¹³⁴ As a result, the Commission continues to enjoy a wide discretion in applying the trade defence rules. The exercise by the Community authorities of their power in the field of trade defence, however, may be subject to review by the Court of Justice (hereinafter referred to as "the Court") under Article 173¹³⁵ of the EEC Treaty, although there is no specific provision in the Community Anti-dumping Regulation.

In practice, the Court has been reluctant to deal with economic evaluations the Community authorities make in their decisions. Furthermore, it has restricted itself to review of the legality of the decisions adopted by the Community authorities. This general attitude of the Court was well expressed in two cases: the *Grundig* case¹³⁶ and the *Remia* case.¹³⁷ In its judgments in the two cases, the Court emphasised that the Commission's decisions were based on an appraisal of complex economic situations and review of such appraisal, therefore, had to be limited to verifying whether the relevant procedural rules had been complied with, and whether there had been a manifest error of appraisal or a misuse of

134. Coun.Dec. No 88/591/Euratom, ECSC, EEC, OJ (1988) L 319/1, amended by OJ (1989) C 215/1, and Coun.Dec. No 93/350/Euroatom, ECSC, EEC, OJ (1993) L 144/21. Through Article 3(3) of 1988 Regulation, the Council decided to re-examine the proposal by the Court of Justice to give the Court of First Instance (hereinafter CFI) competence to exercise jurisdiction in action relating to measures to protect trade within the meaning of Article 113 of the EEC Treaty in case of dumping and subsidy, after two years of operation of the CIF. Furthermore, in its subsequent amendment in 1993, the Council stated that the entry into force of this Decision relating to Article 113 of the EEC Treaty in case of dumping, should be deferred to a date to be fixed by the Council by unanimous decision. See, Coun.Dec. 93/350, p22.

135. Article 173 of the EEC Treaty provides that the Court shall review the legality of acts adopted by the Community authorities ... and it shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

136. Joined cases 56 and 58/64, *Consten & Grundig v Commission*, [1964] ECR 299, at 347.

137. Case 42/84, *Remia v Commission*, [1987] ECR 2545, at 2575.

powers.

Although the above-mentioned cases were in the field of competition, the Court has followed the same approach in anti-dumping proceedings. In the *Ballbearings* case, the Court, citing the *Remia* case, reconfirmed its position and held that the choice between the different methods of calculation requires an appraisal of complex economic situations. The Court 'must therefore limit its review of such an appraisal to verify whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers'.¹³⁸ However, it should be noted that the defendant was forced to prove his innocence as a result of the fact that the Court was reluctant to review the facts established by the Commission and the Council.

After initial reluctance to deal with Community authorities' decisions on anti-dumping measures, the Court started to clarify this matter through the 1983 *FEDIOL*¹³⁹ and 1984 *Allied Corporation*¹⁴⁰ judgments. In these cases, in spite of the fact that the Court recognised complainants right to institute judicial review, a number of problems remain with regard to admissibility, judicial protection, and its scope.

2. The Problems of Admissibility

As mentioned above, the decisions of Community authorities are subject to review by the Court under Article 173 of the EEC Treaty. According to this Article 'any natural or legal person may institute proceedings against a decision addressed to that person or against a

138. Case 240/84, *NTN Toyo Bearing v Council*, [1987] ECR 1809, at 1854.

139. Case 191/82, *FEDIOL v Commission*, [1983] ECR 2913.

140. Joined Cases 239 & 275/82, *Allied Corporation v Commission*, [1984] ECR 1005.

decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.¹⁴¹ Therefore, any natural or legal person may institute annulment proceedings against a decision addressed to himself, and/or against a decision which is of direct and individual concern to him, although in the form of a regulation or of a decision addressed to another person.

The reason why actions for the annulment of anti-dumping decisions often raise problems of admissibility is that anti-dumping proceedings affect different interested parties, namely foreign exporters, Community importers, and Community producers, in different ways. Moreover, some determinations are made in the form of decisions and others in the form of regulations. Undertakings are accepted by decisions while provisional and definitive anti-dumping duties and definitive collection of provisional duties are imposed in the form of regulations.¹⁴² In order to institute the proceeding for the annulment of anti-dumping decisions, three prerequisites must be satisfied; the requirement of a decision, direct concern, and individual concern.

4.2.1. The Requirement of a Decision

According to Article 189 of the EEC Treaty, a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States, while a decision shall, merely, be binding in its entirety upon those to whom it is addressed. Having looked at the basic sources of Community law, it is important to examine the way in which they have been interpreted by the Court, because its judgments and its interpretations of the Treaties and Community laws are definitive and

141. Second para. of Article 173 of the EEC Treaty.

142. See, Article 13(1) and 14 of the Anti-dumping Regulation.

final.

In the *Plaumann* case, the Court held that decisions are characterised by the limited number of persons affected by them.¹⁴³ Later, in *Zuckerfabrik Watenstedt*, the Court defined a regulation by saying that 'it is applicable to objectively determined situations and that it involves legal consequences for categories of persons viewed in a general and abstract manner'.¹⁴⁴

Despite these definitions from the Court, the question whether of admissibility of an individual appeal against a determination to impose anti-dumping duties by regulations remains because the Community authorities do not have power to impose anti-dumping duties by decisions.

With regard to the requirement of a decision, there are two outstanding arguments. In the first *Ballbearings* case, Advocate-General Warner insisted that an anti-dumping regulation is a hybrid instrument. Therefore for everyone except the Big Four it is a regulation and nothing but a regulation. *Quad* each of the Big Four, however, it constitutes a decision of direct and individual concern.¹⁴⁵ In the *Extramet*¹⁴⁶ case, Advocate-General Jacobs said that the requirement of a decision does not exist independently of the requirement of individual concern.¹⁴⁷

Once individual concern is established, therefore, the contested

143. Case 25/62, *Plaumann v Commission*, [1963] ECR 95.

144. Case 6/68, *Zuckerfabrik Watenstedt v Council*, [1968] ECR 409, at 415.

145. Case 113/77, *NTN Toyo Bearings v Council*, [1979] ECR 1185, at 1246.

146. Case C-358/89, *Extramet v Council*, [1991] ECR I-2501, at I-2509 and I-2520.

147. In Case C-152/88, *Sofrimport v Commission*, [1990] ECR I-2477, the Court held that 'With regard to the admissibility of the application for annulment, it must be determined whether the contested measures are of direct and individual concern to the applicant within the meaning of the second paragraph of Article 173 of the EEC Treaty'. In this judgment, the question whether those contested measures amounted in substance to decisions was not discussed. This approach is supported by the Court's judgment in the *Extramet* case.

measure must in substance be a decision, because a true regulation cannot be of individual concern to anybody. Therefore, as cited in *Alusuisse*, the choice of form may not alter the nature of a measure.¹⁴⁸ In the other words, in determining whether a measure constitutes a regulation or a decision, the critical criterion is its substance rather than the label the adopted authorities have chosen to give it. It must be born in mind that the criterion which distinguishes a regulation from a decision is whether or not the measure is of general application.

4.2.2. Direct Concern

An applicant will only be of direct concern if there is a direct relation of cause and effect between the decision and the way in which it can be applied to him. There must not be any margin of discretion between the decision and the application of that decision.

This direct concern test is usually considered satisfied in the anti-dumping cases, because the effect of a regulation involving imposition or collection of duty is to require the customs authorities of the Member States to collect the duty on all imports of the product in question into the Community. The Member States' authorities have no discretion in this matter because 'such collection was purely automatic and, moreover, in pursuance not of intermediate national rules but of Community rules alone'.¹⁴⁹

4.2.3. Individual Concern

It seems that if an applicant can prove that he is individually

148. Case 307/81, *Alusuisse v Council and Commission*, [1982] ECR 3463, at 3472.

149. Case 118/77, *ISO. v Council*, [1979] ECR 1277, at 1294. In the *Alusuisse*, the issue whether the measure was of direct concern to the applicant was not even arisen. See, *Alusuisse* case, see *supra* note 147, at 3472.

concerned by an anti-dumping regulation, the other above-mentioned requirements are assumed to be satisfied. In the *Plaumann* case,¹⁵⁰ the Court interpreted individual concern test and held that 'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as the case of the person addressed'. When this interpretation has been applied in anti-dumping cases, however, the Court has drawn a line to distinguish between producers, exporters, and complainants on the one side and importers on the other.

In the *Ballbearings*¹⁵¹ cases, the Court concluded that the exporter and the importer were individually concerned. In *Allied I and II*¹⁵² cases, the Court held more precisely that the producer and the importer who were

150. Case 25/62, *Plaumann v Commission*, [1963] ECR 95, at 107. The Court in this case also held that if the applicant is not individually concerned by the decision, it becomes unnecessary to enquire whether he is directly concerned.

151. Case 119/77, *Nippon Seiko v Council and Commission*, [1979] ECR 1303, at 1327. With regard to the exporters, the Court held that 'the measure in question is intended to ensure the strict observance of the stated undertakings by the creation of an additional penalty. Thus, although drafted in general terms, Article 1 in fact concerns only the situation of the major Japanese producers who are directly and individually concerned by reason of the undertakings which they have given to revise their prices'.

With regard to the importers, the Court concluded that 'the special feature of Article 3 does not concern all importers but only those who have imported the products manufactured by the four major Japanese producers named in that article'.

152. Joined cases 239 and 275/82, *Allied Corporation v Commission*, [1984] ECR 1005 (*Allied I*) at 1030, and case 53/83, *Allied Corporation v Commission*, [1985] ECR 1621 (*Allied II*), at 1656. In these judgments, the Court ruled that 'measures imposing anti-dumping duties are liable to be of direct and individual concern to those producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or by the Council or were concerned by the preliminary investigation'.

specially identified by an anti-dumping regulation or who were involved in preliminary investigations were individually concerned.

In the case of complainants, furthermore, they are considered to be individually concerned as a result of provisions of the Anti-dumping Regulation providing that 'any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped imports may lodge a written complaint which contain sufficient evidence of the existence of injurious dumping.¹⁵³

The complainant may seek the annulment of an anti-dumping regulation in various situations.¹⁵⁴ In the *FEDIOL* case, the applicant sought the annulment of a communication in the form of a letter from the Commission informing the applicant that an antisubsidy proceeding would not be initiated in respect of the matters raised in a complaint previously lodged by the applicant. The issue before the Court in this case was not the problem of individual and direct concern but the problem of the legal effect of a letter from the Commission. The Court, however, concluded that "complainants must be acknowledged to have a right to bring an action where it is alleged that the Community authorities have disregarded rights which have been recognised in the regulation".¹⁵⁵ This conclusion was in accordance with the basic regulation¹⁵⁶ which recognised the existence of a legitimate interest on the part of Community producers in the adoption

153. Article 5(1) and (2) of the Anti-dumping Regulation.

154. In the *FEDIOL* case, [1983] ECR 2913, the complainants were dissatisfied with the outcome of anti-subsidy proceedings. In the *Timex* case, [1985] ECR 849, the complainants were dissatisfied with the result of an anti-dumping investigation.

155. Case 191/82, *FEDIOL v Commission*, [1983] ECR 2913, at paragraph 28.

156. Coun.Reg.(EEC) No 3017/79, OJ (1979) L 339/1.

antisubsidy measures. In *Timex v Council and Commission*,¹⁵⁷ the applicant, Timex, sought the annulment of the regulation imposing a duty because it was dissatisfied with the result of the investigation, in which it was decided to impose a low level of anti-dumping duty. The Court decided that the action was admissible because of the applicant's role in the proceedings before the Commission and of its market position.

In *Gimelec and Others*,¹⁵⁸ the Commission did not challenge admissibility and moreover the Court did not discuss it, in spite of the fact that the applicants had to establish that they were directly and individually concerned, because the contested decision was not addressed to them. Therefore, the case law suggests that proceedings may be brought either by complainants or by an undertaking which, even though it could not lodge the complaint itself, played a leading role in the initiation of the complaint. Moreover, such proceedings may be brought either against a communication addressed to the applicant stating that no action is to be taken, or against a regulation imposing an anti-dumping duty.¹⁵⁹

Even though the Commission opened an investigation as a result of a complaint by an association of mechanical watch manufacturers in France and the UK, it has not been expressly resolved whether a complainant association has the right to challenge such a regulation. If so, this

157. Case 264/82, *Timex v Council and Commission*, [1985] ECR 849, at 866, paragraph 15. In this case, the Court held that the conduct of the investigation procedure was largely determined by Timex's observations and the anti-dumping duty was fixed in the light of the effect on Timex. The contested regulation was therefore based on the applicant's own situation. Therefore, the action was admissible.

158. Case C-315/90, *Gimelec and Others v Commission*, [1991] ECR I-5589, at I-5603.

159. See, Case 191/82, *FEDIOL v Commission*, [1983] ECR 2913, at 2936, paragraph 31 and 33; Case 264/82, *Timex v Council and Commission*, [1985] ECR 849, at 866, paragraph 15 and 16; Case C-358/89, *Extramet v Commission*, [1991] ECR I-2501, at I-2511-2, paragraph 22; and Case C-315/90, *Gimelec and Others v Commission*, [1991] ECR I-5589, at I-5603.

would be of significance in relation to the test of standing under Article 173 since it is doubtful whether such an association would satisfy either the requirement of direct concern¹⁶⁰ or the requirement of individual concern.¹⁶¹

Until the judgment of the *Extramet* case, the Court took a much stricter approach to the test of standing in actions brought by importers. Although the Court accepted the admissibility of an importer who brought an action in one of the *Ballbearings* cases,¹⁶² and although the Court recognised the admissibility of a limited group of importers in *Nippon Seiko* case,¹⁶³ the conclusion has been different which an independent importer has brought proceedings for the annulment of an anti-dumping regulation.

In the *Alusuisse* case,¹⁶⁴ the Court did not accept the admissibility of a private party with the reason that the contested regulations, as far as independent importers were concerned, applied to objectively determined situations and entailed legal effects for categories of persons regarded generally and in the abstract, and constituted therefore measures of general application. With almost the same reason, the Court in the

160. Case 135/81, *Groupement des Agenes des Voyages v Council*, [1982] ECR 3799.

161. Joined cases 16 and 17/62, *Producteurs de Fruits v Council*, [1962] ECR 471, at 479. The Court held that one cannot accept the principle that an association, in its capacity as representative of a category of businessmen, could be individually concerned by a measure affecting the general interests of that category.

162. Case 118/77, *ISO v Council*, [1979] ECR 1277, at 1292 and 1294. The reason for this judgment is that the contested measure affected only the major producers and their subsidiaries and exclusive importers. Therefore the contested measure was considered to be a decision adopted in the form of a regulation.

163. Case 119/77, *Nippon Seiko v Council and Commission*, [1979] ECR 1303, at 1327.

164. Case 307/81, *Alusuisse v Council and Commission*, [1982] ECR 3463, at 3472.

Allied case reaffirmed the ruling of the *Alusuisse* case.¹⁶⁵ These Court rulings were followed in a number of subsequent cases, in which an importer's standing against an anti-dumping regulation was admissible only where reference to the importer's resale price was used to determine the export prices which was used to decide whether dumping had occurred,¹⁶⁶ and where the anti-dumping duty had been established on the basis of the importer's resale prices.¹⁶⁷ As a result, the standing of independent importers was inadmissible consistently, even though they were the only importers of the product subject to the anti-dumping duty.¹⁶⁸

Accordingly it was insisted in the *Extramet* case that Extramet had no standing to seek a declaration that the contested regulation was void, inasmuch as it was an independent importer whose selling price was not considered in determination of the export price. However, the Court, rejecting this argument, held that although regulations imposing anti-dumping duties are of a legislative character, inasmuch as they apply to all the traders concerned, taken as a whole, their provisions may none the

165. Joined cases 239 and 275/82, *Allied Corporation v Commission*, [1984] ECR 1005, at 1031, para. 15.

166. This is permitted by Article 2(8)(b) of the Community Anti-dumping Regulation. It provides that in cases where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer. See, the orders in Case 279/86, *Sermes v Commission*, [1987] ECR 3109; Case 301/86, *Frimodt Pedersen v Commission*, [1987] ECR 3123; and Case 205/87, *Nuova Ceam v Commission*, [1987] ECR 4427.

167. See, the *Electric motors* cases, i.e. Joined cases C-304/86 and C-185/87, *Enital v Council and Commission*, [1990] ECR I-2939; Joined cases C-305/86 and C-160/87, *Neotype Techmash-export v Council and Commission*, [1990] ECR I-2945; Joined cases C-320/86 and C-188/87, *Stanko France v Commission and Council*, [1990] ECR I-3013; and Case C-157/87, *Electroimpex v Council*, [1990] ECR I-3201.

168. See, the orders in *Sermes*, *Frimodt Pedersen*, and *Nuova Ceam*, already cited, and the judgment in *Electroimpex* case.

less be of individual concern to a certain trader.¹⁶⁹ Although the Court concluded that measures imposing anti-dumping duties may be of individual concern in certain circumstances to certain traders who therefore have standing to bring an action for their annulment, it did not, ironically, support Extramet's argument that the contested regulation was of individual concern to it, in so far as it was the largest importer, it was involved in the anti-dumping procedure and it could be fully identified in the contested regulation. The Court cited only that the applicant was the largest importer of the product subject to the anti-dumping measure. This ruling could be interpreted as meaning that the Court indirectly followed the judgment in the earlier case-law which refused to allow the admissibility of independent importers, even where they belonged to a closed category, were fully identifiable in the contested regulation when it was adopted, and had been involved in the anti-dumping procedure.¹⁷⁰

It should be noted that, as we have seen, the Court has recognised identification in the contested measure and participation in the procedure as relevant to the admissibility of actions brought by other applicant, except independent importers. Since the applicant in *Extramet* satisfied above-mentioned condition, the Court should have cited Extramet's argument in whole.¹⁷¹

169. Case C-358/89, *Extramet v Council*, [1991] ECR I-2501, at I-2531; Joined Cases 239 and 275/82, *Allied Corporation v Commission*, [1984] ECR 1005, at 1030, para. 11; and Case 53/83, *Allied Corporation v Commission*, [1985] ECR 1621, at 1656, para. 4.

170. See, Case 307/81, *Alusuisse v Council and Commission*, [1992] ECR 3463; Case 279/86, *Sermes v Commission*, [1987] ECR 3109; Case 301/86, *Frimodt Pedersen v Commission*, [1987] ECR 3123; and Case 205/87, *Nuova Ceam v Commission*, [1987] ECR 4427.

171. See. Opinion of Advocate General Jacobs in Case C-358/89, *Extramet v Council*, [1991] ECR I-2501, at I-2525.

4.2.4. Remedies available to the Importers

Before the courts of a Member State

To disallow the admissibility of the independent importers would not always mean to block their access to any form of judicial review. According to Article 177 of the EEC Treaty, where questions of Community law are raised before any court of a Member state, that court may request the Court of Justice (hereinafter the Court) to give preliminary rulings.¹⁷² Furthermore, where a question of Community law is raised before any court of a Member state, that court must bring the matter before the Court if no judicial remedy is available under national law against a decision of a court of a Member state.¹⁷³ Therefore, importers who want to contest a regulation imposing anti-dumping duties or ordering definitive collection of provisional duties may rely on these provisions. Because the imposition of duties and definitive collection of provisional duties by the customs in a Member state are based on a Community measure, so a question of Community law would arise. As a result, the Court pointed out in *Alusuisse* and *Allied Corporation* that importers may contest before the national courts individual matters taken by the national authorities in application of the Community regulation¹⁷⁴ and there is no risk of conflicting decisions in this area since, by virtue of the mechanism of the reference for a preliminary ruling under Article 177 of the EEC Treaty, it is for the Court alone to give a final decision on the validity of the contested regulations.¹⁷⁵

172. Second paragraph of Article 177 of the EEC Treaty.

173. Third paragraph of Article 177 of the EEC Treaty.

174. Case 307/81, *Alusuisse v Council and Commission*, [1982] 3643, at 3473, para. 13.

175. Joined cases 239 and 275/82, *Allied Corporation v Commission*, [1984] 1005, at 1030, para. 13. Therefore access to remedies before the national court is also available to importers who presently bring the action before the Court under Article 173. See, case 138/79, *Roquette Freres v Council*, [1980] ECR 3333, at 3367.

In the anti-dumping context, proceedings before the national court is not a completely satisfactory alternative to a direct action before the European Court. The court in a Member state has no jurisdiction to declare the Community regulations invalid because a ruling to that effect can be given only by the European Court.¹⁷⁶ Decisions of the European Court, moreover, could have a uniform character while national court's decisions do not. Even with reference to a preliminary ruling under Article 177, the decision of the Court can not cover the same scope for investigating the matter as a direct action. It is available only in respect of limited points which are referred to the Court by the national courts. Even though importers award interim measures¹⁷⁷ which suspend a national measure based on a Community regulation by a national court, they have to bring proceedings in several national courts simultaneously, since such interim measures would be limited only to the Member state in question. However, there is no guarantee of a uniform outcome from several national courts. Furthermore, it would prejudice the uniform application of Community law, which is a fundamental requirement of the Community legal order.

176. Case 314/85, *Foto-Frost v Hauptzollamt Lubeck-Ost*, [1987] ECR 4199, at 4230, para. 11.

177. Joined cases C-143/88 and C-92/89, *Zuckerfabrik Suderdithmarschen v Hauptzollamt and Paderbone*, [1991] ECR I-415, at I-541 and I-544. The Court held that Article 189 of the Treaty has to be interpreted that it does not preclude the power of national courts to suspend enforcement of a national administrative measure adopted on the basis of a Community regulation. Suspension of enforcement of a national measure adopted in implementation of a Community regulation may be granted by a national court only if that court entertains serious doubts as to the validity of the Community measure and, the question of the validity of the contested measure has not already have been brought before the Court; if there is urgency and a threat of serious and irreparable damage to the applicant; and if the national court takes due account of the Community's interests.

4.2.5. Conclusion

It could be argued whether the Court's case law on the admissibility of actions for the annulment of anti-dumping regulations is in accordance with the predominant tendency of the Court's case law on the same issue in other contexts. The answer could be negative, as a result of the difference between Article 173 of the EEC Treaty and the Anti-dumping Regulation. The Anti-dumping Regulation, imposing a duty in the form of a regulation, can claim immunity from judicial review at the suit of natural and legal persons because Article 173 clearly provides that natural and legal persons should only have the admissibility to challenge acts that amounted in substance to decisions.

With regard to admissibility, the main issues which make the Court's case law on anti-dumping different from the dominant tendency of its case law are, for instance, the issue of individual concern, the position of complainants, and the requirement of a decision as we have seen above.

In *Extramet*, the Court held that the application was admissible with the reason that the applicant was individually concerned because its business activities were seriously affected by the contested regulation and it encountered difficulties in obtaining supplies because the sole Community producer was its main competitor.¹⁷⁸

In other contexts, however, the Court has consistently held that the fact that an applicant carries on a particular economic activity is not enough to establish individual concern.¹⁷⁹ In addition, the mere fact that a measure may exercise an influence on the competitive relationships cannot suffice to allow that any trader in any competitive relationship is

178. Case C-358/89, *Extramet v Council*, [1991] I-2501, at I-2532, para. 17.

179. Case 25/62, *Plaumann v Commission*, [1963] ECR 95. Joined Cases 10 and 18/68, *Eridania v Council*, [1969] ECR 459.

directly and individually concerned by that measure.¹⁸⁰

With respect to the position of complainant,¹⁸¹ as we have seen above, the Court's case laws¹⁸² are ready to accept annulment proceedings against anti-dumping regulations by the complainant. As pointed out in the *Extramet* case, however, it has not been clear whether a complainant trade association has standing to challenge such a regulation. According to the rule applicable outside the anti-dumping field, the Court has insisted that it would satisfy neither the requirement of direct concern¹⁸³ nor the requirement of individual concern.¹⁸⁴

On the requirement of a decision, the anti-dumping cases are broadly consistent with the Court's case law outside the dumping cases. Thus, the Court's judgments in a series of anti-dumping cases, that a contested regulation should be regarded as a decision in substance once individual concern is established, are consistent with the predominant tendency of its case law.¹⁸⁵

Such different approaches in the anti-dumping cases, as mentioned

180. Ibid, *Eridania* Case, at para. 7.

181. Article 5(1) of the Community Anti-dumping Regulation provides that "any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry ... may lodge a written complaint", while Article 173 of the EEC Treaty provides only that "any natural or legal person may institute proceeding against a decision addressed to that person ...".

182. See, Case 191/82, *FEDIOL v Commission*, [1983] ECR 2913, at 2936, para. 31 and 33; Case 264/82, *Timex v Commission and Council*, [1985] ECR 849, at 866, para. 15 and 16; Case C-358/89, *Extramet v Council*, [1991] ECR I-2501, at I-2511, para. 22; and Case C-315/90, *Gimlec and Others v Commission*, [1991] ECR I-5589, at I-5603.

183. Case 135/81, *Groupement des Agences de Voyages v Commission*, [1982] ECR 3799, at 3807, paragraph 7. In this decision, the Court held that as a non-profit-making association the Groupement did not and could not submit a tender in response to the invitation to tender so that the Commission's selection could not in any event have injured it directly.

184. Joined Cases 16 and 17/62, *Producteurs de Fruits v Council*, [1962] ECR 471, at 479.

185. See, subsection 4.2.1.

above, are likely to create uncertainty about admissibility which an applicant must establish in anti-dumping proceedings instituted under Article 173. Therefore, the Court should establish clear guidelines about differences in admissibility between the Court's case law in anti-dumping field and its case law applicable in other contexts.

4.3. Court of First Instance (CFI)

At the request of the Court, the Court of First Instance (hereinafter CFI) was established in order to examine certain petitions which are subject to an appeal to the Court and limited to matters of law, lodged by individuals or corporate bodies.¹⁸⁶ The Council, in the founding Decision of the CFI, decided to examine the Court's proposal to extend the CFI's competence to exercise jurisdiction in petitions lodged against one of the Community authorities by individuals relating to commercial defence measures within the meaning of Article 113 of the EEC Treaty for dumping and subsidy cases.¹⁸⁷

In its opinion¹⁸⁸ on the draft Council Decision, prepared by the Court, which was designed to extend the CFI's jurisdiction to all actions brought by individuals, the Commission considered that actions for annulment would not be significantly influenced by the proposed extension of the CFI's jurisdiction except in measures to protect trade from dumping and subsidies.

In the dumping area, the Commission took the view that the setting up of a double layer of judicial system would be in the interests of

186. Com.Dec. 88/591/Euratom, ECSC, EEC, *establishiing a Court of First Instance of the European Communities*, OJ (1988) L 319/1.

187. *Ibid*, Article 3(3).

188. SEC(92) 495 final.

foreign producers and of Community importers instead of Community industry. Therefore it insisted that it should find a solution to the additional difficulties caused by a two-tier judicial system, which would render the decision-making process even more cumbersome and burdened. This cumbersome procedure may create uncertainty as to the law for all interested parties. A lack of confidence in the effectiveness of Community commercial policy is likely to be created. As a consequence the Commission proposed to the Council the introduction of a more effective system which aimed at harmonising and streamlining the decision-making process with regard to measures of trade protection.¹⁸⁹ This proposal sets out to simplify the decision-making process by transferring to the Commission some of the powers currently relying on the Council. According to the proposal, the decision on a trade protection measure would be taken in all instances by the Commission after consultation of a committee composed of representatives of the Member States and chaired by the representative of the Commission.¹⁹⁰

With respect to the effectiveness of Community commercial defence

189. Commission, *Proposal for a Council Regulation (EEC) on the harmonization and streamlining of decision-making procedures for Community instruments of commercial defence and modification of the relevant Council regulations*, 92/C 181/06, OJ (1992) C 181/9, SEC(92) 1097 final. In the introductory remarks of this proposal, the Commission stated that the increased jurisdictional control which would result from the inclusion of measures of commercial defence with the jurisdiction of the CFI makes it imperative that current decision making procedures for the adoption of such measures be simplified.

190. *Ibid*, p10. According to Article 12a(3) and (6) of the Proposal, the representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. The Council may take a different decision within 20 days of deferment of application of the measures by the Commission.

instruments, there is another aspect of the overall problem, namely, the more lengthy commercial defence procedure in the Community system.¹⁹¹ The Commission, insisting that excessive time delays cause uncertainty in the market place, reduce the chances that measures have the desired effect, and contribute to the creation of a lack of confidence in the effectiveness of Community commercial policy,¹⁹² proposes introduction of the following maximum time-limits for anti-dumping proceedings:

- a maximum 1 month from receipt of complaint to initiation or rejection of complaint;
- a maximum 9 months between initiation of investigation and provisional measures;
- a maximum 15 months between initiation of investigation and definitive conclusion.¹⁹³

For the implementation of this time limits, the Commission suggested three preconditions; separate and parallel investigations of dumping and injury/Community interest, a more systematic use of sampling method in which a large number of parties are involved in the investigation, and recruitment of additional staff.¹⁹⁴

191. Commission, *Proposal for a Council Regulation (EEC) on the introduction of time limits for investigations carried out under the Community instruments of commercial defence and modification of the relevant Council regulations*, Com(93) 541 final, p1. According to the Commission, there are several main reasons for excessive time delays: much broader scope of its investigation because of a Community interest test and a "lesser duty rule", the absence of mandatory time limits in Community system, and shortage of staff in the Community anti-dumping service.

192. Ibid, p1.

193. Ibid, p3. The Commission will review the duration of these time limits within 2 years after its operation, when it may reduce these time limits further.

194. Ibid, p4 and p7. The Commission needs additional staff to implement the time limit, and the figures for staff are 10 in 1994, 73 in 1995, and the remaining 65 in 1996.

5. Reimbursement of Excessive Duty Collected

5.1. Introduction

In the EEC, anti-dumping measures as a trade policy instrument, are not limited on a transaction to transaction basis but apply to all imports of a certain product from a country or countries concerned. As a result, a different dumping margin could be applied to a product from different exporters of a country or countries involved. Therefore, the duty should be reimbursed if it exceeds the actual margin in the particular situation. According to the Community refund procedures provided in Article 16, where an importer can prove that the duty collected exceeds the actual dumping margin, taking into account any application of weighted average, the excess amount must be reimbursed.¹⁹⁵ This provision indicates three possible prerequisites for reimbursement of the excess amount; duty collected, actual dumping margin, and evidence.

Regulation 2423/88,¹⁹⁶ like its predecessors Regulation 2176/84,¹⁹⁷ Regulation 3017/79,¹⁹⁸ and Regulation 459/68,¹⁹⁹ however, does not establish any guidelines about the reimbursement of the duties collected except to put the reservation that consideration should be given to any application of weighted averages.

195. Article 16(1) of the Community Anti-dumping Regulation. This provision implements Article 8(3) of the GATT Anti-dumping Code which provides that "the amount of the anti-dumping duty must not exceed the margin of dumping. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible".

196. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

197. Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1.

198. Coun.Reg.(EEC) No 3017/79, OJ (1979) L 339/12.

199. Coun.Reg.(EEC) No 459/68, OJ (1968) L 93/8.

Until 1984, the Commission did not publish any reimbursement decisions nor was any action for reimbursement brought before the Court. In 1985, the Commission started to publish some of its reimbursement decisions.²⁰⁰ In 1986, eventually, the Commission laid down guidelines regarding the application of Article 16 of the Council Regulation 2176/84.²⁰¹ Subsequently, in 1987, the Court rendered its first judgment on the reimbursement procedure in *Continentale Produkten Gesellschaft* case.²⁰² In March 1992, the Court rendered an important decision in the area of refunds.²⁰³

5.2. Procedure for the Refund of Anti-dumping Duties

5.2.1. Standing and Addressee of Application

The Commission's notice is provided for the purpose of informing interested parties on guidelines regarding the application of refund provisions of the Anti-dumping Regulation and guiding the internal procedure of the Commission. Therefore, it could be considered that the Commission's notice does not have any legislative character.

According to the Commission's notice, any importer who has paid anti-dumping duties may apply for reimbursement on condition that he has not been reimbursed by the exporter or by any third party, and that no future compensatory arrangement will be made or accepted.²⁰⁴ In order to request the reimbursement, the Application should be submitted to the

200. *Cotton yarn (Turkey)*, Com.Dec.85/19/EEC, OJ (1985) L 11/34.

201. Commission, *Notice concerning the reimbursement of anti-dumping duties* (hereinafter referred to as the "Commission's notice"), 86/C 266/02, OJ (1986) C 266/2.

202. Case 312/84, *Continentale Produkten Gesellschaft v Commission*, [1987] ECR 841.

203. Case 188/88, *NMB GmbH and Others v Commission*, [1992] ECR I-1089.

204. Read jointly, Point I(1) and (3)A(d) of the Commission's notice.

Commission via the Member state in the territory of which the products were released for free circulation within three months of the date on which a definitive duty was paid or a provisional duty was definitively collected, even in cases where the Regulation imposing the duties in questions is being challenged before the Court.²⁰⁵

5.2.2. Contents of Application

Importers who have paid duties must prove that the dumping margin has been reduced or eliminated to such an extent that a reimbursement is considered justified. Furthermore, all necessary information for the examination of the admissibility and merits of the application should be submitted together with documentation and sufficient proof for verification.²⁰⁶ This information must be related to duty collected²⁰⁷ and actual dumping margin.²⁰⁸ Incomplete applications which fail to supply this information within the time limit may be rejected because the Commission intends to consider only those applications with all necessary information.²⁰⁹

5.2.3. Refund and Administrative Review

When examining any refund application, the Commission can decide at any time to initiate a review after one year has elapsed since the conclu-

205. Read jointly, Article 16(2) of the Community Anti-dumping Regulation and Point I(2),(8), and (10) of the Commission's notice.

206. Point I(3) of the Commission's notice.

207. Information relating to duty collected includes invoice, customs documents, receipt or other proof of duty paid and declaration that the duty collected has been paid by the importer concerned.

208. Information on actual dumping margin should cover information on normal value and export price.

209. Read jointly, Point I(3) and I(7) of the Commission's notice.

sion of the original investigation.²¹⁰ Commencement of a refund procedure could be followed by a review investigation. If it is proved that the exporter has not dumped or has dumped less than the dumping margin which was determined in the original investigation, the importer can obtain refunds for its imports over the period for which the Commission has established that dumping has occurred.

Even though this Commission's notice is a guideline on the internal refund procedure of the Commission, it does not make clear whether parties will have the same rights provided in Article 14 review provisions, because the notice states only that the Commission may inform the parties directly concerned of any application for the reimbursement of anti-dumping duties and may afford them an opportunity to comment.²¹¹ Although the fact that the Commission chose a notice rather than a regulation could indicate that the Commission's notice does not have a legislative character, legal expectation could be in danger if an importer submitted an application whose contents satisfied all the criteria stipulated in the notice, and the Commission did not act in response to the application. In this respect, the Court in *Louwage v Commission*, held that "although an internal directive has not the character of a rule of law which the administration is always bound to observe, it nonetheless sets forth a rule of conduct indicating the practice to be followed, from which the administration may not depart without giving the reasons which have led it to do so, since otherwise the principles of equality of treatment would be infringed".²¹² Furthermore, the notice did not establish any time limit for the Commission to process the application. This does not mean, however,

210. Second paragraph of Article 14(1) of the Community Anti-dumping Regulation and Point I(5) of the Commission's notice.

211. Point I(9) of the Commission's notice.

212. Case 148/73, *Raymond Louwage v Commission*, [1974] ECR 81 at 89, para. 12.

that the parties directly concerned would not bring an action before the Court.²¹³

5.3. Substantial Commission Policy on Refunds

5.3.1. The Commission's Position

on the Actual Dumping Margin

When an importer has paid anti-dumping duty and shown that the duty collected exceeded the actual dumping margin,²¹⁴ the importer is entitled to a refund. The Commission based on Point I(3) of its notice, however, has not accepted the argument that the actual dumping margin could be that determined at the time of the investigation.²¹⁵ In *Cotton yarn*,²¹⁶ in the Commission's first determination concerning an application for refund, the Commission made it clear that the Commission did not accept the argument that the refund calculation should be based on normal values calculated on a basis different from normal values definitively determined in the investigation. Therefore, in the refund procedure, the applicant can not challenge the legality of an anti-dumping regulation, because a refund can

213. If any natural or legal person complain to the Court that an institution of the Community has failed to address to that person any act, and if, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months. See, Article 175 of the EEC Treaty.

214. Article 16(1) of the Anti-dumping Regulation and Point I(1) of the Commission's notice. For the analysis of refund procedure, two dumping margins should be compared: the original dumping margin and the actual dumping margin. The former is that, based on which an anti-dumping duty has been paid, and the latter is that, based on which a refund is claimed.

215. First paragraph of Point I(3) of the Commission's notice stipulates that the Commission intends to consider only those applications which demonstrate that dumping margin has been reduced or eliminated and indicate the extent to which a reimbursement is considered justified.

216. *Cotton yarn (Turkey)*, Com.Dec.85/19/EEC, OJ (1985) 11/34, at 35.

be based on a change of circumstances between the original dumping margin at the time of the investigation and the new dumping margin at the time of the application for the refund. The Commission's view on the legality of an anti-dumping regulation was supported by the Court in *Continentale Produkten Gesellschaft* case²¹⁷ which held that Article 16 does not permit the validity of the regulation instituting the duties to be challenged or a review of the general findings made during the previous investigations to be requested.

Another question could be raised, whether an importer could make a refund claim based on the actual dumping margin at the time when a refund is requested. According to the Commission, reimbursement can be allowed if the importer proves that the data taken into account have changed since the imposition of the anti-dumping duty.²¹⁸ According to Article 16(1) of the Anti-dumping Regulation, however, 'consideration must be given to any application of weighted averages'. It is impossible to consider the individual values affecting the applicant which may retroactively undermine the validity of a regulation imposing an anti-dumping duty and the general findings in the original investigation.²¹⁹ Therefore, although it seems that a refund could be based on the actual dumping margin at the time when it is requested, it is only for representative values and weighted average, but not for general duties. As a result, the Commission's position in this issue is that an importer should be entitled to a refund only if it could demonstrate that the representative normal value, based on the normal values of the original investigation, has decreased,

217. Case 312/84, *Continentale Produkten Gesellschaft v Commission*, [1987] ECR 841, at 867, para. 12.

218. Point 26 of the Report of the Judge Rapporteur in *Continentale Produkten Gesellschaft* case. See, [1987] ECR 841, at 847.

219. *Ibid*, Point 25 of the Report of the Judge Rapporteur.

or that the weighted average export price of all the exporter concerned has increased following the imposition of anti-dumping duties.

If an importer using a new or non-investigated exporter applies for a refund, it must prove that the highest dumping margin during the investigation has decreased. If the dumping margin was established again as a result of the weighted average dumping margin over a certain period of time, an importer whose individual dumping margin is above the new weighted average margin just because of the new low weighted average dumping margin could claim a refund, whether or not its individual dumping margin has decreased. Otherwise, the general finding of the Commission would be undermined.

5.3.2. Associated Importer

There have been some differences in the application of anti-dumping margins for refunds between an independent importer and an associated importer.²²⁰ For example, if a normal value of 1000 and an export price of 800 has been established for a exporter, anti-dumping duty of 200 should be imposed. If the exporter increases its export price to 1000 and its importer had paid an anti-dumping duty of 200, then normally the importer is entitled to a refund of 200. The importer can deduct the refund from resale price to the first buyer and ask a price of 1000.

In the case of an associated importer, however, the export price has been constructed by deducting all costs incurred between importation and resale from the resale price. Furthermore, the anti-dumping duty is included in such a cost. As a result, under the same condition with an

220. According to Point IB(b)(iii) of the Commission's notice, importer and exporter will be deemed to be associated, in particular, in cases where one of them directly or indirectly controls the other, or both of them are directly or indirectly controlled a third person, or together they directly or indirectly control a third person.

independent importer, as mentioned above, when the exporter increases its export price to 1000, the importer who has paid anti-dumping duty of 200 is still not entitled to a refund because the export price after deducting all costs from the resale price is 800. Therefore, for an associated importer to qualify for a full refund, it must increase the export price at least to 1000; in addition, the importer must increase the resale price to the first independent buyer to 1200. Otherwise the associated importer is not entitled to apply for a refund.

This Commission's position on an associated importer was supported by the Court in the *NMB* case.²²¹ *NMB*'s European subsidiaries insisted that anti-dumping duties should not be considered to be a cost borne between importation and resale and therefore should not be deducted in constructing the export price. Such an interpretation is necessary in order to avoid unjustified discrimination between associated importers and independent importers.²²²

The Court, citing the Anti-dumping Regulation which stipulates expressly that the anti-dumping duties are to be deducted as costs incurred between importation and resale,²²³ ruled that in cases where the importer is associated with the exporter, the dumping margin should be calculated on the basis of export price constructed.

221. *NMB GmbH* case. See, *supra* note 202.

222. *Ibid*, at I-1737, para. 29 and 30.

223. *Ibid*, at I-1738, para. 32.

The discrimination in the treatment of independent importers and associated importers with respect to the refund is justified by the difference in their respective situations in relation to the dumping.²²⁴ The Court concluded, citing Article 2(8)(b) of the Anti-dumping Regulation, that anti-dumping duties should be deducted in constructing the export price, otherwise independent importer would be in a disadvantageous position compared to associated importers.²²⁵

In spite of the Court's ruling and consistent Commission's practice in this issue, it should be noted that the anti-dumping duty different from customs duty should not be treated as a cost to be deducted because it should be reimbursed if no dumping has taken place.

On the difference between the GATT Anti-dumping Code and the Community Anti-dumping Regulation to the construction of the export price, the Court held that the Anti-dumping Regulation is consistent with the Anti-dumping Code²²⁶ with the reason that in GATT Anti-dumping Code allowance should be made for costs incurred between importation and resale "including duties and taxes", and in the Community Anti-dumping Regulation certain

224. The Court considered that the difference in their respective situations affects the conduct of independent importers and associated importers with respect to the passing on of anti-dumping duties to their customers. The former may pass on the anti-dumping duties to their customers because it is not certain that a refund will be granted, and because they would worry about the loss of interest on the amounts paid and suffer the effects of any currency devaluation in the meantime. But the latter could refrain from passing on the anti-dumping duties since they would recognise the commercial practices underlying the dumping and are not in any doubt with respect to the possibility of obtaining a refund. See, *Ibid*, paragraph 37 and 38.

225. Where the importer is associated with the exporter, the price at which the importer buys the goods is not regarded as a reliable basis for determination of the export price, because the exporter has the chance to sell the goods at an fictitiously overestimated price, thus causing the importer to deal at a loss on the Community market.

226. *NMB GmbH* case, at I-1741, para. 47. See, *supra note* 202.

duties, including anti-dumping duties, are specified for which allowance must be made. The Court held "that is the only difference between them".²²⁷ This Court's decision has overlooked the "actual wording" and the importance of anti-dumping duties in the anti-dumping case. According to the actual wording of the GATT Anti-dumping Code, Article 2(5), it is clear and it should be interpreted that anti-dumping duties are not included in allowance for costs because it only demands the inclusion of duties and taxes. Therefore, although it may be the "only difference", there is a critical difference between the GATT Anti-dumping Code and the Community Regulation with respect to the construction of the export price. It follows that there is inconsistency between the Anti-dumping Code and Anti-dumping Regulation.

5.4. Conclusion

As discussed above, few refund applications have been processed successfully. The refund application has been granted only if the weighted average dumping margin for a certain period is lower than the duty. It could be easier for a refund to be granted if individual dumping margins for each individual importer could be used. This argument, however, has been consistently rejected by the Commission and the Court because of inviolability of the general findings of the original investigation and because it would substantially increase the workload of the Commission's

227. This is not consistent with the Court's ruling even in the same case, because the Court rejects the applicant's argument that anti-dumping duties should not be regarded as a cost between importation and resale and therefore should not be deducted in constructing the export price with the reason that it is contrary to "the actual wording" of provision in the Community Anti-dumping Regulation and the Court disregards the difference in "actual wordings" between the GATT Anti-dumping Code and the Community Regulation.

Anti-dumping Division at the investigation stage.

Furthermore in the case of associated importers, it is almost impossible to qualify for a refund unless the product is resold to the first independent buyer on a duty unpaid basis.²²⁸ Otherwise, the Commission has regarded the anti-dumping duty paid by the associated importer as a cost and it has been deducted.

It should be borne in mind, however, that the anti-dumping system is designed to ensure that products are not imported and marketed in the Community at an artificially reduced price. Therefore, application of the anti-dumping duty, as a trade protection measure, is intended essentially to restore fair conditions of competition as regards export price. In these circumstances, the major element is the dumping margin which must be offset and the anti-dumping duty should not exceed the dumping margin. Therefore, the dumping has been eliminated when the sale price in the Community has been increased to an extent which corresponds to the dumping margin found. Once that increase has been made, the product in question is no longer sold at an artificially low price and there is no further need for measures to protect trade.

In the case of an associated importer, the price to be taken into consideration is the resale price to the first independent purchaser. If at a particular resale price a dumping margin is found to exist, and consequently a duty is imposed, the objective which may be legitimately pursued by that trade protection measure is that of obtaining a price increase which will bring that price to the level at which no dumping

228. Point II 2(c) of the Commission's notice states that any reimbursement of anti-dumping duties paid by an associated importer will be granted only where the products in question were resold to the first independent buyer on a duty unpaid basis. A reimbursement will be granted to the company which paid duty, if resale price has been increased by the amount of the dumping margin or a part thereof.

would have existed. That increase may not exceed the dumping margin. If a greater increase were granted, it would no longer be a question of merely restoring a proper price level but of pushing the price of the product up to the level at which it was unfairly placed at a disadvantage by comparison with the competing Community product. In other words, there would be a shift from defence of trade to protectionism. Therefore, in order to bring dumping to an end an associated importer must increase his resale price to an independent purchaser by an amount equal to the dumping margin found to exist, and no more.

In addition, in the Community refund system, there have been some basic problems. One is related to the Anti-dumping system of the Community and the other is concerned with the GATT Anti-dumping system. With respect to the former, a refund application can be considered only where the duty exceeds the dumping margin, and only where the application demonstrates that the dumping margin has been reduced or eliminated.²²⁹ This means that any refund application which is based on the fact that the duty exceeds the injury margin will not be considered. As a result, a refund will not be granted even though the duty exceeds the injury margin. Therefore, the Community anti-dumping system systemically prevents the importer from applying for a refund. The fact that the average dumping margin established was approximately 40%, whereas the actual measures were imposed, on average, at half of that rate,²³⁰ shows that the application of the "lesser duty rule" has been used widely and demonstrates that application for a refund based on the injury margin should be considered.

The next issue is that while the current Article 16 of Regulation 2423/88 makes the importer play a main role in the refund procedure,

229. Point 1, 3 of the Commission's notice.

230. Commission, *11th anti-dumping report*, (1992), COM(93) 516 final, p4.

Article 8(3) of the GATT Anti-dumping Code²³¹ simply demands that the amount of duty in excess of the actual dumping margin be reimbursed. The fact that the excessive duty should be reimbursed to the importer who paid the duty is very logical but it does not mean that only the importer can make a refund application. Therefore, it must open the way for an exporter to apply for a refund as well.

6. REVIEW SYSTEMS IN KOREA

The imposition of the anti-dumping duty and the acceptance of the undertaking may be subject to review,²³² and as a result of the review, anti-dumping duty could be imposed, and the content of the undertaking could be changed, or reimbursement could be ordered.²³³ A review can be held where the interested person or the competent Ministers having jurisdiction over the industry concerned so request with related documentary evidence,²³⁴ provided that at least 1 year has elapsed since the date on which the anti-dumping duty or the undertaking has entered into force.²³⁵

231. Article 8(3) of the GATT Anti-dumping Code provides that if, subsequent to the application of the anti-dumping duty, it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

232. Only in *Dicumyl Peroxide*, anti-dumping determination was subject to review in Korea. *Dicumyl Peroxide* (Japan, Taiwan), KIEP, p201.

233. Article 10(7) of the Korean Customs Act.

234. Reviews could be held where related documentary evidence fell under the following matters : 1. where enough change in situation to justify change of the content of measure has occurred since the imposition of anti-dumping duty or the acceptance of the undertaking; 2. where the domestic industries might be threatened with injury from a termination of the anti-dumping measure or the undertaking; and 3. where the amount of the anti-dumping duty collected exceeds the actual dumping margin. Article 4(14)(i) of the EDCA.

235. Article 4(14)(ii) of the EDCA. Request for a review should be made 6 months before the effect of the anti-dumping measure or the undertaking is lost.

Article 4(14)(i) of the Enforcement Decree showed a list of related documentary evidence, but it is not an exhaustive list, so it should be constructed that evidence means evidence of changed circumstances sufficient to justify the need for review. However, review is not automatically granted, even though an interested person has submitted evidence of changed circumstance, because the Minister has a margin of discretion in deciding whether or not to review.²³⁶

The investigation should be concluded within 6 months from the date on which a review is initiated, and a report of the result of investigation and the letter of resolution on determination be submitted.²³⁷ If the period of application of the anti-dumping measures terminated during the review period, the effect of such anti-dumping measures should be maintained in the period of review.²³⁸

Furthermore, the imposition of the anti-dumping duty or the undertaking accepted should lapse after 5 years from the date on which they entered into force.²³⁹ This is the so-called "sunset review". Even though the period of validity of anti-dumping measures is declared in the Korean Customs Act, the procedures are not clearly laid out in the text of the Act or the Decree.²⁴⁰ Therefore, the procedures of the "sunset" review should be stipulated in more detail before anti-dumping determinations start to expire automatically.

In addition to the administrative and sunset review, an additional

236. Article 4(14)(ii) of the EDCA.

237. Article 4(14)(v) of the EDCA.

238. Article 4(14)(vi) of the EDCA.

239. If the content of the anti-dumping duty or the undertaking is changed according to the result of review, the anti-dumping duty or undertaking should lapse after 5 years from the date on which they were last modified or confirmed. Article 10(8) of the Korean Customs Act.

240. Because the review procedures in Article 4(14) is not for the "sunset review" but for the administrative review.

anti-dumping duty could be considered where the exporter bears the anti-dumping duty. However, as mentioned above, it must always be borne in mind that review could give more benefits rather than the imposition of an additional duty,²⁴¹ and that the anti-dumping duty should not be imposed where there is no injury because injury was eliminated by the imposition of the anti-dumping duty.

Finally, judicial review²⁴² must be guaranteed in order to prevent unreasonable anti-dumping determination under discretion of the investigation authorities. However, judicial review is not statutorily determined in the Korean Customs Act or its Enforcement Decree. Therefore, it is necessary to be prescribed in the Korean anti-dumping law that the anti-dumping determinations may be reviewed judicially.

241. See, subsection 2.4 on an additional duty in section I of this chapter.

242. So far, no judgment has been held by any Korean judicial system on the anti-dumping determinations.

**Chapter 8 : FUTURE PROSPECTS FOR
THE ANTIDUMPING LAWS**

1. INTRODUCTION

When submitting its proposed amendments to the anti-dumping legislation in 1988, the Commission explained in its explanatory memorandum¹ why it needs define more precisely certain rules in the Community's anti-dumping law. The Commission pointed out six issues as follows: the changed nature of anti-dumping proceedings, the more frequent use of a definitive duty instead of an undertaking, the increased litigation therefrom, the ambiguity of the Community's anti-dumping law in certain areas, the possibility of increased litigation if anti-dumping determinations were included in the jurisdiction of the Court of First Instance, and the growing complexity of cases. In the resulting 1988 regulation,² the Commission's administrative practices which had been applied previously, were codified. The amendment includes the following issues³ as mentioned in the previous chapters: the treatment of discounts and rebates and the calculation of "SGA" expenses and profit in the determination of normal value, deductible costs in the case of the determination of the constructed export price, adjustments for the fair comparison of normal value and export prices, the use of averaging and sampling techniques, clarifying false or misleading information in order to avoid undue disruption to proceedings, additional anti-dumping duties for the effectiveness of anti-dumping duty and implementation of the guidelines⁴ relating to the refund

1. Commission, *Proposal for a Council Regulation (EEC) amending Regulation (EEC) No 2176/84 on protection against dumped or subsidised imports from countries not members of the European Economic Community*, COM(88) 112 final, Brussel, 22 March 1988, p1.

2. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

3. Ibid, p3.

4. Commission, *Commission notice concerning the reimbursement of anti-dumping duties*, 86/C 266/02, OJ (1986) C 266/2.

procedure.

All the changes mentioned above have one thing in common; they are biased in favour of a finding that dumping has taken place. The Commission insisted in its 1990 *Ninth Annual Anti-dumping Report*⁵ that while the number of investigations initiated in 1988 and 1990 remained relatively high compared to 1986 and 1989, they are lower than the number initiated in 1981, 1982 and 1984. The number of anti-dumping measures applied in 1987, 1988 and 1989 was less than half the numbers applied in 1982 and 1983. This analysis is only partly correct and leads to an underestimation of the impact of the Community's anti-dumping system on imports from countries not members of the Community. While the total number of anti-dumping measures applied in the years 1981 and 1987 was high compared to the years 1988 and 1992, the total number of cases of imposition of definitive duty applied before 1988 was lower than in 1988 and after.⁶

Before 1988, 22 out of 283 investigations were concluded by determination of no dumping and 46 investigations were concluded by determination of no injury, but in 1988 and afterwards only 2 out of 152 investigations were concluded by determination of no dumping⁷ and 33 investigations were concluded by the determination of no injury. This means that once a complaint is lodged, the Commission can in almost all cases find the existence of dumping by virtue of the 1988 Anti-dumping Regulation, but it is still difficult to prove that the dumped imports are, through the effects of dumping, causing injury to an established Community industry.

5. Commission, *9th anti-dumping report (1990)*, SEC(91) 974 final, Brussels, 31 May 1991, p33.

6. While 63 definitive duties out of the total 282 anti-dumping measures were imposed between 1981 and 1987 (22%), 81 definitive duties out of a total 152 anti-dumping measures were imposed between 1988 and 1992 (53%).

7. *Potassium permanganate* (USSR), Com.Dec.91/24/EEC, OJ (1991) L 14/56. *Cotton yarn* (Egypt) Com.Dec.92/179/EEC, OJ (1992) L 82/70.

This seems to be a result of the fact that the Community authorities has not codified certain other important aspects of their practice, such as the methods to be used for calculating the injury margin. Considering the fact that more than 40% of Community anti-dumping duties have been set by the "lesser duty rule", it is necessary to define more precisely the methods for calculating the injury margin, but it should not be defined in such a way that the injury caused by the dumped imports can be proved more easily than at present.

The Commission reported that only 0.3% of imports from the Asian newly industrialised economies were subject to anti-dumping duties and 27.6% of the anti-dumping investigations initiated during the 1980s concerned exports from the Far East, including China,⁸ and this could be a result of the increased trade from those countries. The investigations initiated in the years 1988 to 1992 show that, over the period, the sectors most involved were those of chemicals and electronics with, in 1992, the largest number of initiations or actions again taking place in the electronics sector. Taking account of the fact that the main export products from the Far East are in electronics sector, anti-dumping measures which tend to concentrate on the electronics sector may have a disproportionate impact on exports from the Far East.

Even though it is true that the relatively high proportion of anti-dumping cases against certain countries has not prevented these countries from increasing their trade with Community, the fact that a definitive duty has more frequently been applied in recent determinations could be a great threat to future exports to the Community.

Based on the Community's anti-dumping activities during the last 13 years, in this chapter three ways of change of the present anti-dumping

8. Commission, *9th anti-dumping report*, SEC(91) 974 final, Brussel, 31 May 1991, p34.

system will be discussed: change of the Community anti-dumping regulation itself, to make the conduct of anti-dumping economically rational within the existing international rules and definitions of dumping,⁹ change of the Community anti-dumping legislation by the Commission itself, and change at an international multilateral level, under the auspices of the GATT.

2. FUTURE PROSPECTS FOR THE DECISION-MAKING PROCEDURE OF THE COMMUNITY

On 17 July 1992, the Commission adopted a proposal for a Council Regulation on the harmonisation and streamlining of decision-making procedures for Community instruments of commercial defence and the modification of the relevant Council Regulations.¹⁰ The issue which is being watched with keen interest is the transfer of certain powers for taking definitive measures from the Council to the Commission. The basic changes in the decision-making procedure proposed are that (a) the decision to impose definitive anti-dumping duties would be taken by the Commission which should be assisted and consulted by a management committee¹¹ in all

9. The Community anti-dumping regulation has been analysed throughout the thesis; therefore the remaining two issues will be discussed in this part.

10. SEC (92) 1079 final, and see, OJ (1992) C 181/9. The proposal concerns definitive measures of commercial defence which were provided under Council Regulation (EEC) No 2423/88 *on protection against dumped or subsidized import*, Council Regulation (EEC) No 2641/84 *on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practice*, and Council Regulation (EEC) No 288/82 *on common rules for imports*.

11. See, Coun.Dec.87/373/EEC, *laying down the procedures for the exercise of implementing powers conferred on the Commission*, OJ (1987) L 197/33.

cases;¹² (b) the committee should deliver its opinion on the Commission's draft within a time limit which is set by the chairman according to the urgency of the matter;¹³ and (c) if the definitive measure imposed by the Commission is not in accordance with the opinion of the committee, the Commission should communicate to the Council and the Council may take a different decision by a qualified majority within the time limit.¹⁴

Therefore, the Commission could take even more power in deciding whether the matter is urgent or not, because the chairman from the Commission has laid down a strict time limit for the delivery of an opinion from the committee. Under the current Regulation, it is not the Commission but the Council which imposes definitive duties by a qualified majority (54 votes out of 76). According to this proposal, however, a qualified majority would be needed not to approve but to oppose the imposition of definitive duties. Furthermore, this qualified majority for opposition to the imposition of definitive measures has to be reached within twenty days of the deferral of the application.¹⁵

The Commission insisted that these changes are only for internal Community procedures,¹⁶ but they may affect the position of the Community's trading partners. This system would speed up decisions on cases where there is no disagreement between the Commission and the Member States. These internal changes, however, could result in an even worse situation for the Community's trading partners because of the lack of transparency and the shorter period allowed for preparation for the pro-

12. Article 12a(2) and (4) of Commission proposal for a Council Regulation (EEC) on the harmonization and streamlining of decision-making procedures for Community instruments of commercial defence and modification of the relevant Council regulations, SEC(92) 1076 final.

13. Ibid, Article 12a(3).

14. Ibid, Article 12a(4) and (5).

15. Ibid, Article 12a(5)

16. Commission, 11th anti-dumping report, COM(93) 516 final, p86.

ceeding. Up to now, the Member States have played a decisive role in the qualified majority system of the Council. According to the proposal, Member States' powers of intervention would be curtailed, not only because almost all of the decision-making process will be completed in the Commission, but also because a qualified majority not a qualified minority is required to oppose the Commission's decision.

As mentioned above,¹⁷ this proposal stemmed from the Commission's opinion¹⁸ on the request of the Court of Justice that measures of commercial defence should be included in the jurisdiction of the Court of First Instance. This proposal is still before the Council because no agreement has been established among the Member States.

Not only the decision-making procedure but also the excessive time delays of anti-dumping investigations is another aspect of the overall problem which should be reformed.¹⁹ As a result, on 4 November the Commission put before the Council a proposal for an amendment to Council Regulations²⁰ with a view to speeding up investigations and making them more transparent.²¹ The main purpose of this proposal, as mentioned

17. See, chapter 7, title II, subsection 4.3. Court of First Instance.

18. SEC (92) 495 final.

19. According to *6th anti-dumping report*, the average time taken to complete the normal investigations concluded in 1987 was 9.1 months, 9.0 months in 1986 and 9.3 months in 1985. Average time taken to impose provisional duties in the investigation concluded in 1987 was 7.7 months, 7.6 months in 1986 and 8.0 months in 1985. These excessive time delays are roughly in conformity with present time spending. See, COM(89) 106 final, p7.

20. This proposal concerns two Community instruments which were provided under Council Regulation (EEC) No 2423/88, OJ (1988) L 209/1, *on protection against dumped or subsidised imports* and Council Regulation (EEC) No 288/82, OJ (1982) L 35/1, *on common rules for imports*.

21. Commission, *Proposal for a Council Regulation (EEC) on the introduction of time limits for investigations carried out under the Community instruments of commercial defence and modification of the relevant Council Regulations*, COM(93) 541 final.

above,²² is the introduction of mandatory time limits for investigations under Community anti-dumping law.

The Commission, furthermore, pointed out that the imposition of such deadlines would not be realistic unless investigations of dumping and injury/Community interest were to be carried out separately and in parallel, clarifications were to be made to existing provisions,²³ and staffing increased.²⁴ Therefore, this proposal is principally aimed at (a) incorporating time limits,²⁵ (b) providing a basis for sampling where there are a large number of parties involved and clarifying the provisions with regard to interested parties and the treatment of non or partial cooperators,²⁶ and (c) permitting the imposition of provisional measures for a full 6 months rather than the current situation where they are first imposed for 4 months and then, if necessary, extended for a further two months by the Council.²⁷

3. CHANGES AT A MULTILATERAL LEVEL

The 92 countries taking part in the Conference at Punta del Este, 1986, reached a decision on the launching of a new round of multilateral trade negotiations, to be known the 'Uruguay Round' which is the 8th round of multilateral trade negotiations following from the Tokyo Round,²⁸

22. See, chapter 7, title II, subsection 4.3 Court of First Instance.

23. It means a more systematic use of sampling. Moreover, the consequences of non-cooperation by interested parties need to be clarified.

24. See, *supra* note 22, COM(93) 541 final, p4.

25. Article 1(2)(3) and (6) of the Proposal

26. *Ibid*, Article 1(7).

27. *Ibid*, Article 1(12).

28. See, Bull. EC 9-1986, point 1.4.1 *et seq.*, and Commission, *20th the General Report on the Activities of the European Communities*, 1986, point 810.

conducted under the auspices of the GATT since it was established in 1947. The economic interests of the developed countries differ substantially from those of the developing countries, and there are also major differences in the economic interests of the various industrialised countries themselves. Furthermore, in 1989, negotiations were taking place within the context of the Uruguay Round to improve, clarify and expand such agreements as the GATT Anti-dumping Code.²⁹ As a result, by 1990 this multilateral trade negotiation had not been concluded although it had been expected to be concluded in 4 years. Moreover, negotiation of a new GATT anti-dumping Code was postponed as well. Negotiations on anti-dumping have proved particularly difficult, with major disagreements between countries whose economies are mainly export oriented, like Japan, Korea and Hong Kong, and others, like the Community, whose import and export trade is more in balanced.

After a year of intensive negotiations on all subjects covered by the Round, the GATT Director-General, Mr. Arthur Dunkel, was in a position to table a draft final act in December 1991. The 'Dunkel Paper' by and large reflected the consensus among the participants, but also included a number of compromises and trade-offs on the most politically sensitive issues.

As a part of a draft final act, the GATT Director-General released his compromise text on anti-dumping because negotiators had failed to agree

29. Because the Uruguay Round aimed to bring about further liberalization and expansion of world trade to the benefit of all countries, including the improvement of access to markets by the reduction and elimination of tariffs, quantitative restrictions and other non-tariff measures and obstacles. See, *Part 1, A, objectives in Ministerial Declaration on the Uruguay Round*, Bull. EC 9-1986, point 1.4.4., and Commission, *8th anti-dumping report*, SEC(91) 92 final, p13.

on several important issues.³⁰

Most of the changes provided for in the 'Dunkel Paper'³¹ were incorporated in an "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994" (hereinafter referred to as the "1994 GATT Anti-dumping Code").³²

In this chapter, the changes are summarised under three headings; the procedural changes, the determination of dumping, and the determination of injury. Some of the changes in 1994 GATT Anti-dumping Code are in accordance with the current rules and practice in the Community, but others may require significant changes from the current application of the Community law and practices in order to comply with the new GATT Anti-dumping Code.

3.1. Changes in the Procedure

When compared with the current Community regulation,³³ it seems that the 1994 GATT Anti-dumping Code has made changes in the following areas.

Authorities in the importing country should notify the government of the exporting countries concerned after receipt of a properly documented

30. With respect to the anti-circumvention, for instance, the 'Dunkel Paper' set a 30% local contents criterion instead of the 40% local content criterion in the current Community Regulation. Furthermore, the Community should make concessions on the determination of dumping which will inevitably result in lower dumping margins in some areas. This will be discussed in the next subsection.

31. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT Doc. MTN.TNC/W/FA, 20 Dec. 1991.

32. Commission, *Proposal for a Council Decision concerning the conclusion of the results of the Uruguay Round of Multilateral Trade Negotiation (1986-1994)*, COM(94) 143 final, pp145-169.

33. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

application and before an investigation is initiated.³⁴ However, in the Community, if the Commission decides to initiate proceedings after consultation, it will not inform the government of the exporting country concerned but only announce the initiation of a proceeding in the Official Journal of the European Communities.³⁵ Therefore, in order to be in accordance with these new international obligations, in particular those arising from Article VI of the General Agreements on Tariffs and Trade (hereinafter referred to as 'GATT'), the Community should change its current practice under its current Anti-dumping Regulation. Once an investigation is started, it should be concluded within 18 months after its initiation without exception.³⁶ This has been one of the main targets of reform of the Community legislation.³⁷ The Community will have to accelerate reform of its any practices where proceedings often take much longer.

Where the imported products under investigation are commonly sold at the retail level, industrial users of the product and representatives of consumer organisations should have the opportunity to be provided with information which is relevant to the investigation regarding dumping, injury and causality.³⁸ This may improve the position of the consumers in the Community where the Community interest have been deemed to be the same as the interests of Community industry.

With respect to sampling techniques, in cases where the number of exporters, producers, importers or types of products involved is too large

34. Article 5(5) of the 1994 GATT Anti-dumping Code.

35. Article 7(1)(a) of the Community Anti-dumping Regulation.

36. Article 5(10) of the 1994 GATT Anti-dumping Code provides that 'investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation'.

37. See, *supra* note 22, COM(93) 541 final.

38. Article 6(12) of the 1994 GATT Anti-dumping Code.

to determine an individual dumping margin for each of interested parties concerned in relation to the product under investigation, then samples, either from a reasonable number of interested parties or products or from the largest percentage of the volume of the exports from the country in question, may be applied to establish normal value and export prices.³⁹ Any sampling should be made in consultation with and with the consent of the exporters, producers or importers concerned.⁴⁰ Furthermore, an individual dumping margin for a non-sampled producer or an exporter who submits the necessary information in time should be determined unless individual examinations would be unduly burdensome to the authorities.⁴¹ However, if a non-sampled producer or an exporter who submits the necessary information in time could be subject to the same weighted average dumping margin found with respect to sampled producers, the authorities' undue burden could be relieved. The Community's current practice under its Anti-dumping Regulation which stipulates the use of the most frequently occurring or representative prices as sampling techniques should therefore be reviewed.⁴²

Regarding the Commission's proposal for mandatory time limits for investigations, the proposal tries to permit the application of provisional measures for a full 6 months instead of the current application of a 4 months period and then extension for another 2 months if necessary.⁴³

39. Article 6(10) of the 1994 GATT Antidumping Code.

40. Ibid, Article 6(10)(1).

41. Ibid, Article 6(10)(2).

42. Article 2(13) of the Community Anti-dumping Regulation.

43. Title 1, Article 1(12) of the Commission's proposal on the introduction of time limits provides that provisional duties shall have maximum period of validity of four months. However, where exporters representing a significant percentage of the trade involved so request or do not object upon notification by the Commission, provisional anti-dumping duties may have a period of validity of six months. See, *supra note* 22, COM(93) 541 final, p23.

This means that the Commission wants to strengthen trade protection measures by way of a six month period of validity of provisional anti-dumping duties. Ironically, the 1994 GATT Anti-dumping Code introduces more protective provisional measures providing that provisional anti-dumping duties may have a limited duration of six months normally and 9 months where exporters representing a significant percentage of the trade involved so request, or the authorities concerned so decide, and when authorities determine that a duty lower than the margin of dumping would be sufficient to remove injury.⁴⁴ Therefore, the Community could justify its more protective trend in its reforms and, if it wished, enjoy a full 9 months period of validity of provisional antidumping measures.

Giving support to the Community's discretionary practice to accept or reject undertakings,⁴⁵ the 1994 GATT Anti-dumping Code provides explicitly that undertakings offered need not be accepted by the importing country authorities if they consider their acceptance impractical for reasons of general policy.⁴⁶ Therefore, the Community's discretionary power to accept or reject undertakings is reinforced by the result of multilateral trade negotiation and it may reject any undertakings from exporting countries for general commercial policy which exporters never expect.

In the Community, the unfair situation of new exporters, who had no link of any sort with the exporters in the original investigation, who did not export during that investigation period and who have subsequently com-

44. Article 7(4) of the 1994 GATT Anti-dumping Code.

45. See, case 294/86 and 77/87, *Technointorg v Commission and Council*, ECR [1988] 6077, at 6117, and case 240/88, *NTN Toyo Bearing v Council*, ECR [1987] 1809.

46. Article 8(3) of the 1994 GATT Anti-dumping Code. It provides that undertaking offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy.

menced exporting or have the firm intention to do so, has been worsened by the imposition of residual anti-dumping duties set at the highest duty level imposed in the original case.⁴⁷ Therefore new-comers reviews are becoming more common since the Commission started to carry out such reviews in 1990.⁴⁸ Even though new-comers may offer undertakings, their the situation is still disadvantageous because if they begin to export to the Community, it only be possible to apply for an Article 14 review if at least one year has elapsed since the conclusion of the investigation. This unfair practice within the Community is challenged by the 1994 GATT Anti-dumping Code which explicitly provides that the authorities should promptly carry out a review on an accelerated basis for new comers who are not related to any of exporters subjected to anti-dumping duties. No anti-dumping duties should be levied on imports from such exporters while the review is being carried out.⁴⁹ In order to comply with this new GATT rule, the Community could no longer rely on the one year "lapse rule" in Article 14.

Another new rule in the 1994 GATT Code is a "sunset" provision which provides that any definitive anti-dumping duty should be terminated after 5 years from its imposition. Current Community rules and practice are well reflected in this GATT rule, but this still can be distinguished

47. Four reviews of anti-dumping measures on new-comers were concluded in 1992 as follows; *Video cassette tapes* (Hong Kong), Coun.Reg.(EEC) No 1292/92, OJ (1992) L 139/1, *Video cassette tapes* (Hong Kong), Coun.Reg.(EEC) No 1769/92, OJ (1992) L 182/6, *Monosodium glutamate* (Indonesia) Com.Dec.92/493/EEC, OJ (1992) L 299/40, and *Video cassette tapes* (Hong Kong), Coun.Reg.(EEC) No 3498/92, OJ (1992) L 354/1. Among them, in *Monosodium glutamate*, the Commission accepted an undertaking offered by a new-comer (PT Indomiwon Citra Inti) who had the firm intention to export to the Community but had not started to do so yet, in spite of the fact that the Council has concluded that undertakings from potential exporters should not be accepted. See, *Sodium carbonate* (USA), Coun.Reg. (EEC) No 3337/84, OJ (1984) L 311/26.

48. *Video tapes in cassettes* (Hong Kong), Coun.Reg.(EEC) No 3522/90, OJ (1990) L 343/1.

49. Article 9(5) of the 1994 GATT Anti-dumping Code.

from Community law because there is no obligations to inform importing country's industries known to be concerned.⁵⁰ As has been proved in the Community, this has been a positive development. Since Article 15 was first introduced into the Community Regulation in 1984⁵¹ and came into force in 1985, a total of 212 anti-dumping measures have been allowed to expire automatically.⁵²

3.2. Changes in Substantive Rules

3.2.1. The Determination of Dumping

The 1994 GATT Code gives a clear answer to the question when sales of the like product in the ordinary course of trade on the domestic market of the exporters do not permit a proper comparison. In relation to the volume of sales of product in question in the home market of the exporting country, if the sales constitute 5% or more of the sales to the importing country, such sales should be considered a basis for the determination of the normal value.⁵³ This is a kind of positive achievement which might limit the discretionary powers of the anti-dumping authorities in the importing country, but it is not very helpful to exporting countries which have a small domestic market, like Singapore and Hong Kong. Since *Electronic typewriters* in 1984,⁵⁴ the Commission has determined that the sales of individual models on the domestic market of the exporting country would be used as the basis of normal value if the volume of such sales was equal

50. Article 11(3), and Article 15 of the 1994 GATT Anti-dumping Regulation.

51. Coun.Reg.(EEC) No 2176/84, OJ (1984) L 201/1.

52. Commission, *11th anti-dumping report*, COM(93) 516 final, p69.

53. See, footnote 2 in Article 2(2) of the 1994 GATT Anti-dumping Code.

54. *Electronic typewriters* (Japan), Com.Reg.(EEC) No 3643/84, OJ (1984) L 335/43, p44.

to, or more than, 5% of the volume of exports to the Community.⁵⁵ And it must be noted that the Community authorities in *Dot-Matrix Printers*,⁵⁶ excluded sales below cost in the domestic market of the exporting country in applying the above mentioned 5% criterion.

With respect to sales below the per unit (fixed or variable) costs of production, the GATT Code shows stricter attitudes to the issue of permitting a finding of dumping than the 1979 GATT Code and the current Community legislation. Distinguishing prices at the time of sales from prices for the period of investigation, the GATT Code provides that if the former is above the weighted average of the latter, such prices should be considered for recovery of all costs reasonably allocated within a reasonable period of time, even though prices are below the per unit costs.⁵⁷

Article 2(2)(1)(1) of the 1994 GATT Anti-dumping Code introduces a more clearly defined rule on the methods of cost calculation.⁵⁸ According to this rule, costs should be calculated on the basis of the exporter's record which is in accordance with the generally accepted accounting principles (GAAP) of the exporting country. This provision would seem to limit the investigating authorities' discretionary power to calculate costs by adopting *ad hoc* accounting methodologies. In *DRAMS* from Korea,⁵⁹

55. In *Canon* case, this determination was supported by the Court. See, joined cases 277 and 300/85, *Canon France, Canon Rechner Deutschland, Canon (U.K) v. Council*, [1988] ECR, 5731. Therefore, this 5% rule should be applied on a model-by-model basis, at least in the Community.

56. *Serial-Impact Dot-Matrix Printers* (Japan), Coun.Reg. (EEC) No 3651/88, OJ (1988) L 317/33, p36.

57. Article 2(2)(1) of the 1994 GATT Anti-dumping Code.

58. It provides that costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

59. *DRAMS* (Korea), Coun.Reg.(EEC) No 611/93, OJ (1993) L 66/1, p3.

for example, the Commission took the position that all R&D costs actually incurred in the period of investigation and related to DRAMs, be it current or future products, should be allocated to DRAMs sold in the period of investigation and could not be depreciated, although the Korean producers claim that R&D costs incurred in the past and deferred to the period of investigation should be the basis for the determination of the cost of the production, not R&D costs for the future generation.⁶⁰ Therefore, this Community practice could be challenged, as the Community should now use the GAAP of the exporting country.

Since *Ballbearings*,⁶¹ the Community authorities have refused to accept exporters' requests for special consideration of their production facilities in a start-up or expansion phase, with the reason that neither the GATT rules nor Community Regulation⁶² provide for a different set of rules to be applied to exporters in a start-up or expansion phase.⁶³ The Code, however, provides special rules on amortisation and depreciation periods and allowances not only for capital expenditure and other development costs but also for start-up operations.⁶⁴ Therefore, it remains to

60. In the discussion of Vermulst and Graafsma, "Commercial Defence Actions and Other Int'l Trade Developments in the EC: 1 July 1992-31 Dec. 1992", 4 *EJIL* (No.2) 1993, p290, the authors insisted that this was the first time that the Commission had rejected Korean GAAP (generally accepted accounting principles) in spite of the fact that in all previous EC anti-dumping proceedings, Korean GAAP had not been accepted by the Community authorities.

61. *Ballbearings* (Japan and Singapore), Coun.Reg.(EEC) No 2089/84, OJ (1984) L 193/1, p2.

62. Coun.Reg.(EEC) No 3017/79, OJ (1979) L 339/1.

63. The Commission, in *Monosodium glutamate* (Indonesia), OJ (1992) L 299/40, made an adjustment for start-up operation because it assumed that capacity was utilized to a reasonable extent.

64. Article 2.2.1.1 of the 1994 GATT Anti-dumping Code. In its footnote 6, it stipulates more stringently that the adjustment for start-up operations shall reflect the costs at the end of the start-up period, or if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

be seen whether the Community authorities adjust their practice to comply with this new GATT rule.

For a fair comparison between the normal value and the export price, if a conversion of currencies is required, the new Code provides that such conversion should be made using the rate of exchange on the date of sale and fluctuations in exchange rates should be ignored.⁶⁵ Therefore, a finding of dumping should not be based exclusively on exchange rate fluctuations.

Contrary to the Community's practice in relation to comparisons between normal value established on a weighted average basis and export prices on a transaction by transaction basis which is in favour of a higher dumping margin, the new Code requires that the dumping margin should be established by a comparison of a weighted average normal value with a weighted average export price or by a comparison of the normal value and export price on a transaction to transaction basis. This is a very positive change for foreign exporters or foreign producers, and if the Community changed its current provisions in order to comply with the new GATT Code, the current situation under which dumping has been found easily and a higher dumping margin has been artificially created would be improved. The new Code, however, is silent on sales through related sales subsidiaries. It simply provides that if the export price is unreliable because of an association between the exporter and the importer or a third party, the export price may be constructed, and allowances for costs including duties and taxes, incurred between importation and resale, and for the profit accruing, should be made as stipulated in the 1979 Code.⁶⁶ When an exporter sells in both its home market and in the importing coun-

65. Article 2(4)(1) of the 1994 GATT Anti-dumping Code.

66. Read jointly, Article 2(3) and (4) of the 1994 GATT Anti-dumping Code.

try through related companies, allowances for costs incurred between the exporter and the first independent buyer should be made not only in relation to export price, but also normal value, to achieve a fairer comparison. The ECJ's position⁶⁷ in supporting these 'Asymmetrical' methods on allowances to normal value and export price confirms unfair comparison and should have been challenged. Moreover, ensuring a fair comparison after making the basic elements, namely, normal value and export price unfair, makes no sense.

On the Community's treatment of anti-dumping duties in calculating dumping margin in refund claims, the so-called "duty as a cost" issue, the new GATT Code introduces a clear guideline providing that in determining whether and to what extent a reimbursement should be made, authorities should calculate the export price with no deduction for the amount of anti-dumping duties paid.⁶⁸ Therefore, the inconsistency between GATT rules and the Community Anti-dumping Regulation which has been supported by the Court ruling⁶⁹ should be terminated. These new GATT rules should have a great influence on the Community's existing practice concerning additional duties.⁷⁰

67. Case 260/84, *Minebea Company Ltd v Council*, [1987] ECR 2000, at 2004, and joined cases 277 and 300/85, *Canon Inc. v Council*, [1988] ECR 5731, at 5804. See, the judgments on an anti-dumping duty on imports of ballbearings in cases 240, 255, 256, and 258/84, [1987] ECR 1809, 1861, 1899 and 1923 as well. In those cases, basically, the Court held that calculation of the normal value and the export price may be made according to the special methods for each purpose respectively. The fair comparison cannot therefore be conditional on calculation of the normal value and the export price by identical methods.

According to Article 2(9) of the Anti-dumping Regulation, it is clear that comparison is considered after the normal value and the export price have been established.

68. Case 188/88, *NMB GmbH v Commission*, [1992] ECR I-1689, at I-1741, para 47.

69. Article 9(3)(3) of the 1994 GATT Anti-dumping Code.

70. *Silicon metal (P.R. China)*, Coun.Reg.(EEC) No 1607/92, OJ (1992) L 170/1.

3.2.2. The Determination of Injury

In order to examine the impact of the dumped imports on the importing country's industry, the magnitude of the margin of dumping is explicitly considered to be one of the relevant economic factors,⁷¹ although this factor cannot give decisive guidance alone.

By comparison with the Community's law and practice from the perspective of an exporter or a foreign producer, the new GATT Code is much more generous in relation to the rejection of an application or the termination of an investigation without protective measures.⁷² New GATT Code stipulates that there should be immediate termination of anti-dumping proceedings where the margin of dumping is *de minimis*, or the volume of dumped imports is negligible⁷³ even though dumping and injury is found. This new GATT rule will give more room to exporters with a small dumping margin and exporting countries with low market shares. If the Community amends its regulation in accordance with this new GATT rule, the number of investigations which are terminated without protective measures will sharply increase.⁷⁴ The 7% collective market-share test, however, opens

71. Article 3(4) of the 1994 Antidumping Code.

72. In the Community, investigations can be terminated without protective measures only in the following three cases; no dumping is found; no injury is found; or the withdrawal of the complaint. See Article 9 of the Community Anti-dumping Regulation.

73. According to subparagraph 8 of Article 5 of the 1994 GATT Anti-dumping Code, the margin of dumping which should be considered to be *de minimis* is less than 2%. The volume of dumped imports shall normally be regarded as negligible if the volume from any particular country has represented less than 3% of market share, provided, however, that the total market share of all exporting countries under investigation, each with less than 3% of market share, is not more than 7%.

74. In 1992, 12 investigations were terminated without protective measures. Among them, 1 found no dumping, 4 found no injury and 7 resulted from the withdrawal of the complaint. See, Commission, *11th antidumping report*, COM(93) 516 final, p64.

the possibility of taking protective measures where many countries with less than a 3% market share are involved. In order to avoid the application of a 3% test, Community producers will make complaints about imports from as many countries as possible.

With respect to cumulation, Article 3(3) of the 1994 GATT Anti-dumping Code provides that where the import of a product from more than one country is simultaneously subject to anti-dumping investigations, the investigation authorities may cumulatively assess the effects of such imports only if they determine that: (1) the margin of dumping established in relation to the imports from each country is not more than *de minimis* as defined in paragraph 8 of Article 5, and that the volume of imports from each country is not negligible; and (2) a cumulative assessment of the effects of the imports is appropriate in the light of the conditions of competition between imported products and the like domestic product. Therefore, cumulation can be allowed only where imports of a product from more than one country are simultaneously subject to anti-dumping investigation. This means that cumulating products subject to different investigations,⁷⁵ as has been done by the Community in past cases, should no longer be possible.

75. See, *Certain electronic weighing scales* (Korea, Singapore), Com.Reg.(EEC) No 1103/93, OJ (1993) L 112/20; *Certain electronic weighing scales* (Japan), Coun.Reg.(EEC) No 993/93, OJ (1993) L 104/4.

Chapter 9: CONCLUSION

This study has analysed and compared the anti-dumping laws, and administrative and judicial practice in the European Community and Korea. Recently, anti-dumping law has played a major role in the complex, technical field of international trade law. In particular, the new GATT Anti-dumping Code¹ has been enacted, and a new Community anti-dumping regulation adopted,² in order to accommodate the changes of the new GATT Anti-dumping Code.

This study has sought to show the limitations of the international rules on anti-dumping. Loopholes in the international anti-dumping rules have been utilised by the European Community to by-pass international rules and adopt new, and more protectionist, provisions which victimise developing, export-oriented countries. Therefore, in the following conclusion, some comments will be made on the protectionist bias in the Community anti-dumping law and practice, and as a conclusion, some recommendations will be made for the development of the Korean anti-dumping law and practice.

1. PROCEDURAL ASPECTS

Visibility as well as procedural and substantive fairness shall be the most important principles underpinning a reasonable antidumping law, otherwise there is a risk that the protectionist tilts found in the Community Anti-dumping Regulation and its practice in favour of a finding of dumping will be used as the legislative model for developing countries.

1. Commission, *Proposal for a Council Decision concerning the conclusion of the result of the Uruguay Round of Multilateral Trade Negotiation (1986-1994)*, COM(94) 143 final.

2. Coun.Reg.(EC) No 3283/94 *on the protection against dumped imports from countries not members of the European Community*, OJ (1994) L 349/1.

Anti-dumping laws increasingly incorporate protectionist tilts. This is often justified on the ground that it is consistent with GATT or that the practice was not mentioned in the Code, i.e., was not prohibited.

With respect to visibility, anti-dumping procedures need to become more transparent in order not to lose credibility. The EC Commission's decisions should probably be viewed in a political context, because it is a political agency combining the functions of prosecutor, judge and jury in spite of the fact that the proceedings before the Commission are administrative in nature. Thus, the Commission has the stronger power in the decision making procedure in the Community, because the Council imposes a definitive anti-dumping duty or extends provisional measures, acting by simple majority.³ This means that there is less democratic control by the Member States over the Commission's decisions, and that the imposition of anti-dumping duties is easier, even though the Commission has to justify its actions according to principles such as the effectiveness of the Community's instruments of commercial defence, or the speedy resolution of anti-dumping disputes.

2. SUBSTANTIAL ASPECTS AND PROBLEMS OF CIRCUMVENTION

Investigations of the establishment of dumping and injury therefrom are carried out concurrently.⁴ This means there is an unfortunate bias against the foreign exporter, because it means that the exporters have to comment on the issue of injury before the complainant has replied to the injury questionnaire.

Where there is a partial discrepancy in the costs of production

3. Article 1 of the Coun.Reg.(EC) No 522/94, OJ (1994) L 66/10.

4. Article 7(1)(c) of the Community Anti-dumping Regulation.

between companies' replies and their internal documents, the Commission disregards all costs of production data and makes its findings on the basis of the facts available. This practice is, however, in favour of a finding of dumping because information which is favourable to the exporter is disregarded. Furthermore, the Commission disregards any information which it has been unable to verify. This may cause a suspicion that the Commission is only using the information which is in favour of a finding of dumping, because it cannot verify all information due to the short period allowed for verification and shortage of manpower. The fact that no official report on the verification is accessible to the parties concerned also demonstrates a lack of transparency in anti-dumping procedures of the Community.

With respect to substantive fairness, there are a number of crucial issues for a finding of dumping. All measures or provisions in the Community Anti-dumping Law and practice in order to inflate normal price and to depreciate export price should be reviewed. For instance, when the normal value and the export price is constructed, SGA expenses play a key role in a finding of dumping, because only direct SGA expenses are deducted with respect to normal value, while deductions allowed for constructing the export price include direct and indirect SGA expenses and a reasonable profit margin. This means the normal value is artificially inflated and the export price is relatively depreciated, in favour of a finding of dumping. Therefore, for fair competition, allowance given to the constructed export price should also be allowed to the constructed normal value.

According to Article 2(6) of the 1979 GATT Anti-dumping Code, these adjustments to the normal value and the export price are to effect a fair comparison. In order to effect a fair comparison, equal treatment of sales on the exporter's home market and importing market should be guaran-

teed i.e., individual sales to contemporaneous individual sales, or the average export price to the average home market price over an equivalent period. Equal treatment should also be given to any adjustment in prices in both markets. Ensuring a fair comparison based on unfair basic elements i.e., established normal value and export price, does not make sense. Therefore, the rules on adjustment should not override the fair comparison requirements, because the purpose of making adjustment to the prices is to effect a fair comparison between the export price and the normal value.⁵

Through the anti-dumping measures a Community industry which produces like products and is injured by dumped imports has to be protected. However, the flexible interpretation of the 'like product' notion makes it possible that the Community industry which does not produce like products could be protected, because the Commission did not draw a clear line in the definition of a number of categories of like products.⁶ However, the 'like product' notion should be interpreted strictly, in order not to protect the Community industry which does not produce a like product.

In arriving at a determination of injury, the reason of injury should be limited to the direct effects of dumped imports⁷ as distinct from volume and prices which are not dumped, or contraction in demand that is unrelated to the dumped imports, despite negative impact on Community industry. However, the Commission has tended to include all imports that

5. Article 2(6) of the 1979 GATT Anti-dumping Code provides that in order to effect a fair comparison between the export price and the domestic price in the exporting country (Or the country of origin), the two prices shall be compared at the same level of trade, and in respect of sales made at as nearly as possible the same time.

6. In Korea, the 'like product' or the 'similar goods' notion is interpreted more strictly. See, *Printing Plate*, FMA No 1993-76, OG (1993) No 12606, p194, and *Glass Fiber*, FMA No 1994-57, OG (1994) No 12786, p36.

7. Article 3(1) of the 1979 GATT Anti-dumping Code.

affect a particular industry in the Community. When the Commission routinely investigates the volume, prices and consequent impact of the total imports, the injury could be caused not by the dumped imports. Therefore, determination of injury must be made only if the dumped imports are, through the effects of dumping, causing injury.

The Community Anti-dumping Regulation regards a significant increase of the volume of dumped imports and their increase in market share as the most important test for a finding of injury. If the Community industry substantially increases its sales volume and market share, it should not be regarded as being injured, even though imports volume and their market share is increased as well. Even in this situation, if the Commission considers that the Community industry is injured, this means the Community industry must dominate all booming industries in the Community.

When the Commission calculated injury margins, in the *DRAMs*⁸ determination, it claimed that the adjusted price of imports had depressed Community price increase and the sales of DRAMs were made below cost of production. However, the adjusted price of DRAMs included extensive R&D expenses, covering three generations ahead of the current commercialisation which had nothing to do with the allegedly dumped DRAMs. R&D costs for current commercialisation only should be allocated in calculating injury margins, because the reason of injury should be limited to the direct effects of dumped imports.

In the case of lesser duty rules, none of the interested parties can know the injury margin because of the confidentiality of the data and the fact that there is no established methodology for the calculation of injury margins. Up to the present, the calculation of injury margins is based on four different methodologies; comparison between the adjusted

8. *DRAMs* (Korea), Com.Reg.(EEC) No 2686/92, OJ (1992) L 272/13, p19.

weighted average resale prices of the dumped imports and the price of a like product in the Community, comparison of a target price, consisting of the full costs of production including SGA and a reasonable profit, with the dumped price,⁹ increase of the price of dumped imports by the amount by which the target price exceeded the sales prices of the directly competitive Community products,¹⁰ and injury margin calculation based on turnover on sales and profitability of the Community producers.¹¹ Therefore, the Commission has retained much discretion in the calculation of injury margins and has changed its methodologies for calculation frequently so that this practice has caused a transparency problem. If the Commission wants to use different methodologies in the calculation of injury margin in different determinations, legal expectation could be in danger, and in order to improve transparency of the investigation, interested parties should be given the relevant data, in order to compare the results under different methodologies. Moreover, to make matters worse, anti-dumping duties based on the injury margin are not refundable, because the Community authorities only take into account for refund, the dumping margin, not the injury margin.¹²

With regard to refund, there have also been some basic problems.

First, according to the Community Anti-dumping Regulation, the importer plays a main role in the refund procedure, and the fact that the excessive duty is refunded to the importer who paid the duty is very logical, but there is no reason why an exporter should not apply for a

9. *Video Cassettes and video tape reels* (Korea, H.K.), Com.Reg.(EEC) No 4062/88, OJ (1988) L 356/47.

10. *Compact disc players* (Korea, Japan), Com.Reg.(EEC) No 2140/89, OJ (1989) L 205/5.

11. *Audio tapes in cassettes* (Korea, Japan), Com.Reg.(EEC) No 3262/90, OJ (1990) L 313/5, and *Microdisks* (Korea, H.K.), Com.Reg.(EC) No 534/94, OJ (1994) L 68/5.

12. Article 16(1) of the Community Anti-dumping Regulation.

refund.¹³

Second, the refund application has been granted only in cases where the weighted average dumping margin for a certain period is lower than the original anti-dumping duty. However, it is almost impossible for an individual importer to prove the change of the weighted average dumping margin for a certain period. Therefore, it would be much easier for a refund to be granted if individual dumping margins for each individual importer could be used.

Lastly, a refund application can be considered only where the duty exceeds the original dumping margin, and where the application demonstrates that the original dumping margin is reduced or eliminated. As a result, any application which is based on the fact that the duty exceeds the injury margin will not be considered. The lesser duty rule has been used widely because, in cases where the injury margin is lower than the dumping margin, the anti-dumping duty is set at the level of the injury margin. Therefore, consideration should also be given to allowing an application for a refund based on the injury margin. Otherwise, the Community refund system could be criticised on the basis that it systematically prevents the importer from applying for a refund.

The most significant unilaterally adopted rules in the Community anti-dumping regulation are the rules on circumvention. Circumvention needs to be stipulated by clear and multilaterally accepted rules. According to anti-circumvention rules of the Community, anti-dumping duties are imposed not on imported parts or materials but on the finished products assembled in the Community.

Basically, however, anti-dumping rules do not deal with the poss-

13. Article 8(3) of the 1979 GATT Anti-dumping Code demands that the amount of duty in excess of the actual dumping margin be reimbursed. It could be interpreted that an importer or an exporter can apply for a refund.

ibility of imposing anti-dumping duties on products manufactured within importing countries, but deal with trading between countries. Furthermore, the Community Anti-circumvention rules apply only where assembly in the Community is conducted by related parties. Therefore, independent Community manufacturers assembling dumped parts benefit from these rules because no duties are imposed.

In order to impose anti-dumping duty on the finished products assembled by circumvented parts, three cumulative prerequisites in Article 13(10)(a) should be satisfied. However, the existence of dumping is not established even though these three conditions are satisfied. Moreover, a finding of dumping and resulting injury with regard to a finished product should not be extended to its parts and components unless there has been a separate determination that the parts have actually been dumped and thereby have caused injury to the Community production of the 'like product'. Therefore, it should always be borne in mind that anti-dumping duties can only be imposed where dumping and resulting injury is established.

In case of prospective exporters, the same principle should be applied, because a source of imports which has never exported a certain product to the Community, could not in all justice be regarded as having dumped and caused injury, and should not be subject to imposition of anti-dumping duties.

Where the exporter, in whole or in part, either directly or indirectly, has borne the anti-dumping duties imposed, instead of raising the price, an additional anti-dumping duty may be imposed in order to increase a price corresponding to the amount borne by the exporter. However, an additional anti-dumping duty can be imposed only after an examination of dumping and injury therefrom is conducted, because the fact that anti-dumping duties were borne by the exporters does not automatically indicate the continuation of dumping. In fact, this situation could be dealt

without additional anti-dumping duties. In other words, if the exporter were to bear the anti-dumping duty, and if there were no anti-absorption duty in the Community, the exporter would have to suffer financially in order to maintain cheap export prices even after the imposition of anti-dumping duties, the Community can get anti-dumping duties revenue, and consumers could still enjoy cheap products without inflation pressure. Then, anti-dumping duties could be imposed again, as a result of review.

3. REVIEW

Judicial review has played a very important role in the Community Anti-dumping system, because a regulation which imposes anti-dumping duty may be annulled only by the Court's judgment and the judgment is final. In practice, however, the Court has been reluctant to deal with the economic evaluation that the Community authorities make in their decisions. The attitude of the Court has improved since the *FEDIOL* case¹⁴ and the *Allied* case,¹⁵ in which the Court recognised the complainant's right to institute judicial review. Nevertheless, actions for the annulment of Commission action applying the Community anti-dumping rules give rise to a number of problems because determinations for the imposition of antidumping duties are made in the form of regulations. The Court has not consistently accepted the admissibility of independent importers, although there are some exceptions,¹⁶ while it has accepted the admissibility of the complainant. In *Extramet*,¹⁷ however, the Court accepted the admiss-

14. Case 191/82, *FEDIOL v Commission*, [1983] 2913.

15. Joined cases 239 & 275/82, *Allied Corporation v Commission*, [1984] ECR 1005.

16. Case 118/77, *ISO v Council*, [1979] ECR 1277, at 1291 and 1294, and Case 119/77, *Nippon Seiko v Council and Commission*, [1979] ECR 1303, at 1327.

17. Case C-358/89, *Extramet v Council*, [1991] ECR I-2501, at I-2532.

ibility of the applicant. These different approaches in the anti-dumping cases causes uncertainty about the admissibility of the applicant in anti-dumping proceedings instituted under Article 173. If this uncertainty is to be avoided, the Court should recognise the admissibility of the independent importer in future judgments, consistently.

Despite this uncertainty, the existence of judicial review has played a very important role in Community anti-dumping law, because appeal to the Court is the only way to make antidumping measures void when they are imposed on imported products. Affected by the *Japanese Ballbearings* cases,¹⁸ the Community has improved the previous lack of transparency. After these cases, the exporters' rights were considerably improved in the Community anti-dumping regulation 1681/79, which provided that exporters and importers of the product subject to investigation may request to be informed of the "essential facts and considerations".¹⁹ Therefore, it is worth bringing more anti-dumping cases before the Court, because this provides more pressure on the Community authorities to improve transparency in the anti-dumping system.

4. RECOMMENDATIONS FOR THE KOREAN ANTIDUMPING LAW AND PRACTICE

With regard to the anti-dumping law in Korea, visibility and fairness in the procedural and substantive aspect of the anti-dumping procedure must also be considered as the most important principles. However, anti-dumping measures have not been applied frequently, because of institutional inertia, and therefore there is no established practice in the

18. Cases 113, 118-121/77, *Japanese Ballbearings cases* [1979] ECR 1185-1363.

19. Article 7(4)(b) of the Community Anti-dumping Regulation.

application of anti-dumping measures.²⁰

First of all, the major Korean rules concerning anti-dumping are dispersed in Article 10 of the Korean Customs Act, Articles 4(2) to 4(15) of the Enforcement Decree of the Customs Act, and Article 37 and Article 40(6) of the Foreign Trade Transactions Act. Therefore, a special Act governing anti-dumping complaints should be considered and enacted in order to improve the transparency of the anti-dumping system.

Korea has a bifurcated anti-dumping system under which the Office of Customs Administration investigates the existence of dumping and the Korean Trade Commission conducts the injury investigation. This bifurcated system could be switched to a unitary system, perhaps modelled on the European Community anti-dumping system, in order to speed up investigations and make them more transparent.

With respect to the procedural aspects, the discretion of the MOF and the investigation authorities should be reduced, because the interested person's opportunity to address a public hearing, or to consult an interested person with opposing views, is very restricted. On the other hand, most anti-dumping complaints are lodged by the individual companies, instead of an association of the industry concerned. Considering that the main victims of dumping are the products of small and medium sized local companies, more complaints should be lodged by associations or organisations, composed of domestic producers or acting on their behalf, because only a few individual companies can afford to going through the high costs of anti-dumping proceedings.

With respect to substantive aspects, it is too early to say that there is established practice. Moreover, in some provisions, a more

20. Between 1986 and 1993, in Korea, only 15 anti-dumping investigations were initiated. Of these, only 7 investigations were concluded in the form of anti-dumping duties.

precise definition is required for the transparency of the anti-dumping proceedings. For instance, the normal price is constructed, if it is impossible to apply the ordinary trade price due to a "special market situation",²¹ and the dumping price is calculated on the basis of a "reasonable criterion" by the MOF, where there is a special relationship between the parties concerned, and there is no resale to an independent buyer.²² There is no definition of a "special market situation" or a "reasonable criterion" in the Act or the Decree.

Furthermore, there are two outstanding areas of institutional inertia in the Korean anti-dumping rules: cumulation and anti-circumvention. In *Glass Fiber*,²³ the KTC evaluated the impact of imports cumulatively, even though cumulation is neither prescribed by the Korean Customs Act or its Enforcement Decree nor established by practice. Therefore, provisions for cumulation should be enacted.

There is no anti-circumvention provision in the Korean Customs Act or in its Enforcement Decree. As a result of a trade liberalisation policy, one of the main issues is to protect the domestic industry in Korea because imports are increasing rapidly. Anti-dumping measures have been regarded as the most effective measure for the protection of the domestic industry concerned,²⁴ and they will be applied more frequently than before. Therefore it could be predicted that foreign producers or exporters will try to escape or circumvent the anti-dumping duties by exporting parts and components and assembling them in Korea. That is why anti-

21. Article 4(6)(1) of the EDCA.

22. Article 4(6)(iv) of the EDCA.

23. *Glass Fiber*, FMA No 1994-57, OG (1994) No 12786, p39.

24. In case of *Phosphoric Acid*, 89.3% of the total quantity of imports was from China in 1992. However, it decreased to 68.1% in 1993 when the antidumping duty started to be imposed, and dropped further to 46.8% in 1994. See, Seoul Shinmun, '*Imports restraint effect of antidumping duties*', Jan. 25. 1995, p18.

circumvention measures need to be prescribed in the Korean anti-dumping law. When this institutional inertia is rectified, however, it should always be borne in mind that the anti-dumping duty must be imposed only where dumping has occurred and injury was caused therefrom. Therefore, requirement of evidence of dumping and of injury therefrom must be added, even though the GATT Anti-dumping Code does not contain provisions regarding the circumvention of anti-dumping measures.

This study has looked at anti-dumping laws in the Community and Korea comparatively in the context of the GATT Anti-dumping rules. Despite the fact that the Community anti-dumping law²⁵ and practice can be a useful legislative model for the Korean anti-dumping system, there is also a risk that the protectionist tilts found in the Community law and its practice can form examples for the Korean law which will be patterned after the Community law because of the recognised proximity between the Community and the GATT law. Therefore, it is expected that a new Community anti-dumping regulation²⁶ which has been adopted in order to accommodate the changes of the new GATT rules can be a more desirable legislative model for the current Korean anti-dumping system.

25. Coun.Reg.(EEC) No 2423/88, OJ (1988) L 209/1.

26. Coun.Reg.(EC) No 3283/94, OJ (1994) L 349/1.

BIBLIOGRAPH

A. BOOKS

American Bar Association, *Uruguay Round Trade Negotiation: Where Do We Go From Here?*, (The Dection of International Law and Practice, the US Chamber of Commerce and the Division for Professional Education, 1991).

Ivo Van Bael & J-F Bellis, *International Trade Law and Practice of the European Communities: EEC anti-dumping and other Trade Protection Laws*, (Bicester: CCH, 1985).

-----, *Anti-dumping and Other Trade Protection Laws of the EEC (2ed ed.)*, (CCH Edition Ltd., 1990).

Beseler & Williams, *Anti-dumping and Antisubsidy Law: the European Community*, (Sweet & Maxwell, London, 1986).

R.M. Bierwagen, *GATT Article VI and the Protectionist Bias in Anti-dumping Laws*, (Kluwer Law and Taxation Publishers, Deventer and Boston, 1990).

Jacques H.J. Bourgeois, *Subsidies and International Trade: A European Lawyer's Perspective*, (Kluwer Law and Taxation Publishers, 1991).

D.W. Bowett, *The Law of International Institutions*, (Stevens & Sons, London, 1982).

M.B. Brown, *European Union: Fortress or Democracy? Towards a Democratic Market and a New Economic Order*, (Russell Press Ltd, Nottingham, 1991).

P. Cecchini, *The European Challenge 1992 - The Benefits of a Single Market*, (Office for Official Publication of the European Communities, 1988).

Sang-Won Cho, *Tax Law Codification '94'*, (Hyum-Am Publication Co. Ltd., Seoul, 1994).

W.M. Clarke, *Planning for Europe: 1992 and the Common Internal Market*, (Waterlow, 1989).

Commission, *International trade of the European Community: a review of certain aspects of external trade of the Community*, European Economy (No 39), 1989.

-----, *EC-Nics trade. A statistical analysis, EC 1991*, Eurostat.

Commission, DG IX, *Europe without frontiers-completing internal market*, European Documentation (No 2), (Office for Official Publication of the European Communities 1989).

Commission, DG X, *Europe: World partner, The external relations of the European Community*, Europe on the Move (Office for Official Publication of the European Communities 1991).

J. Cunnane & C. Stanbrook, *Dumping and Subsidy*, (European Business Publications, London, 1983).

G. Daniels, *EC-Japan: past, present and future in the European Community and the challenge of the future*, (Pinter, 1989).

M. Davenport, *Europe: 1992 and the developing world*, (Overseas Development Institute).

J.W. Dudley, *1992 Strategies for the Single Market*, (Kogan Page).

Eurostat, *External trade: Statistical yearbook, EC 1988*, (Office for Official Publication of the European Communities, 1989).

-----, *Europe in Figure* (3rd & 4th ed.), (Office for Official Publication of the European Communities, 1992 & 1995).

Hazel Fox(ed.), *International Economic Law and Developing States: Some Aspects*, (The British Institute of Int'l and Comparative Law, 1988).

D.A.C. Freestone & J.S. Davidson, *The Institutional Framework of the European Communities*, (Routledge, London and New York, 1990).

J. Grahl, *1992: the big market. The future of the European Community*, (Lawrence and Wishart, 1990).

J. Grahl, P. Teague, *External policy and political cooperation in 1992-The big market*, (Lawrence and Wishart, 1990).

N. Green, T.C. Hartley and U.A. Usher, *The Legal Foundation of the Single European Market*, (Oxford University Press, Oxford, 1991).

S.T. Han, *European Integration: The Impact on Asian Newly Industrialised Economies*, OECD, Paris, 1992.

T.C. Hartley, *The Foundations of European Community Law* (2nd ed.), (Clarendon Press, London, 1990).

B. Hawk, *Antitrust and Trade Policies of the European Economic Community*, 1983 *Fordham Corporate Law Institute, Annual Proceedings*, New York, N.Y.: Bender 1984.

M. Hilf, Jacobs and Petersmann (ed.), *GATT and the EC*, (Kluwer Law and Taxation Publishers, 1986).

- M. Hilf & E-U Petersmann, *National Constitutions And International Economic Law*, (Kluwer Law and Taxation Publishers, Denenter and Boston, 1993).
- R.E. Hudec, *The GATT Legal System and World Trade Diplomacy (2nd ed.)*, (New York: Praeger Publishers, 1990).
- J.H. Jackson and Edwin A. Vermulst(ed.), *Anti-dumping Law and Practice: A Comparative Study*, (Harvester Wheatsheaf, Chicago, 1990).
- J.H. Jackson, *International Economic Relations (2nd ed.)*, (West Publishing Co., St. Paul, Minn., 1986).
- KFTA, *Trade Annual 1993*, (Dong-A Publication Co., Seoul, 1993).
- , *Trade Annual 1994*, (Dong-A Publication Co., Seoul, 1994).
- C.K. Min, *The Economic Cooperation Between EC and Korea: Problems and Prospects*, (KIEP, Friedrich-Eberrrt-Stiftung, 1992).
- T.W. Kang, *Is Korea the Next Japan*, (The Free Press, New York and London,)
- KIEP, *The present situation and its improvement direction on the policies and systems related to Trade in Korea*, (KIEP, Seoul, 1992).
- D.S. Kim, *European Community Law*, (Bobmun Sa, Seoul, 1988).
- I.K. Kim, *Trade Conflict and the GATT*, (Koyowon Publishers, Seoul, 1986).
- Korea Overseas Information Service, *A Handbook of Korea (9th ed.)*, (Samhwa Printing Co.Ltd., 1993).
- D. Lasok, *The Customs Law of the European Economic Community (2nd ed.)*, (Kluwer Law and Taxation Publishers, 1990).
- O. Long, *Law and Its Limitations in the GATT Multilateral Trade System*, (Martimus Nijhoss Publishers, 1985).
- M. Maresceau, *The European Community's Commercial Policy after 1992: The Legal Dimension*, (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993).
- D.G. Mayes, *The European Challenge: Industry's response to the 1992 Programme*, (Harvester Wheatsheaf, New York, London, Tokyo), 1991.
- E. McGover, *International Trade Regulation*, (Exeter Globefield Press, 1986).
- L.B.M. Mennes & J. Kol, *European Trade Policy and the Developing World*, (Croom Helm, London/New York/Sidney, 1988).

P.A. Messerlin, *Anti-dumping Laws and Developing Countries*, Policy Research and External Affairs Working Paper - World Bank, June 1988.

T. Millett, *The Court of First Instance of the European Communities*, (Butterworths, London/Edinburgh, 1990).

P. Nicolaidis (ed.), *The Trade Policy of the European Community: Legal Basis, Instruments, Commercial Relations*, (European Institute of Public Administration, Maastricht, 1993)

OECD, *OECD Economic Survey - Korea*, (OECD Publication, 1994).

D.A. Parrott and I. Pogany, *Current Issues in International Business Law*, (Avebury Gower Publishing Co. Ltd., 1988).

E-U Petersmann & G. Jaenicke, *Adjudication of International Trade Disputes and National Economic Law*, (University Press Fribourg Switzerland, 1992).

J. Pinder, *The Single Market: a step towards European Union in the European Community and the Challenge of the future*, (Pinter, 1989).

R. Plender & Usher, *Cases and Materials on the Law of the European Communities*, (Butterworths, 1989).

V.C. Price, *1992: Europe's last chance? From Common Market to Single Market*, Occasional Paper, No.81., (Institute of Economic Affairs, 1988).

P. Sarcevice and H. Van Houte, *Legal Issues in International Trade*, (Graham and Trotman Ltd., 1990).

C. Stanbrook, *The Impact of Community Interest and Injury Determination on Anti-dumping Measures in the EEC*, (Fordham Corp.L.Inst., 1985).

Steenbergen, Jaques and Foque, *Change and Adjustment - External Relations and Industrial Policy of the European Community*, (London: Kluwer, London, 1984).

J. Steiner, *Textbook on EEC Law (2nd ed.)*, (Blackstone, 1990).

N. Tempini, *Multinational Enterprises and the European Community*, (European Dossier Series, No.9, PNL Press, 1989).

U.N., *Handbook of the International Trade and Development Statistics*, (New York, 1989).

UN, *Regional trading blocs: a threat to the multi-lateral trading system*, Views and recommendations of the Committee for developing Planning, United Nations, Department of Int'l Economic and Social Affairs, The CDP Report, 1990, (United Nations, 1990).

Edwin A. Vermulst, *Anti-dumping Law and Practice in the United States and the European Communities: A Comparative Analysis*, (N.H.P.C., Amsterdam, New York, Oxford, 1987).

J. Viner, *Dumping: A Problem in International Trade*, (Augustus M. Kelley Publishers, New York, 1966).

E.L.M. Volker (ed.), *Protectionism and the European Community* (2nd ed.) (Kluwer Law and Taxation Publishers, Deventer & London, 1987).

L.A. Winters, *Trade Flows and Trade Policy after "1992"*, (Cambridge Univ. Press).

S. Woolcock, *The Uruguay Round: Issues for the EC and the United States*, (The Royal Institute of Int'l Affairs, 1990).

D. Wyatt & A. Dashwood, *The Substantive Law of the EEC*, (Sweet & Maxwell, London, 1987).

B. ARTICLES

F.M. Abbott, "GATT and the European Community : A Formula for Peaceful Coexistence", (1990) 12 *Mich.J.Int'l L.*, 1-58.

T.E. Abeltschauer, "Towards a European constitution of the firm: problems and perspectives", (1990) 11 *Mich.J.Int'l L.*

K. Admantopoulos, "Subsidies in external trade law of the EEC: towards a stricter legal discipline", (1990) 15 *Eur.L.Rev.*

R.P. Alford, "Why A Private Right of Action Against Dumping would Violate GATT", (1991) 66 *New York U.L.Rev.* (No 3), 696-755.

P.F. Allgeier, "Korean Trade Policy in the Next Decade: Dealing with Reciprocity", (1988) 16 *World Development* (No 1), 85-97.

K. Anderson, "Is an Asian-Pacific Trade Bloc Next?", (1993) 25 *JWT* (No 4), 27-40.

M.I.B Arnold, "The EEC new trade policy instrument: some comments on its application", (1988) 22 *JWTL* (No.6), 19-38.

A. Arnall, "Challenging EC Anti-dumping Regulations: The Problem of Admissibility", (1992) 13 *ECLR* (Issue 2), 73-81.

K.Y. Bae, "Import Liberalisation and Relief for Industrial Injury", (1993) 10 *Economy and Management* (Hyosung University), 145-164.

Ivo Van Bael, "The GATT Dispute Settlement Procedure", (1988) 22 *JWT* (No 4), 67-77.

-----, "Lessons for the EEC: More Transparency, Less Discretion, and, at Last, a Debate?", *Anti-dumping Law and Practice* (Jackson & Vermulst ed.), 1990, 405-408.

-----, "EEC Anti-Dumping Enforcement: An Overview of Current Problems", (1990) 1 *EJIL*, 118-147.

-----, "EEC Anti-dumping Law and Procedure Revisited", (1990) 24 *JWT* (No 2), 5-23.

-----, "Japanese Investment in the EC: Trojan Horse or Hostage?", (1987) *Int'l Financial Law Rev.*, June, 10-15.

-----, "Minimising the Damage in an EEC Anti-Dumping or Antitrust Action", (1985) *Int'l Bus.Law.*, Oct., 403-409.

-----, "A Practitioner's Guide to Due Process in EEC Anti-trust and Anti-dumping Proceedings", (1984) 18 *Int'l Law.*, 841-867.

-----, "Ten Years of EEC Anti-dumping Enforcement", (1979) 13 *JWTL*, 395-408.

L.S. Baker, "Europe 1992-the quiet revolution", (1990) 22 *Case.W. Res.J.Int'l L.*

S.A. Baker, "Like Products and Commercial Reality", *Anti-dumping Law and Practice* (J.H. Jackson ed.), 1990, 287-294.

M. Bangemann, "Fortress Europe : The Myth", (1990) 9 *Nw.J.Int'l L.*

J.J. Barcelo III, "A History of GATT Unfair Trade Remedy Law - Confusion of Purposes", (1991) 14 *World Economy* (No 3), 311-33.

B.J.M. Baron, "Van Vorst tot Vorst, Europe 1992: Freemovement of goods in the wider context of a changing Europe", (1988) 25 *CML Rev.*, 693-709.

P.R. Beaumont, "European Court of Justice and jurisdiction and enforcement of judgments in civil and commercial matters", (1989) 38 *Int'l & Comp.L.Q.*, 217-220.

H.O. Beede, "The EEC rule-of-origin "game": can non-members play?", (1990) 14 *Suffolk Transnat'l L.J.*, 81-126.

T.A. Behney, "Escape clause relief in the EEC and United States: different approaches to the dilemma of adjustment to a new world trading environment", Jr. (1990) 15 *N.C.J.Int'l L. & Com.Reg.*

F.K. Beier, "The law of unfair competition in the European Community - its development and present status", (1985) 7 *Eur.Intell.Prop.Rev.*

A. Bell, "Current developments: European Community law - Constitutional aspects", (1991) 40 *Int'l & Comp.L.Q.*, 210-215.

-----, "Anti-dumping Practices of the EEC: The Japanese Dimension", (1987) *LIEI*, 1987/2, 1-31.

J.-F Bellis, "European Community trade policies vis-avis Korea and Taiwan in the eighties: a comparative perspective", (1990) 11 *Mich. J.Int'l. L.*, 509-524.

-----, "The EEC Anti-dumping System", *Anti-dumping Law and Practice* (J.H Jackson ed.), 1990, 41-98.

-----, "Judicial Review of EEC Anti-dumping and Antisubsidy Determinations after "FEDIOL": The Emergence of New Admissibility Test", (1984) 21 *CML Rev.*, 539-552.

Bellis, Vermulst and Waer, "Further Changes in the EEC anti-dumping Regulation: A Codification of Controversial Methodologies", (1989) 23 *JWT* (No 2), 21-34.

J.H. Bello, "Access to Business Confidential Information in Anti-dumping Proceedings", *Anti-dumping Law and Practice* (Jackson & Vermulst ed.), 1990, 349-353.

J.H. Bello, A.F. Holmer and J.O. Preiss, "AntiDumping Reform in the Uruguay Round: Balancing Conflicting Interests", *Uruguay Round Trade Negotiation: Where Do We Go From Here*, Tab B, 1991, 1-52.

P.A.G. van Bergeijk & D.L. Kabel, "Strategic Trade Theories and Trade Policy", (1993) 27 *JWT* (No 6), 175-186.

R.M Bierwagen & K. Hailbronner, "Input, Downstream, Upstream, Secondary, Diversionary and Components or Subassembly Dumping", (1988) 22 *JWTL* (No 3), 27-59.

M.D.H. Bloom, "Globalization and the Korean Electronics Industry", (1993) 6 *Pacific Rev.* (No 2), 119-126.

E.B. Blumenfeld, "Second Report...on the role of multinational undertakings in the Community and its external trade", *Parliament, Committee on External Economic Relations, PE DOC A2-378/88.*

Armin von Bogdandy, "The Non-Violation of Article XXIII:2 GATT", (1992) 26 *JWT* (No.4), 95-111.

R.D. Boltuck, "An Economic Analysis of Dumping", (1987) 21 *JWT* (No 5), 45-54.

R.D. Boltuck & S. Kaplan, "Conflicting Elitements: Can Antidumping and Antitrust Regulation be Reconciled?", (1993) 61 *Cincinnati Law Rev.*, 903-953.

-----, "Reply to Prof. Lazar's Comment on 'An Economic Analysis of Dumping'", (1988) 22 *JWT* (No 6), 129-131.

Anne-Marie Van den Bossche, "GATT: The Indispensable Link Between the EEC and Hungary?", (1989) 23 *JWT* (No 3), 141-155.

J.H.J. Bourgeois, "Competition Policy and Commercial Policy", *The European Community's Commercial Policy after 1992: The Legal Dimension* (M. Maresceau ed.), 1993, 113-133.

-----, "Trade Policy-Making Institutions and Procedures in the European Community", *National Constitutions and International Economic Law* (Hilf & Petersmann ed.), 1993, 175-202.

-----, "The Common Commercial Policy - Scope and Nature of Powers", *Protectionism and the EC* (E. Volker ed.), 1-16.

-----, "EC Anti-dumping Enforcement - selected second generation issues", *Antitrust and Trade Policies of the European Economic Community* (B. Hawk ed.), Fordham Corp.L.Inst., 1985.

U. Bourke, "Portress Europe or friend of the world?", (1989) *AA Accountancy Age*, June.

D. Brand, "Regional Bloc Formation and World Trade", (1992) 27 *Intereconomics* (No 6), 274-281.

J.L. Brand, "Recent Developments: The New World Order of Regional Trading Blocs", (1992) 8 *Am.U.J.Int'l L. & Pol'y*, 163-169.

C. Bright, "Commercial agreements and competition law: the defence of voidness", (1987) 137 *New L.J.* (No 13) 1056-8.

L. Brittan, "Priorities in competition policy", (1989) *European Access* (No 2), 19-21.

-----, "Shaping a framework for global trade: the challenge for the European Community", (1993) *Euro.Acc.* (No 3), 8-13.

M.C.E.J. Bronckers, "A Legal Analysis of Protectionist Measures Affecting Japanese Imports into the EC - Revisited", *Protectionism and the EC* (E. Volker ed.), 57-120.

A. Brown, "Trade Fairs and Fair Trade: the Commission's Exemption Policy", (1992) 13 *ECLR* (Issue 2), 66-72.

Campbell, "The Single European Act and the implications", (1986) 35 *Int'l & Comp.L.Q.*

W.H. Cavitt, "New Elements in the Anti-dumping Equation: Implementing the GATT Uruguay Round, US-Mexico Free Trade Negotiations", (1991) 17 *Can.U.S.L.J.*, 23-29.

U. Chae, "Direction and Problems of the Anti-dumping", (1993) *Management and Taxation*, 122-132.

C.W. Cheon, "Anti-dumping duties in the EC and Korean's Countermeasure", (1993) 12 *The Customs Journal*, 20-27.

-----, "GATT Anti-dumping Code and UR Anti-dumping Code", (1994) *The Customs Journal* (No 7), 22-26.

S. Cho, "An Analysis on the UR Anti-dumping Code", (1994) *Journal of Machine Industry*, 38-42.

H.B. Choi, "EC Anti-dumping Law: The Problems in the Determination of Dumping", (1994) *Transnat'l Law & Bus. Studies*, 52-86.

Stuart A. Christie, "Toward a more competitive Common Market: European Economic Community Council Regulation No 4064/89; on the control of corporate mergers within the European Community", (1991) 22 *Rutgers Com.&Tech.L.J.*, 457-83.

-----, "Anti-dumping policy of the European Community and the growing spectre of protectionism in technology-related goods", (1990) 16 *Rutgers Computer & Tech.L.J.*, 475-507.

T. Christoforou, "European Economic Community law: the territorial scope of application of EEC antitrust law-the Wood Pulp judgment, joined cases 89, 104, 116, 117 and 125-29/'85, European Court of Justice, 27 September 1988", (1989) 30 *Harv. Int'l L.J.*, 195-206.

G.L. Close, "Self-Restraint by the EEC in the Exercise of its External Powers", (1981) 1 *YEL*, 45-69.

Commission, "The European Single Act: countdown to 31 December 1992", (1990) *European File*, 13/90, 3-10.

-----, "Completing the internal market: an area without internal market, Progress Report Required by Article 8b of the Treaty", *COM(90) 552 final*.

-----, DG X, "The European Community's relations with ASEAN", (1991) *Europe Information: External Relations*, (No 1).

-----, "Commission opinion of 21 October 1990 on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union", (1991) *EC Bull.*, supplement 2/91.

-----, "A Community of Twelve: key figures", (1991) 6-7 *European File*, 2-31.

- , "The Institutions of the European Community", (1991) 8 *European File*, 2-11.
- , "Completion of the Internal market: Sixth Report by the European Community", *Background Report*, ISEC/B21/91(24.7.91).
- , "The European Community as a world trade partner; the second trade report", (1993) 52 *European Economy*, Annex I - A concise review of the EC trade policy, 187-198.
- , "Report of the Commission...on the implementation of measures for completing the internal market", *SEC(91)* 2491.
- , "Commission reports on progress towards the single market", (1989) *The Accountant*, (No 5830), 15-20.
- , "Europe a world partner: the external dimension of the single market", (1988) *EC Bull.* (No 10), 10-2.
- , "Trade policy: EEC Commission modifies application of Article 115", (1987) *Eur.Rep.*.
- , "Intergovernmental conference: contribution by the Commission", (1991) *EC Bull.*, supplement 2/91.
- , "Direct investment in the EC 1984 - 1991", (1992) *eurostat*.
- A.F. Conard, "The European alternative to uniformity in corporation laws", (1991) 89 *Mich.L.Rev.*, 2150-2200.
- R. Condon, "EC Customs Procedures", *The Trade Policy of the European Community* (P. Nicolaidis ed.), 1993, 33-38.
- M. Cremona, "The Completion of the Internal Market and the Incomplete Commercial Policy of the European Community", (1990) 15 *E.L.Rev.*, 283-297.
- S. Crosby, "The single market and the rule of law", (1991) 16 *Eur. L. Rev.*, 451-65.
- S.A. Crossick and M. Clough, "Is the European Community's Commercial Policy Protectionist? Article 115 - A Shield or A Sword?", (1986) 20 *Int'l Law.* (No 1), 293-302.
- M.W.S. Davenport, "The External Policy of the Community and its Effects upon the Manufactured Exports of the Developing Countries", (1990) 29 *JCMS* (No 2), 181-200.
- William J. Davey, "Anti-dumping Law in the GATT and the EC", *Anti-dumping Law and Practices*(J.H Jackson ed.), 1990, 295-301.

- , "An Analysis of European Communities Legislation and Practice relating to Anti-dumping and Countervailing Duties", *Anti-trust and Trade Policies of the EEC* (B. Hawk ed.), 1983.
- A.V. Deardorff, "Economic Perspectives on Anti-dumping Law", *Anti-dumping Law and Practice* (Jackson & Vermulst ed.), 1990, 23-40.
- W.D. DeGrandis, "Proving Causation in Anti-dumping Cases", (1986) 20 *Int'l Law*. (No 2), 563-590.
- Donald E. Dekieffer, "Foreign Policy Trade Controls and the GATT", (1988) 22 *JWT* (No.3), 73-80.
- R. Denton, "The new commercial instrument and AKZO v. DuPont", (1988) 13 *Eur.L.Rev.*, 3-27.
- Y. Devuyt, "GATT Customs Union Provisions and the Uruguay Round: The European Community Experience", (1992) 26 *JWT* (No 1), 15-34.
- P. Didier, "EEC Anti-dumping Rules and Practices", (1980) 17 *CML Rev.*, 349-370.
- , "EEC Anti-dumping: The Level of Trade Issue After the Definitive CD Player Regulation, Japanese Proposal to GATT on the Level of Trade Issue", (1990) 24 *JWT* (No 2), 103-109.
- C. Dilley & H.M. Hibbing (Rep.), "The European Community-international personality pre- and post- 1992", (1990) 84 *Am.Soc'y Int'l L.Proc.*, 213-28.
- P. Dolye, "1992: looking ahead", (1989) 1989 *Private Investors Abroad*, 8.1-8.10.
- R. Drifte, "The European Community and Japan: Beyond the Economic Dimension", (1983/84) 37 *J.Int'l Affairs*, 147-152.
- Economic and Social Committee, "1992 and European Community external trade (Own-Initiative Opinion)", (1989) *EC Bull.*, (No 7-8), 16-19.
- P. Eeckhout, "The External Dimension of the Internal Market and the Scope and Content of a Modern Commercial Policy", *The European Community's Commercial Policy after 1992: The Legal Dimension* (M. Maresceau ed.), 1993, 81-101.
- C-D Ehlermann, "Application of GATT Rules in the European Community", *GATT and the EC*, 1986, 127-140.
- , "The Contribution of EC Competition Policy to the Single Market", (1992) 29 *CML Rev.*, 257-282.
- M.E. Elling, "The emerging European Community: a framework for institutional and legal analysis", (1990) 13 *Hastings Int'l & Comp. L.Rev.*, 511-530.

- F. Engering, "Economic relations between the EC and Japan", (1989) *European Affairs*, (No 1), p51-56.
- R.D. English, "The European Single Market: A Challenge to the World Economy", (1992) 16 *Suffolk Transnat'l L.J.*, 1-68.
- A. Evans, "Freedom of trade under the common law and European Community law: the case of football bans", (1986) 102 *L.Q.Rev.*, 510-548,
- U. Everling, "The Law of the External Economic Relations of the European Community", *GATT and the EC*, 1986, 85-106.
- D.P. Fidler, "Competition Law and International Relations", (1992) 41 *Int'l & Comp.L.Q.*, 563-589.
- F.L. Fine, "EEC anti-dumping: the problem of imports from state-trading countries", (1988) *Law & Pol'y int'l Bus.*, 91-107.
- N. Forwood, M. Clough, "The Single European Act and free movement - legal implications of the provisions for the completion of the internal market", (1986) 11 *Eur.L.Rev.*, 383-408.
- G. Fotherby, "Current Development: Customs and Excise Duties and V.A.T.", (1990) 39 *Int'l & Comp.L.Q.*, 226-233.
- E.M. Fox, "Monopolisation and dominance in the United States and the European Economic Community: efficiency, opportunity, and fairness", (1986) 61 *Notre Dame L.Rev.*, 981-1020.
- E.P.M. Gardener, "The European Free Trade Association and the European Community", (1991) 25 *Int'l Law.*, 187-207.
- D.J. Gerber, "Law and abuse of economic power in Europe", (1987) 62 *Tul.L. Rev.*, 57-107.
- P.A Geroski, "European industrial policy and industrial policy in Europe", (1989) 15 *Oxford Rev. of Econ. Policy* (No.2), 20-36.
- G. van Gerven, "New Anti-Circumvention Rules in EEC Anti-dumping Law", (1988) 22 *Int'l Law.* (No 3), 809-828.
- H. Giersch, "EC 1992: Competition is the clue", (1989) *European Affairs* (No 3), p10-17.
- Laurence W. Gormley, "Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods", (1989) 9 *YEL*, 197-208.
- L.W Gormley, J.F Marchipont, "Aspects of the European Community's Industrial Policy", (1984) 6 *Mich.Y.B.Int'l Legal Stud.*, 79-95,.

F. Graafsma & B. Driessen, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 January 1994 - 30 June 1994", (1994) 5 *EJIL* (No 4), 572-599.

W. Grabendorff, "The single European Market and its impacts on U.S-Latin American trade relations", (1991) 22 *U.Miami Inter-Am.L.Rev.* 297-327.

J. Grahl, "1992 and all that", (1989) *Marxism Today*, April, 8-13.

R. Griffith, "Anti-dumping Duties on Parts in the EEC", *Anti-dumping Law and Practice* (Jackson & Vermulst ed.), 1990, 311-325.

O. Grolig and P. Bogaert, "The Newly-Amended EEC Anti-dumping Regulations: Blackholes in the Common Market", (1987) 26 *JWT* (No.6), 79-87.

J. Hagelstam, "Mercantilism Still Influences Practical Trade Policy at the End of the Twentieth Century", (1991) 25 *JWT*, 95-105.

-----, "Some Shortcomings of International Anti-dumping Provisions", (1993) 25 *JWT* (No 5), 99-110.

A. Hamlin, "Europe and 1992", (1989) 6 *The Economic Review* (No.4).

K. Hammarskjold, "Deregulation-idealism, ideology or power politics? Focus-Europe", (1987) 12 *Annals Air & Space L.*, 65-77.

M. Hart, "Dumping and Free Trade Areas", *Anti-dumping Law and Practice* (Jackson & Vermulst ed.), 1990, 326-342.

R.C. Henderson, "Taxes, Market Structure and International Price Discrimination", (1993) 23 *JWT* (No 4), 147-165.

S. Henrich-Cohen, "EEC Treaty Article 115 - the surviving safeguard: ridding residual Member States protection in the Single Market", (1993) 24 *Law Pol'y Int'l Bus.*, 553-587.

G. Hertig, "The European Community", (1991) 11 *Int'l Rev.L.& Econ.*, 331-342.

R. Herzstein, "Dumping and Trade Liberalisation: A Two-Tiered Approach to Reducing Anti-dumping Displines between Open Trading Partners", *Anti-dumping Law and Practice* (Jackson & Vermulst ed.), 1990, 343-348.

M. Hilf, "The Application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic Germany", (1986) *GATT and the EC*, 153-186.

-----, "The Single European Act and 1992: Legal Implications for the Third Countries", (1990) 1 *EJIL*, 89-117.

- B. Hindley, "EC Imports of VCRs from Japan : A Costly Precedent", (1986) 20 *JWTL*, (No 2), 168-184.
- , "Europe: fortress or freedom", (1989) *Occasional Paper*, (No 2), *The Bruges Group*.
- , "Dumping and Far East Trade of the European Community", (1988) 11 *World Economy*, 445-464.
- , "A European Community Precedent: Exports of VCRs from Japan", *European Trade Policies and the Developing World* (Mennes & Kol ed.), 1988, 268-289.
- , "Anti-Dumping Action and the EC: A Wider Perspective", *National Constitutions and International Economic Law* (Hilf & PETERSMANN ed.), 1993, 371-390.
- B. Hoekman, "Rules of Origin for Goods and Services: Conceptual Issues and Economic Considerations", (1993) 25 *JWT*, 81-99.
- B.M. Hoekman & M.P. Leidly, "Dumping, Anti-dumping and Emergency Protection", (1989) 23 *JWT* (No 5), 27-44.
- S.M. Hoffer, "May Exchange Rate Volatility Cause Dumping Injury?", (1992) 26 *JWT* (No 3), 61-72.
- S. Holmes, "Anti-Circumvention under the European Union's New Anti-dumping Rules", (1995) 29 *JWT* (No 3), 161-180.
- N. Hopkinson, "Japan and European Community", (1991) *Wilton Park Papers*, (No 42), HMSO.
- G.N. Horlick, "How the GATT Became Protectionist - An Analysis of the Uruguay Round Draft Final Anti-dumping Code", (1993) 27 *JET* (No 5), 5-18.
- , "Proposals for Reform of the GATT Anti-Dumping Code", (1992) 18 *Brook J.Int'l L.*, 181-188.
- G.N. Horlick & E.C. Shea, "The World Trade Organisation Anti-dumping Agreement", (1995) 29 *JWT* (No 1), 5-31.
- S. Hornett, "Embryos and Europe: What prospect for harmonisation?", (1991) 141 *New L.J.*, 713-744.
- D. Horovitz, "Dealing with dumping in the EEC-EFTA free trade areas", (1989) 10 *ECLR*, 540-556.
- H. Van Houte, "Health and Safety Regulations in Int'l Trade", *Legal Issues in Int'l Trade*, 1990.
- S.L. Hsu, "Input Dumping and Upstream Subsidies: Trade Loopholes which Need Closing", (1986) 25 *CJTL*, 137-167.

- D. Hudig, "EC legislation and European industry's inter-national competitiveness", (1989) *European Affairs*, (No 3), p84-87.
- T.H. Irwin, "The new Europe: the economic giant is born", (1991) 78 *A.B.A.J.*, 58-61.
- John H. Jackson, "Dumping in International Trade: Its Meaning and Context", *Anti-dumping Law and Practice* (J.H Jackson ed.), 1990, 1-22.
- , "Dolphins and Hormons: GATT and the Legal Environment for International Trade After the Uruguay Round", (1992) 14 *U.Ark Little Rock.L.J.* (No 3), 429-454.
- , "Consistency of Export-Restraint Arrangements with the GATT", (1988) 11 *The World Econ.*, 485-500.
- F.G. Jacobs, "Constitutional developments in the European Community and the impact of the single European market after 1992", (1990) 11 *Mich.J.Int'l L.*, 88-96.
- , "Observation on the Anti-dumping Law and Practice of the European Community, and some Possible Reforms", *Anti-dumping Law and Practice*(J.H Jackson ed.), 1990, 354-359.
- , "Competition Policy and Commercial Policy", *The European Community's Commercial Policy after 1992: The Legal Dimension* (M. Maresceau ed.), 1993, 65-77.
- A. Jacquemin, "Europe post-1992 and external liberalisation", (1991) 81 *The American Economic Review*, 166-170.
- A. Jacquem & A. Sapir, "The EC and Industrial Policy in 1992", *The Economic Cooperation between EC and Korea*, (KIEP, Seoul, 1992).
- R.M. Jarvis, "American Business and the Single European Act: scaling the walls of 'fortress Europe'", (1989/'90) 20 *Cal.W.Int'l L.J.*, 227-261.
- M.L. Jones, "'Putting 1992' in Perspective", (1989) 9 *Nw.J.Int'l L. & Bus.*, 463-486.
- K. Jones, "Voluntary Export Restraint: Political Economy, History and the Role of the GATT", (1989) 23 *JWT*, 125-140.
- B.C. Kang, "A Study on the Anti-dumping Policy of the EC", (1992) 9 *San-Kyong Yon-Ku* (Chang-Won University), 25-41.
- K.H. Kim, "Korea in the 1990s: Making the Transition to a Developed Economy", (1988) 16 *World Development* (No 1), 7-18.
- K.H. Kim, "Korean Antidumping System: Problems and its Direction for Improvement", (1994) *The Customs Journal* (No 8/9), 66-69/56-62.

- M.Y. Kim, "Relief Measures for Industrial Injuries Caused by the Dumped Imports in Korea", (1992) *Hwa-Sum*, Sep., 15-22.
- S.K.P. Kim, "Changes in United States Foreign Trade Policies: Implications on Korean - American Trade Relations", (1991) 5 *Temp.Int'l & Comp.L.J.*, 303-327.
- F. von Kirchbach, "Euro-Asian Trade: The Stepchild in Triadic Relations Takes Over", (1992) 27 *Intereconomics* (No 5), 245-250.
- Richard I. Kirkland, "Outsider's guide to Europe in 1992", (27.10.1988) *Fortune*, 97-101.
- N. Kirmani, "The Uruguay Round: revitalising the global trading system", (1989) *Finance and Development*, 6-8.
- Jan Klabbers, "Jurisprudence in International Trade Law: Article XX of Gatt", (1992) 26 *JWT* (No 2), 63-94.
- M.H. Klein, "The Single European Act and Social Dumping: A New Appeal for Multilateral Collective Bargaining", (1991) 12 *U.Pa.J. Int'l Bus.L.* (No 3), 411-431.
- G. Kleinfeld & D. Gaylor, "Circumvention of Anti-dumping and Countervailing Duty Orders through Minor Alterations in Merchandise", (1994) 28 *JWT* (No 1), 77-88.
- A. Koekkoek, A. Kuyvenhoven, & W. Molle, "Europe 1992 and the Developing Countries: An Overview", (1990) 29 *JCMS* (No 2), 111-131.
- Bohn-Young Koo, "A review of the industrial incentive system in Korea", (1984) *KDI*.
- G. Koopmann, "EC trade policy beyond 1992", (1989) 24 *Intereconomics* (No.5) 207-215.
- T. Koopmans, "The role of law in the next stage of European integration", (1986) 35 *Int'l & Comp.L.Q.*, 925-931.
- V. Korah, "From legal form toward economic efficiency-article 85(1) of the EEC treaty in contrast to U.S antitrust", (1990) 35 *Antitrust Bull.*, 1009-1036.
- M. Koulen, "Some Problems of Interpretation and Implementation of the GATT Anti-dumping Code", *Anti-dumping Law and Practice* (J.H. Jackson ed.), 1990, 336-373.
- M.E. Kreinin & M.G. Plummer, "Effects of Economic Integration in Industrial Countries on ASEAN and the Asian NIEs", (1992) 20 *World Development* (No 9), 1345-1366.
- C.M. Krupp, "A Shot Across the Bow: South Korea's First Test of Its Anti-dumping Law", (1992) 26 *JWT* (No 3), 111-124.

- R. Kulms, "Competition, Trade Policy and Competition Policy in the EEC: The Example of Anti-dumping", (1990) 21 *CML Rev.*, 285-313.
- M. Kunihiro, "The external implications of 1992: a Japanese view", (1989) *The World Today*, 29-31.
- P.J. Kuyper, "Judicial Protection and Judicial Review in the EEC", *Anti-dumping Law and Practice* (Vermulst ed.), 1990, 374-383.
- J.T. Kuzmik, "A Community Export Price Offset", (1988) 25 *CML Rev.*, 317-331.
- D. Lal, "Trade Blocs and Multilateral Free Trade", (1993) 31 *JCMS* (No 3), 349-358.
- H-C von Heydebrand und der Lasa, "Confidential Information in Anti-dumping Proceedings before United States Courts and the European Court", (1986) 11 *Eur.L.Rev.*, 331-349.
- K.P.E Lasok, "Procedure in Anti-dumping Investigations", (1987) *ECLR*, 143-162.
- F. Lazar, "Structural/Strategic Dumping: A Comment on Richard Boltuck's 'An Economic Analysis of Dumping'", (1988) 22 *JWT* (No 3), 91-93.
- B.H. Lee, "Substance of the Anti-dumping System and the Countermeasures", (1993) *Journal of Petrochemistry*, Oct., 2-7.
- K.H. Lee, "Anti-dumping System and Small and Medium Sized Enterprises in Korea", (1993) 3 *Observer*, 406-420.
- D.T. Lee, "An Analysis on the European Community's Anti-dumping Procedures and Korea's Countermeasures", (1993) *J.Int'l Man.*, 102-158
- C.W. Lee, "The EC 1992: Trade Policy Implications for Korea", (1990) *Korea and World Affairs*, 54-65.
- D.M. Leipziger, "Editor's Introduction: Korea's Transition to Maturity", (1988) 16 *World Development* (No 1), 1-5.
- L.R. Le Lievre and Lue G. Houben, "EC Versus Japan : The Community's Legal Weapons", (1987) 24 *CML Rev.*, 427-455.
- Van Lennep and Van Barlingen, "EEC Anti-dumping: the Refund Procedure", (1987) 30 *Sw.Rev.Int'l Comp.Law*, 33-64.
- W.H.M. Lloyd-Schut, "Construction joint ventures: EEC competition aspects", (1992) 9 *Int'l Costr.L.Rev.*, 3-10.

C. Lister, "Dawn raids and other nightmare: the European Commission's investigatory powers in competition law matters", (1990) 24 *Geo.Wash.J.Int'l L. & Econ.*, 45-88.

J.K Lockett, "EEC anti-dumping law and trade policy after Ballbearings II: discretionary decisions masquerading as legal process?", (1988) 8 *Nw.J.Int'l L. & Bus.*, 365-404.

J.M. Lutz, "GATT Reform or Regime Maintenance : Differing Solutions to World Trade Problems", 25 (1991) *JWT*, 107-122.

R. Macdonald, "Lowering the drawbridge on fortress Europe", (1989) *European Trends*, (No 1), 77-86.

M. Maresceau, "The GATT in the Case-Law of the European Court of Justice", *GATT and the EC*, 1986, 107-126.

-----, "The Concept 'Common Commercial Policy' and the Difficult Road to Maastricht", *The European Community's Commercial Policy after 1992: The Legal Dimension* (M. Maresceau ed.), 1993, 5-19.

F. Marvasti, "The Single European Act: a profitable perspective not only for the European Community", (1991) 20 *Sw.U.L.Rev.*, 175-194.

S. Mario and S.S Giuseppe, "Italian and EC competition law: a new relationship - Reciprocal exclusivity and common principles", (1992) 29 *CML Rev.*, 93-131.

J. Mathis, "The International Trade System: GATT Structure, Principles, Membership", *The Trade Policy of the European Community* (P. Nicolaides ed.), 1993, 13-18.

-----, "GATT Dispute Settlement Procedures", *The Trade Policy of the European Community* (P. Nicolaides ed.), 1993, 19-24.

K. Matsumoto & G. Finlayson, "Dumping and Anti-dumping: Growing Problems in World Trade", (1990) 24 *JWT* (No 4), 5-19.

D.G. Mayes, "The External Implications of Closer European Integration", (1990) *National Institute of Economic Review* (No 134), 73-85.

M.G. McDermott, "The internationalisation off the South Korean and Taiwanese electronics industries: the European Dimension", *Europe and the multinationals*, 1992, New Horizon in Int'l Business, 206-231.

F. McDonald, "The Single European Market", (1990) 90 *European Business Review*, 52-59.

A. McGee, "The evolution of the single market-harmonization or liberalisation", (1990) 53 *Mod.L.Rev.*, 573-698.

- R.E.W. Mead, "Europe 1992: the Single Market", (1989) *1989 Private Investors Abroad*.
- K.M. Meessen, "Europe en route to 1992 : the Completion of the Internal Market and its Impact on Non-Europeans", (1989) 23 *Int'l Law*.
- P.A. Messerlin & Y. Noguchi, "The EC Anti-dumping and Anti-Circumvention Regulations: A Costly Yet Futile Exercise, The Case of the Photocopier", Sept. 1991, 1-39.
- T. Millett, "The New European Court of Justice", (1989) 38 *Int'l & Comp.L.Q.*, 811-833.
- G.A. Moens, "The 1992 challenge: the right of establishment and the freedom of movement of goods in the European Community", (1990) 16 *U. Queensl L.J.*, 70-92.
- , "Freedom of movement of goods in the European Community", (1990) 17 *Melb.U.L.Rev.*, 733-743.
- J.C. Monica, Jr., "United States exports with Japanese label: potential effects of EC '92 on automobiles manufactured by Japanese companies on U.S soil", (1991) 24 *Geo. Wash. J. Int'l L. & Econ.*, 623-645.
- K. Mortelmans, "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a new Definition?", (1991) 28 *CML Rev.* (No 1), 115-136.
- S.L. Na & K. Hong, "The Effect of European Single Market on the Korea-EC Trade Pattern", (1990) 15 *J.Eco.Dev.* (No 2), 93-129.
- B. Neuss, "The European Community and South Korea", (1990) *Korea and World Affairs*, 86-110.
- N.A. Neuwahl, "Joint Participation in International Treaties and the Exercise of Power by the EEC and Its Member States: Mixed Agreement", (1991) 28 *CML Rev.* (No 4), 717-40.
- P. Nicolaidis, "Overview of EC Trade Policy I: Competence, Decision-Making Procedure", *The Trade Policy of the European Community* (P. Nicolaidis ed.), 1993, 1-6.
- , "Overview of EC Trade Policy II: Instruments, Commercial Relations", *The Trade Policy of the European Community* (P. Nicolaidis ed.), 1993, 7-12.
- , "The EC Anti-Dumping Regulation", *The Trade Policy of the European Community* (P. Nicolaidis ed.), 1993, 39-44.
- , "Anti-competitive effects to trade policy", (1991) 26 *Intereconomics* (NO 4), 173-176.

- , "The Competition Effects of Dumping", (1990) 24 *JWT* (No 5), 115-131.
- , "Safeguards and grey area measures: a challenge to Gatt", (1989) *European Trends*, (No 2), 87-94.
- , "How Fair is Fair Trade?", (1987) 21 *JWT* (No 4) 147-162.
- P. Nicolaidis & R. van Wijngaarden, "Reform of Anti-dumping Regulations - The Case of the EC", (1993) 27 *JWT* (No 3), 31-53.
- G.P. Nielsson, "Economic and political factors supporting the 'Europe 1992' reform program", (1991) 12 *Whittier L.Rev.*, 177-184.
- E. Noel, "The Institutions of the European Community", (1992) 15 *Suffolk Transnat'l L.J.*, 514-562.
- C. Norall, "The New Trends in Anti-dumping Practice in Brussels", (1986) 9 *The World Economy*, 97-112.
- , "The New Amendments to the EC's Basic Anti-dumping Regulation", (1989) 26 *CML Rev.*, 83-101.
- S. Ostry, "Europe 1992 and the Evolution of the Multilateral Trading System", (1990) 22 *Case W.Res.J.Int'l L.*, 311-329.
- A.M. den Oudsten, "Undertakings in EEC anti-dumping law", (1989) 4 *Fla.Int'l L.J.*, 319-400.
- N.D. Palmeter, "The US Search for 'Net ESP': Anti-dumping Comparisons when Value is Added After Importation and Before Sale", (1992) 26 *JWT* (NO 4), 113-119.
- , "The US Rules of Origin Proposal to GATT: Monotheism or Polytheism?", (1990) 24 *JWT* (No 2), 25-36.
- , "Material Retardation in the Establishment of an Industry Standard in Anti-dumping Cases", (1987) 21 *JWT* (No 6), 113-115.
- , "Rules of Original or Rules of Restriction? A Commentary on a New Form of Protectionism", (1987) 11 *Fordham Int'l L.J.* (No 1), 1-50.
- R.P. Parker, "The Tools of Trade: Can Trade Laws Help Make Industries Competitive?", (1991) 36 *St.Loui.U.L.J.* (No 1), 119-39.
- J. Pelkmans & J. Tan, "Trade Protection in the EC and Korea", *The Economic Cooperation between EC and Korea*, (1992) KIEP, 65-96.
- , "Bilateral Trade Relations Between Korea and the EC", *The Economic Cooperation between EC and Korea*, (1992) KIEP, 97-122.

-----, "Asian and EC - 1992", (1990) *National Institute of Economic Review* (No 134), 99-109.

P. Pescatore, "Some Critical Remarks on the 'Single European Act'", (1987) 24 *CML Rev.*, 9-18.

-----, "Judicial Protection of Individual Rights by the EC Court of Justice in the Field of Foreign Trade", *National Constitutions and International Economic Law* (Hilf & Petersmann ed.), 1993, 203-210.

M.E. Peters, "Free Trade Area Agreements as the Economic and Legal Solution to Bilateral Trade Relations: The Case of Japan", (1990) 28 *CJTL* (No 2), 449-482.

E-U Petersmann, "Int'l and European Foreign Trade Law : GATT Dispute Settlement Proceedings AGAINST the EEC", (1985) 22 *CML Rev.*, 441-487.

-----, "Grey Area Trade Policy and the Rule of Law", (1985) 19 *Int'l Law*.

-----, "The EEC as a GATT Member-legal Conflicts between GATT Law and European Community Law", *GATT and the EC*, 1986, 23-71.

-----, "Grey Area Trade Policy and the Rule of Law", (1988) 22 *JWT* (No 2), 23-44.

-----, "GATT Dispute Settlement Proceedings in the Field of Anti-dumping Law", (1991) 28 *C.M.L.Rev.* (No 1), 69-113.

-----, "Constitutional Principles Governing the EEC's Commercial Policy", *The European Community's Commercial Policy after 1992: The Legal Dimension* (M. Maresceau ed.), 1993, 23-61.

-----, "The GATT Dispute Settlement System and the Uruguay Negotiations on its Reform", *Legal Issues in International Trade* (Sarcevice & van Houte ed.), 1990,, 53-99.

P.A. Petri, "Korea's Export Niche: Origins and Prospects", (1988) 16 *World Development* (No 1), 47-63.

E. Piontek, "Anti-dumping in the EEC - Some Observations by an Outsider", (1987) 21 *JWTL* (No 4), 67-94.

R. Plender, "Competence, European Community law and nationals of non-member states", (1990) 39 *Int'l & Comp.L.Q.*, 599-610.

D. Plunkett, " Korea's Trade Links with Europe", (1992) *Export Today*, 47-50.

- I. Pogany, "Steel Wars vs Star Wars : the Impact of Voluntary Export Restraints on the GATT", *Current Issues in International Business Law* (D. Perrott & I. Pogany ed.), 1988.
- N. Preston, "Several states, one unity, one law?", (1990) 24 *Akron L.Rev.*, 141-61.
- H.G. Preusse, "Voluntary Export Restraints - An Effective Means Against a Spread of Neo-Protectionism?", (1991) 25 *JWT* (No 2), 5-17.
- C. Quingley, "The notion of a state aid in the EEC", (1988) 13 *Eur.L.Rev.*, 242-56.
- M. Quinn, N. MacGowan, "Could article 30 impose obligations on individuals?", (1987) 12 *Eur.L.Rev.*, 163-78.
- A.H. Qureshi, "The Role of GATT in the Management of Trade Blocs: An Enforcement Perspective", (1993) 27 *JWT* (No 3), 101-115.
- H.-J. Rabe & M. Schutte, "EC Anti-dumping Law: Current Issues in the light of the Jurisdiction of the Court", (1989) 26 *CML Rev.*, 643-674.
- W. Rawlinson, "An Overview of EEC Trade with Non-Community Countries and the Law Governing These External Agreements", (1989/90) 13 *Fordham Int'l L.J.*, 205-233.
- G. Ress, "Direct Actions before the EC Court of Justice: The Case of Anti-Dumping Law", *Adjudication of International Trade Disputes in International And National Economic Law*, 1992, 159-260.
- M. Reynolds, "Politics, GATT and the ECJ hit anti-dumping measures", (1991) 1 *European Report* (No 5) 1-3.
- Y.W. Rhee, "The Export Drive: The Key to Korea's Success", (1988) *Korea's Economy* (No 2), 23-25.
- J.H Riggs, Jr., A. Giustini, "Joint ventures under EEC competition law", (1991) 46 *Bus.Law.*, 849-908.
- P. Robson, "The New Regionalism and Developing Countries", (1993) 31 *JCMS* (No 3), 329-348.
- S.J. Rothberg, "From Beer to BST : Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade", (1990) 75 *Minn.L.Rev.*, 505-535.
- S. Rothstein, "The European Economic Community: challenge and opportunity", (1990) 24 *J.Marshall L.Rev.*, 145-207.
- J.G. Ruggie, "Trade, Protectionism and the Future of Welfare Capitalism", (1994) 48 *J.Int'l Affairs* (No 1), 1-11.

- P. Sands, "Current Development : External relations", (1990) 39 *Int'l & Comp.L.Q.*, 223-226.
- A. Sapir, "Regionalism and the New Theory of Int'l Trade: Do the Bells Toll for the GATT? A European Outlook", (1993) 16 *The World Economy* (No 4), 423-438.
- A. Schildhaus, "1992 and the Single European Act", (1989) 23 *Int'l Law.*, 549-555.
- I. Schmidt & S. Richard, "Conflict between Anti-dumping and Anti-trust Law in the EC", (1992) *Intereconomics*, Sept./Oct., 223-229.
- Frank Schoneveld, "The European Community Reaction to the "Illicit" Commercial Trade Practices of Other Countries", (1992) 26 *JWT* (No 2), 17-34.
- P.V. Schueren, "Customs Classification: One of the Cornerstones of the Single European Market, but One Which cannot be Exhaustively Regulated", (1991) 28 *CML Rev.* (No 4), 855-876.
- , "The EEC and Free Trade Agreements: Stretching the Limits of GATT Exceptions to Non-Discriminatory Trade?", (1992) 26 *JWT* (No 5) 59-78.
- G.W. Seong, "Counterplans for Industrial Injuries Caused by Marekt Liberalisation", (1993) *Technology and Venture*, 24-34.
- A.C. Seward, "U.S. multinational approach to the single European market", (1991) 12 *Whittier L.Rev.*, 235-239.
- E. Sharpston, "When is an agreement anticompetitive?", (1991) 135 *Solic.J.* (No 1), 1186-1188.
- , "European Community law and the doctrine of legitimate expectations: how legitimate, and for whom?", (1990) 11 *Nw.J.Int'l L. & Bus.*, 87-103.
- H.G. Shermers, "The European Court of First Instance", (1988) 25 *CML Rev.*, 541-558.
- D.B. Silver & G.L. Bustin, "Settlement of EEC Anti-dumping Proceedings", (1985) 19 *Int'l Law.* (No 4), 1273-1288.
- K.R. Simmonds, "The Community and the Uruguay round", (1988) 25 *CML Rev.*, 95-115.
- P. De Smedt, "EC Anti-dumping Law: EC Applies Duties to Foreign-Owned Assembly Operations in the EC", (1987) 15 *Int'l Bus.Law.*, 479-485.
- Y.G. Shin, "Improving Direction of relief system for Industrial Injury in Korea", (1994) *The Customs Journal* (No 3), 42-45, (No 5) 42-47, (No 6) 30-35, (No7) 44-49, (No 8) 56-61.

-----, "Anti-dumping regulations of the Developed Countries and Korean's Countermeasure", (1993) *Tendency of Economy in the World*, 87-96.

W. Snyder, "Due process in the European Economic Community: rights of businesses during Commission's inspections", (1991) 22 *U.Tol.L.Rev.*, 955-974.

J. Steenbergen, "Circumvention of anti-dumping duties by importation of parts and materials: recent EEC anti-dumping rules", (1988) 11 *Fordham Int'l L.J.*, 332-346.

-----, "Some Comments on EEC Anti-dumping Enforcement", *Anti-dumping Law and Practice* (Jackson & Vermulst ed.), 1990, 396-399.

-----, "Trade Regulation Since the Tokyo Round", *Protectionism and the European Community*, 185-224.

K. Stegemann, "Anti-Dumping Policy and the Consumer", (1985) 19 *JWTL*, 466-484.

E. Stein, "European foreign affairs system and the Single European Act of 1986", (1989) 23 *Int'l Law.*, 977-994.

T.P. Stewart, "Anti-Dumping, Subsidies and Countervailing Measures: The Negotiations are still Long Way to Go", *Uruguay Round Trade Negotiations: Where Do We Go From Here*, Tab M, 1991, 1-49.

D. Stoelting, "The Jurisdictional Framework of the European Court of Justice", (1991) 29 *Colum.J.Transnat'l L.*, 193-214.

P.D. Sutherland, "The competition of the European Community", (1980) 30 *Saint Louis U.L.J.*, 147-170.

A. Sutton, "Relations between the European Community and Japan in 1982 and 1983", (1983) 3 *YEL*, 285-322.

J.A. Taylor & E. Vermulst, "Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings Under United States Law: A Framework for the European Communities", (1987) 21 *Int'l Law.*, 43-70.

P.K.M. Tharakan, "The Sector-Country Incidence of Anti-dumping and Countervailing Duty Cases in the European Communities", *European Trade Policies and the Developing World* (Mennes & Kol ed.), 99-144.

② F.C. de la Torre, "The Status of GATT in EEC Law: Some New Developments", (1992) 26 *JWT* (No 5), 35-43.

S. Toy, "The battle for Europe", (1991) *Business Week*, (No 3206), 16-23, 72(editorial).

J. Tumlr, "GATT Rules and Community Law - A comparison of Economic and Legal Functions", *GATT and the EC*, 1986, 1-21.

J.A. Usher, "The EC as a Single Unit in Foreign Trade", *Current Issues in Int'l Business Law*, 1988, 22-43.

-----, "The Single Market and Goods Imported from Thirds Countries", (1986) 6 *YEL*, 159-182.

P. Vandoren, "The Interface between Anti-dumping Law and Policy in the European Community", (1986) *LIEI* (No 2).

-----, "Recent Developments in the Area of the Interface between Anti-dumping and Competition in the EC", (1992) *LIEI* (No 1), 21-60.

Edwin A. Vermulst, "The Anti-dumping System of Australia, Canada, the EEC and the USA: Have Anti-dumping Laws Become a Problem in Internatioanl Trade?", *Anti-dumping Law and Practice* (J.H Jackson ed.), 1990, 425-466.

-----, "Anti-Diversion Rules in Anti-dumping Procedures: Interface or Short Circuit for the Management of Interdependence?", (1990) 11 *Mich.J.Int'l L.*, (No 4), 1119-1194.

-----, "Injury Determinations in Anti-dumping Investigations in the US and the European Community", (1986) 7 *New York L.S.J.Int'l & Comp.L.* (No 2&3), 301-421.

-----, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1988 - 30 July 1989", (1990) 1 *EJIL*, 337-365.

-----, "Commercial Defence Actions and Other International Trade Developments in the European Communities II: 1 July 1989 - 30 June 1990", (1990) 2 *EJIL*, 166-199.

-----, "Rules of Origin as Commercial Policy Instruments - Revisited", (1992) 26 *JWT* (No 6), 61-102.

E.A. Vermulst & F. Graafsma, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1990 - 30 June 1991", (1991) 2 *EJIL*, 146-176.

-----, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1991 - 30 June 1992", (1992) 3 *EJIL* (No 2), 372-421.

-----, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1992 - 31 December 1992", (1993) 4 *EJIL* (No 2), 283-304.

-----, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 January 1993 - 30 June 1993", (1993) 4 *EJIL* (No 4), 588-606.

-----, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1993 - 31 December 1993", (1994) 5 *EJIL* (No 4), 285-311.

-----, "A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China", (1992) 26 *JWT* (No 3), 5-60.

E. Vermulst & B. Driessen, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1994 - 31 December 1994", (1995) 6 *EJIL* (No 2), 287-316.

E. Vermulst & P. Waer, "Anti-Diversion Rules in Anti-dumping Procedures: Interface or Short-Circuit for the Management of Interdependence?", (1990) *Mich.J.Int'l L.* (vol 11).

-----, "European Community Rules of Origin as Commercial Policy Instruments?", (1990) 24 *JWT* (No 3), 55-100.

-----, "The Calculation of Injury Margins in EC Anti-dumping Proceedings", (1993) 25 *JWT* (No 6), 5-42.

-----, "The Post-Uruguay Round EC Anti-dumping Regulation - After a Pit Stop, Back in the Race", (1995) 29 *JWT* (No 2), 53-76.

E. Vogel-Polsky, "What future is there for a Social Europe following the Strasbiurg Summit?", (1990) *Indus.L.J.*, 65-80.

P. Vogelenzang, "Two Aspects of Article 115 EEC Treaty: Its Use to Buttress Community-Set Sub-Quotas, and the Commission's Monitoring System", (1981) 18 *CML Rev.*, 169-196.

E. Völker, "The Direct Effect of International Agreement in the Community's Legal Order", (1983) *LIEI* (11983/1), 131-146.

-----, "The Major Instruments of the Common Commercial Policy of the EEC", *Protectionism and the EC*, 1987, 17-56.

-----, "Technical Regulations and Standards and Commercial Policy", *The European Community's Commercial Policy after 1992: The Legal Dimension* (M. Maresceau ed.), 1993, 287-303.

-----, "Community Law Regulations on Foreign Trade", *National Constitutions and International Economic Law* (Hilf & Petersmann ed.), 1993, 137-173.

↙ P. Waer, "Constructed Normal Value in EC Dumping Margin Calculation", (1993) 27 *JWT* (No 4), 47-80.

✓ P. Waer & E. Vermulst, "EC Anti-dumping Law and Practice after the Uruguay Round - A New Lease of Life?", (1994) 28 *JWT* (No 2), 5-22.

R. Wallace, "Signposts to 1992", (1991) 135 *Solic.J.*, 58-60.

N. Walter, "Europe 1992 and beyond", (1990) 22 *Case W.Res.J.Int'l L.* 331-340.

S. Weatherill, "EEC competition law: complaining to the Commission", (1989) *The Company Lawyer*, 47-50.

M.D. Williams, "European antitrust law and its application to American corporations and their subsidiaries", (1987) 9 *Whittier L.Rev.*, 517-35.

L.A. Winters, "The world trade talks: a brief history of GATT", 8 (1991) *Economic Review* (No 5), 25-28

-----, "Goals and Own Goals in European Trade Policy", (1992) 15 *The World Economy* (No 5), 557-574.

-----, "The EC and protection: The political economic", (1994) 38 *Euro.Eco.Rev.*, 596-603.

S. Woolcock, "The European *acquis* and Multilateral Trade Rules: Are they Compatible?", (1993) 31 *JCMS* (No 4), 539-558.

F. Wooldridge, "Free movement of goods: the Allen and Hanburys case", (1989) 113 *Solic.J.*, 65-67.

R. Wright, "Validity of Anti-dumping Remedies - Some Thoughts", *Anti-dumping Law and Practice* (Jackson & Vermulst ed.), 1990, 418-424.

G.N. Yannopoulos, "The European Community's Common External Commercial Policy", (1985) 19 *JWTL* (No 5), 451-465.

-----, "The Effects of the Single Market on the Pattern of Japanese Investment", (1990) *National Institute of Economic Review* (No 134), 93-98.

G. Yarrow, "Economic Aspects of Anti-dumping Policies", (1987) 3 *Oxford Rev.Eco.Pol.* (No 1), 66-79.

A. B. Zampette (Rep.), "European trade, 1992: fortress or partnership?", (1989) 83 *Am.Soc'y Int'l L.Proc.*, 332-350.

"A community within the Community: prospects for foreign policy integration in the European Community", (1990) 103 *Harv.L.Rev.*, 1066-1085.

C. MISCELLANEOUS

1. FINANCIAL TIMES

December	14	1995,	p7.	December	16	1994,	p7.
September	21	1995,	p5.	December	9	1994,	p18 & p2.
August	22	1995,	p4 & p19.	November	4	1994,	p6.
August	19	1995,	p5.	October	27	1994,	p6.
May	29	1995,	p14.	October	18	1994,	p1 & p12.
May	23	1995,	p17.	October	17	1994,	p29.
May	9	1995,	p7 & p28.	October	11	1994,	p3.
May	3	1995,	p22.	September	22	1994,	p3.
May	2	1995,	p19.	September	16	1994,	p1.
April	19	1995,	p8.				
April	10	1995,	p16.	November	4	1993,	p6.
April	4	1995,	p6 & P3.	September	2	1993,	p6.
March	10	1995,	p6.	September	1	1993,	p6 & p17.
March	7	1995,	p4.	August	23	1993,	p4.
February	17	1995,	p11.	August	18	1993,	p16.
February	23	1995,	p28.				
February	10	1995,	p17.				
February	9	1995,	p24.				
February	7	1995,	p3.				
January	24	1995,	p10.				
January	13	1995,	p4.				
January	10	1995,	p6.				

FT Survey : South Korea, June 26 1995.
FT Survey : South Korea, October 20 1995.

2. SEOUL SHINMUN

August	14	1995,	p17.	March	7	1995,	p16.
August	10	1995,	p17.	March	4	1995,	p6 & P16.
July	19	1995,	p15.	February	28	1995,	p16.
July	15	1995,	p6.	February	20	1995,	p17.
July	9	1995,	p6.	February	16	1995,	p6.
June	24	1995,	p19.	February	8	1995,	p9.
June	15	1995,	p16.	February	5	1995,	p8.
June	11	1995,	p8.	February	3	1995,	p9.
June	3	1995,	p17.	January	29	1995,	p8.
June	2	1995,	p16.	January	26	1995,	p6.
May	8	1995,	p17.	January	25	1995,	p8.
April	25	1995,	p18.	January	7	1995,	p3.
April	11	1995,	p4.				
April	1	1995,	p3 & P5.	December	31	1994,	p9.
March	30	1995,	p17.	December	27	1994,	p6.
March	25	1995,	p6.	December	22	1994,	p5.
				December	21	1994,	p8.
				December	17	1994,	p4.

THE TIMES & The Independent

12 Page Special Report: South Korea, The Times, March 8 1995.
A Special Report: South Korea, The Independent, March 8 1995.

3. KOREA NEWSREVIEW

July	8 1995, p26.	December	3 1994, p14-p15.
May	20 1995, p21-p22, p26, p27.	November	26 1994, p14-p15.
April	29 1995, p23.	October	1 1994, p25.
March	25 1995, p12-15.	September	3 1994, p25.
March	4 1995, p4-p5, p15, p16.	July	23 1994, p15.
February	11 1995, p22.	February	26 1994, p23, p28.
January	14 1995, p21.	February	17 1994, p27.
		February	12 1994, p25.
		January	29 1994, p15.
		January	1 1994, p21, p23.

FAR EASTERN ECONOMIC REVIEW

Focus : South Korea, June 22 1995, p41-56.
January 12 1995, p72.
December 22 1994, p52.
November 17 1994, p30.
October 27 1994, p84.
October 13 1994, p72.
October 6 1994, p50-52.
September 8 1994, p52-53.
June 23 1994, p50-52.
June 16 1994, p62.
April 7 1994, p75.
June 17 1993, p62.

ECONOMIST

November 26 1994, p115-116.
November 5 1994, p85-86.
The Economist Survey of the European Community, July 3 1993.

**ANNEX I: EXCERPTS FROM THE GENERAL AGREEMENT ON
TARIFFS AND TRADE**

Article VI - Anti-dumping and Countervailing Duties

1. The contracting Parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowances shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provision of Paragraph 1.

4. No product of the territory of any contracting party imported into the territory of another contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for the consumption in the country of origin, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of another contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidisation.

6.(a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidisation, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) THE CONTRACTING PARTIES may waive the requirement of subparagraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidisation which causes or threatens material injury to an industry in the territory of

another contracting party exporting the product concerning to the territory of the importing contracting party.

7. A system for the stabilisation of the domestic price or of the return to domestic producers of a primary commodity, independently of the movement of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

- (a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
- (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Ad Article VI

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognised that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraph 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidisation.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or suctioned by governments.

Paragraph 6(b)

Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

**ANNEX II: AGREEMENT ON IMPLEMENTATION OF
ARTICLE VI OF THE GENERAL AGREEMENT
ON TARIFFS AND TRADE 1994**

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby agree as follows:

PART I

Article 1

Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated¹ and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Article 2

Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country², such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value

¹The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

²Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

only if the authorities determine that such sales are made within an extended period of time⁴ in substantial quantities⁵ and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.⁶

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

⁴When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

⁵The extended period of time should normally be one year but shall in no case be less than six months.

⁶Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

⁷The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

- (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.⁷ In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale⁸, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different

⁷It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

⁸Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

Article 3

Determination of Injury⁹

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

⁹Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.¹⁰ In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors

¹⁰One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

Article 4

Definition of Domestic Industry

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that

- (i) when producers are related¹¹ to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
- (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied¹² only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry

¹¹For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

¹²As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

Article 5

Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;
- (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application

expressed¹³ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.¹⁴ The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

¹³In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

¹⁴Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

Article 6

Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.¹⁵ Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters¹⁶ and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a

¹⁵As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

¹⁶It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.¹⁷

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.¹⁸

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available

¹⁷Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

¹⁸Members agree that requests for confidentiality should not be arbitrarily rejected.

to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
- (ii) the government of the exporting Member; and
- (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

- (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
- (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
- (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

Article 8

Price Undertakings

8.1 Proceedings may¹⁹ be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

¹⁹The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 9

Imposition and Collection of Anti-Dumping Duties

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 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.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources

from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

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

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.²⁰ Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

²⁰It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10

Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities

determine for the dumped product in question that:

- (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and
- (ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.²¹ Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence

²¹A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

of dumping and injury.²² The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

Article 12

Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report²³, adequate information on the following:

- (i) the name of the exporting country or countries and the product involved;
- (ii) the date of initiation of the investigation;
- (iii) the basis on which dumping is alleged in the application;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested parties should be directed;
- (vi) the time-limits allowed to interested parties for making their views known.

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

²²When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

²³Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;
- (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
- (iv) considerations relevant to the injury determination as set out in Article 3;
- (v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

Article 13

Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14

Anti-Dumping Action on Behalf of a Third Country

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

Article 15

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

PART II

Article 16

Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee, (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and (b) its domestic procedures governing the initiation and conduct of such investigations.

Article 17

Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

- (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and
- (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

PART III

Article 18

Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.²⁴

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

²⁴This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT
TO PARAGRAPH 7 OF ARTICLE 6

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.
2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.
3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.
4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.
5. Sufficient advance notice should be given to the firms in question before the visit is made.
6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the Member in question and (b) the latter do not object to the visit.
7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.
8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX II.

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, any failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their

disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

ANNEX III: COUNCIL REGULATION (EC) NO 3283/94,
ON PROTECTION AGAINST DUMPED IMPORTS
FROM COUNTRIES NOT MEMBERS OF THE
EUROPEAN COMMUNITY, OJ (1994) L 349/1

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 3283/94

of 22 December 1994

on protection against dumped imports from countries not members of the European Community

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 113 thereof,

Having regard to the Regulations establishing the common organization of agricultural markets and the Regulations adopted pursuant to Article 235 of the Treaty applicable to goods manufactured from agricultural products, and in particular the provisions of those Regulations which allow for derogation from the general principle that protective measures at frontiers may be replaced solely by the measures provided for in those Regulations,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Whereas, by Regulation (EC) No 2423/88 ⁽²⁾, the Council adopted common rules for protection against dumped or subsidized imports from countries which are not members of the European Community;

Whereas, these rules were adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement on Tariffs and Trade (hereinafter, GATT), from the Agreement on Implementation of Article VI of the GATT (1979 Anti-Dumping Code) and from the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Code on Subsidies and Countervailing Duties);

Whereas, the multilateral trade negotiations concluded in 1994 have led to new Agreements on the implementation of Article VI of GATT and it is therefore appropriate to amend the Community rules in the light of these new Agreements; whereas it is also desirable, in the light of the different nature of the new rules for dumping and subsidies, to have separate Community rules in these two areas and, consequently, the new rules on protection against subsidies and countervailing duties are dealt with in a separate Regulation;

Whereas, in applying these rules it is essential, in order to maintain the balance of rights and obligations which the GATT Agreement establishes, that the Community takes account of their interpretation by the Community's major trading partners;

Whereas, the new agreement on dumping, namely, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter, 1994 Anti-Dumping Agreement), contains new and detailed rules, in particular, with regard to the calculation of dumping, procedures for initiation and the subsequent investigation, including the establishment and treatment of the facts, the imposition of provisional measures, the imposition and collection of anti-dumping duties, the duration and review of anti-dumping measures and the public disclosure of information relating to anti-dumping investigations; whereas, in view of the extent of the changes and to ensure and adequate and transparent implementation of the new rules, it is appropriate to transpose the language of the new agreements into Community legislation to the extent possible;

Whereas, it is desirable to lay down clear and detailed rules on the calculation of normal value, in particular that in all cases it should be based on representative sales in the ordinary course of trade in the exporting country; whereas, it is expedient to define the circumstances in

¹⁾ Opinion delivered on 14 December 1994 (not yet published in the Official Journal).

²⁾ OJ No L 209, 2. 8. 1988, p. 1. Regulation as amended by Regulation (EC) No 521/94 (OJ No L 66, 10. 3. 1994, p. 7) and Regulation (EC) No 522/94 (OJ No L 66, 10. 3. 1994, p. 10).

which domestic sales may be considered to be made at a loss and disregarded and recourse may be had to remaining sales or constructed value or sales to a third country; whereas it is also desirable to provide for a proper allocation of costs, including in start-up situations, where it is also appropriate to lay down guidance on the definition of start-up and the extent and method of allocation; whereas it is also necessary, when constructing normal value, to indicate the methodology that is to be applied to determine the amounts for selling, general and administrative costs and the profit that shall be included in such value;

Whereas, when determining normal value for non-market economy countries, it appears prudent to set out rules of procedure for choosing the appropriate market economy third country that is to be used for such purpose and, where it is not possible to find a suitable third country, to provide that normal value may be established on any reasonable basis;

Whereas, it is expedient to define the export price and to enumerate the adjustments which are to be made in those cases where a reconstruction of this price from the first open-market price is deemed necessary;

Whereas, for the purpose of ensuring a fair comparison between export price and normal value, it is advisable to list the factors which may affect prices and price comparability and to lay down specific rules on when and how the adjustments shall be made, including the fact that any duplication of adjustments has to be avoided; whereas, it is also necessary to provide that comparison may be made using average prices though individual export prices may be compared to an average normal value where the former vary by customer, region or time period;

Whereas, it is desirable to lay down clear and detailed guidance on the factors which may be relevant for the determination of whether the dumped imports have caused material injury or are threatening to cause injury; whereas, in demonstrating that the volume and price levels of the imports concerned are responsible for injury sustained by a Community industry, attention should be given to the effect of other factors and in particular existing market conditions in the Community;

Whereas, it is advisable to define the term 'Community industry' and provide that parties related to exporters

may be excluded from such industry and to define the term 'related'; whereas, it is also necessary to provide for anti-dumping action to be taken on behalf of producers in a region of the Community and to lay down guidelines on the definition of such a region;

Whereas, it is necessary to set down who may lodge an anti-dumping complaint, including the extent to which it should be supported by the Community industry, and the information on dumping, injury and causality which such complaint should contain; whereas, it is also expedient to specify the procedures with regard to the rejection of complaints or the initiation of proceedings;

Whereas, it is necessary to lay down how interested parties shall be given notice of the information which the authorities require, ample opportunity to present all relevant evidence and full opportunity to defend their interests; whereas, it is also desirable to set out clearly the rules and procedures to be followed during the investigation, in particular that interested parties have to make themselves known, present their views and submit information within specified time limits, if such views and information are to be taken into account; whereas, it is also appropriate to set out the conditions under which an interested party may have access to, and comment on, information presented by other interested parties; whereas, there should also be cooperation between the Member States and the Commission with regard to the collection of information;

Whereas, it is necessary to lay down the conditions under which provisional duties may be imposed, including the condition that they may not be imposed earlier than 60 days from initiation and no later than nine months from initiation; whereas, for administrative reasons, it is also necessary to provide that such duties may in all cases be imposed by the Commission either directly for a nine-month period or in two stages of six and three months;

Whereas, it is necessary to specify procedures for accepting undertakings which eliminate dumping and injury instead of imposing provisional or definitive duties; whereas, it is also appropriate to lay down the consequences of violation or withdrawal of undertakings and that provisional duties may be imposed in cases of suspected violation or where further investigation is necessary to complete the findings, whereas, in accepting undertakings, care should be taken that the proposed undertakings, and their enforcement, do not lead to anti-competitive behaviour;

Whereas, it is necessary to provide for the termination of cases, by termination without measures or by conclusion with definitive measures, normally within 12 months, and in no case later than 15 months, from the initiation of the investigation; whereas, investigations or proceedings should be terminated where the dumping is *de minimis* or the injury is negligible and it is appropriate to define these terms; whereas, where measures are to be imposed, it is necessary to provide for the termination of investigations and to lay down that measures should be less than the margin of dumping if such lesser amount would remove the injury, as well as to specify the method of calculating the level of measures in cases of sampling;

Whereas, it is necessary to provide for retroactive collection of provisional duties as deemed appropriate and to define the circumstances which may trigger the retroactive application of duties to avoid the undermining of the definitive measures to be applied; whereas it is also necessary to provide that duties may be applied retroactively in cases of violation or withdrawal of undertakings;

Whereas, it is necessary to provide that measures are to lapse after five years unless a review investigation indicates that they should be maintained; whereas, it is also necessary to provide, in cases where sufficient evidence is submitted of changed circumstances, for interim reviews or for investigations to determine whether refunds of anti-dumping duties are warranted; whereas it is also appropriate to lay down that in any calculation of dumping which necessitates a reconstruction of export prices, duties shall not be treated as a cost incurred between importation and resale where the said duty is being reflected in the prices of the products subject to measures in the Community;

Whereas, it is necessary to provide specifically for the assessment of export prices and dumping margins where the duty is being absorbed by the exporter through a form of compensatory arrangement and the measures are not being reflected in the prices of the products subject to measures in the Community;

Whereas, the 1994 Anti-Dumping Agreement does not contain provisions regarding the circumvention of anti-dumping measures, though a separate GATT Ministerial Decision recognizes circumvention as a problem and has referred it to the GATT Anti-dumping Committee for resolution, whereas given the failure of the multilateral negotiations so far and pending the outcome of the referral to the GATT Anti-Dumping Committee, it is necessary to introduce new provisions

into Community legislation to deal with practices, including simple assembly in the Community or a third country, which have as their main aim the circumvention of anti-dumping measures;

Whereas, it is expedient to permit suspension of anti-dumping measures where there is a temporary change in market conditions which makes the continued imposition of such measures temporarily inappropriate;

Whereas, it is necessary to provide that imports under investigation may be made subject to registration upon importation in order to enable measures to be applied subsequently against such imports;

Whereas, in order to ensure a proper enforcement of measures, it is necessary that Member States monitor, and report to the Commission the import trade of products subject to investigation and subject to measures and the amount of duties collected under this Regulation;

Whereas, it is necessary to provide for consultations of an Advisory Committee at regular and specified stages of the investigation; whereas, the Committee should consist of representatives of Member States with a representative of the Commission as chairman;

Whereas, it is expedient to provide for verification visits to check information submitted on dumping and injury, though such visits should be dependent on proper replies to questionnaires being received;

Whereas, it is essential to provide for sampling in cases where the number of parties or transactions are large in order to permit a timely completion of investigations;

Whereas, it is necessary to provide that for parties who do not cooperate satisfactorily other information may be used to establish findings and such information may be less favourable to the party than if it had cooperated;

Whereas, provision should be made for the treatment of confidential information so that business secrets are not divulged;

Whereas, it is essential that provision is made for proper disclosure of essential facts and considerations to parties which qualify for such treatment and that such disclosure is made, with due regard to the decision-making process

in the Community, within a time period which permits parties to defend their interests;

Whereas, it is prudent to provide for an administrative system under which arguments can be presented in relation to whether measures are in the Community interest, including the consumer interest, and to lay down the time periods within which such information has to be presented as well as the disclosure rights of the parties concerned;

Whereas, it is imperative to link implementation of time limits to the establishment of the necessary administrative structure within the Commission's services; whereas, the Council, therefore, should specify, in a decision to be adopted by qualified majority no later than 1 April 1995, when these time limits are to apply,

HAS ADOPTED THIS REGULATION:

Article 1

Principles

1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.
2. A product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.
3. The exporting country shall normally be the country of origin. However, it may be an intermediate country, except where, for example, the products are merely transhipped through that country, or the products concerned are not produced in that country, or there is no comparable price for them in that country.
4. For the purpose of this Regulation, the term like product shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration.

Article 2

Determination of dumping

A. NORMAL VALUE

1. The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

- (a) Where the exporter in the exporting country does not produce or does not sell the like product the normal value may be established on the basis of prices of other sellers or producers.
- (b) Prices between parties which appear to be associated or to have a compensatory arrangement with each other may be considered as being in the ordinary course of trade and may be used to establish normal value only if it is determined that they are not affected by the relationship.

2. Sales of the like product destined for domestic consumption, shall normally be used to determine normal value if such sales volume constitute 5 % or more of the sales volume of the product under consideration to the Community. However, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned.

3. When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or based on the export prices, in the ordinary course of trade, to an appropriate third country, provided that these prices are representative.

4. Sales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below per unit (fixed and variable) costs of production plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if it is determined that such sales are made within an extended period of time in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

- (a) If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

- (b) The extended period of time should normally be one year but shall in no case be less than six months and

sales below per unit cost shall be considered to be made in substantial quantities within such a period when it is established that the weighted average selling price is below the weighted average unit cost, or that the volume of sales below unit cost is not less than 20 % of sales being used to determine normal value.

For the purpose of paragraphs 1 to 7, costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.

Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilized. In the absence of a more appropriate method, preference shall be given to the allocation of costs on the basis of turnover. Unless already reflected in the cost allocations under this paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production.

Where the costs for part of the period for cost recovery are affected by the use of new production facilities requiring substantial additional investment and by low capacity utilization rates, which are the result of start-up operations which take place within or during part of the investigation period, the average costs for the start-up phase shall be those applicable, under the abovementioned allocation rules, at the end of such a phase, and shall be included at that level, for the period concerned, in the weighted average costs referred to in paragraph 4 (a). The length of a start-up phase shall be determined in relation to the circumstances of the producer or exporter concerned, but shall not exceed an appropriate initial portion of the period for cost recovery. For this adjustment to costs applicable during the investigation period, information relating to a start-up phase which extends beyond that period shall be taken into account in so far as it is submitted prior to verification visits and within three months from the initiation of the investigation.

For the purpose of paragraphs 1 to 7, the amounts selling, for general and administrative costs and for

profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined, on the basis of:

- (i) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (ii) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7. In the case of imports from non-market economy countries and, in particular, those to which Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) No 1765/82, (EEC) No 1766/82 and 3420/83 ⁽¹⁾ applies, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where these are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin.

- (a) For the purpose of this paragraph, an appropriate market economy third country shall be selected in a not unreasonable manner, with due account taken of any reliable information made available at the time of selection. Account shall also be taken of time limits and, where appropriate, a market economy third country which is subject to the same investigation shall be used.
- (b) The parties to the investigation shall be informed shortly after initiation of the market economy third country envisaged and shall be given 10 days to comment.

⁽¹⁾ OJ No L 67, 10. 3. 1994, p. 89.

B. EXPORT PRICE

8. The export price shall be the price actually paid or payable for the product when sold from the exporting country to the Community.

9. In cases where there is no export price or where it appears that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on any reasonable basis.

(a) In these cases, adjustment for all costs, including duties and taxes, incurred between importation and resale, and for profits accruing, shall be made to establish a reliable export price, at the Community frontier level.

(b) The items for which adjustment shall be made include those normally borne by an importer but paid by any party, either in or outside the Community, which appears to be associated or to have a compensatory arrangement with the importer or exporter, including: usual transport, insurance, handling, loading and ancillary costs; customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods; and a reasonable margin for selling, general and administrative costs and profit.

C. COMPARISON

10. A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated to affect prices and, therefore, price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed hereafter:

(a) *Physical characteristics*

An adjustment shall be made for differences in the physical characteristics of the product concerned. The amount of the adjustment shall correspond to a reasonable estimate of the market value of the difference.

(b) *Import charges and indirect taxes*

An adjustment shall be made to normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when destined for consumption in the exporting country and not collected or refunded in respect of the product exported to the Community.

(d) *Discounts, rebates and quantities*

An adjustment shall be made for differences in discounts and rebates, including those given for differences in quantities, if these are properly quantified and are directly linked to the sales under consideration. An adjustment may also be made for deferred discounts and rebates if the claim is based on consistent practice in prior periods, including compliance with the conditions required to qualify for the discount or rebates.

(d) *Level of trade*

An adjustment for differences in levels of trade, including any differences which may arise in OEM (Original Equipment Manufacturer) sales, shall be granted where, in relation to the distribution chain in both markets, it is shown that the export price, including a constructed export price, is at a different level of trade to the normal value and the difference has affected price comparability which is demonstrated by consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. The amount of the adjustment shall be based on the market value of the difference.

(e) *Transport, insurance, handling, loading and ancillary costs*

An adjustment shall be made for differences in the directly related costs incurred for conveying the product concerned from the premises of the exporter to an independent buyer, where such costs are included in the prices charged. These costs comprise transport, insurance, handling, loading and ancillary costs.

(f) *Packing*

An adjustment shall be made for differences in the respective, directly related costs of the packing for the product concerned.

(g) *Credit*

An adjustment shall be made for differences in the cost of any credit granted for the sales under

consideration, provided that it is a factor taken into account in the determination of the prices charged.

h) *After-sales costs*

An adjustment shall be made for differences in the direct costs of providing warranties, guarantees, technical assistance and services, as provided for by law and/or in the sales contract.

i) *Commissions*

An adjustment shall be made for differences in commissions paid in respect of the sales under consideration.

Currency conversions

When the price comparison requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Normally, the date of sale should be the date of invoice but the date of contract, purchase order or order confirmation, may be used if these more appropriately establish the material terms of sale. Fluctuations in exchange rates shall be ignored and exporters shall be granted 60 days to reflect a sustained movement in exchange rates during the period of investigation.

D. DUMPING MARGIN

1. Subject to the relevant provisions governing fair comparison, the existence of margins of dumping during the investigation period shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community or by a comparison of individual normal values and individual export prices to the Community on a transaction to transaction basis. However, a normal value established on a weighted average basis may be compared to prices of all individual export transactions to the Community, if there is a pattern of export prices which differ significantly among different purchasers, regions or time periods and the methods specified in the first sentence of this paragraph would not reflect the full degree of dumping being practised. This paragraph shall not preclude the use of sampling in accordance with Article 17.

2. The dumping margin shall be the amount by which the normal value exceeds the export price. Where dumping margins vary, a weighted average dumping margin may be established.

Article 3

Determination of injury

1. Pursuant to this Regulation, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products, and (b) the consequent impact of these imports on the Community industry.

3. With regard to the volume of the dumped imports, consideration shall be given as to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the dumped imports on prices, consideration shall be given as to whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

4. Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the effects of such imports shall be cumulatively assessed only if it is determined that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in Article 9 (3) and that the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

5. The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry including: the fact that an industry is still in the process of recovering from the effects of past dumping or subsidization, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits,

output, market share, productivity, return on investments, utilization of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

7. Known factors other than the dumped imports, which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and Community producers, developments in technology and the export performance and productivity of the Community industry.

8. The effect of the dumped imports shall be assessed in relation to the production of the Community industry of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

9. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which

would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

(a) In making a determination regarding the existence of a threat of material injury, consideration should be given to, *inter alia*, such factors as:

(i) a significant rate of increase of dumped imports into the Community market indicating the likelihood of substantially increased imports;

(ii) sufficient freely disposable or an imminent, substantial increase in capacity of the exporter indicating the likelihood of substantially increased dumped exports to the Community, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

(b) No one of the factors listed above by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

Article 4

Definition of Community industry

1. For the purposes of this Regulation, the term 'the Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5 (4), of the total Community production of those products, except that:

(i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'the Community industry' may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such a

market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community. In such circumstances, injury may be found to exist even where a major portion of the total Community industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such a market.

2. For the purpose of paragraph 1, producers shall be considered to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

Where the Community industry has been interpreted as referring to the producers in a certain region, the exporters shall be given an opportunity to offer undertakings pursuant to Article 8 in respect of the region concerned. In such cases, when evaluating the Community interest of the measures, special account shall be taken of the interest of the region. If an adequate undertaking is not offered promptly or the situations set out in Article 8 (9) and (10) apply, a provisional or definitive duty may be imposed in respect of the Community as a whole. In such cases, the duties may, if practicable, be limited to specific producers or exporters.

The provisions of Article 3 (8) shall be applicable to this Article.

Article 5

Initiation of proceedings

Except as provided for in Article 5 (6), an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

The complaint may be submitted to the Commission, or to a Member State, which shall forward it to the

Commission. The Commission shall send Member States a copy of any complaint it receives. The complaint shall be deemed to have been lodged on the first working day following its delivery to the Commission by registered mail or the issuing of an acknowledgement of receipt by the Commission.

(b) Where, in the absence of any complaint, a Member State is in possession of sufficient evidence of dumping and of injury resulting therefrom for the Community industry, it shall immediately communicate such evidence to the Commission.

2. A complaint under paragraph 1 shall include evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury. The complaint shall contain such information as is reasonably available to the complainant on the following:

- (i) identity of the complainant and a description of the volume and value of the Community production of the like product by the complainant. Where a written complaint is made on behalf of the Community industry, the complaint shall identify the industry on behalf of which the complaint is made by a list of all known Community producers of the like product (or associations of Community producers of the like product) and, to the extent possible, a description of the volume and value of Community production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the Community;
- (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product on the Community market and the consequent impact of the imports on the Community industry, as demonstrated by relevant factors and indices having a bearing on the

state of the Community industry, such as those listed in Article 3 (3) and (5).

3. The Commission shall, to the degree possible, examine the accuracy and adequacy of the evidence provided in the complaint to determine whether there is sufficient evidence to justify the initiation of an investigation.

4. An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination of the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 % of total production of the like product produced by the Community industry.

5. The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the complaint for the initiation of an investigation. However, after receipt of a properly documented complaint and before proceeding to initiate an investigation, the government of the exporting country concerned shall be notified.

6. If in special circumstances, it is decided to initiate an investigation without having received a written complaint by or on behalf of the Community industry for the initiation of such investigation, this shall be done on the basis of sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

7. The evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation. A complaint shall be rejected where there is insufficient evidence of either dumping or of injury to justify proceeding with the case. Pursuant to this Article, proceedings shall not be initiated against countries whose imports represent a market share of below 1 %, unless such countries collectively account for 3 %, or more, of Community consumption.

8. The complaint may be withdrawn prior to initiation, in which case it shall be considered not to have been lodged.

9. Where, after consultation, it is apparent that there is sufficient evidence to justify initiating proceedings the Commission shall initiate proceedings within 45 days of the lodging of the complaint and publish a notice in the *Official Journal of the European Communities*. Where insufficient evidence has been presented, the complaint shall, after consultation, be so informed within 45 days of the date on which the complaints is lodged with the Commission.

10. The notice of initiation of the proceedings shall announce the initiation of an investigation, indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission, it shall state the periods within which interested parties may make themselves known, present their views in writing and submit information if such views and information are to be taken into account during the investigation; it shall also state the period within which interested parties may apply to be heard by the Commission in accordance with Article 6 (5).

11. The Commission shall advise the exporters, importers and representative associations of importers or exporters known to it to be concerned, as well as representatives of the exporting country and the complainants, of the initiation of the proceedings and, with due regard to the protection of confidential information, provide the full text of the written complaint received pursuant to Article 5 (1) to the known exporters, and to the authorities of the exporting country and make it available, upon request, to other interested parties involved. Where the number of exporters involved is particularly high, the full text of the written complaint should instead be provided only to the authorities of the exporting country or to the relevant trade association.

12. An anti-dumping investigation shall not hinder the procedures of customs clearance.

Article 6

The investigation

1. Following the initiation of the proceedings, the Commission, acting in cooperation with the Member States, shall commence an investigation at Community level. Such investigation shall cover both dumping and injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of not less than six months immediately prior to the initiation of the proceedings. Information relating to a period subsequent to the investigation period shall, normally, not be taken into account.

2. Parties receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days reply. The time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the day on which it was sent to the exporter or transmitted to the appropriate diplomatic representative of the exporting country. An extension to the 30 day period may be granted, taking due account of the time limits of the investigation and provided the party gives a good reason, in terms of its particular circumstances, for such extension.

3. The Commission may request Member States to supply information and Member States shall take whatever steps are necessary in order to give effect to such requests. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out. Where this information is of general interest or where its transmission has been requested by a Member State, the Commission shall forward it to the Member States, provided it is not confidential, in which case a non-confidential summary shall be forwarded.

4. The Commission may request Member States to carry out all necessary checks and inspections, particularly amongst importers, traders and Community producers, and to carry out investigations in third countries, provided the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection. Member States shall take whatever steps are necessary in order to give effect to such requests from the Commission. Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.

5. The interested parties, which have made themselves known in accordance with Article 5 (10), shall be heard if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceedings and that there are particular reasons why they should be heard.

6. Opportunities shall, on request, be provided for the importers, exporters, representatives of the government of the exporting country and the complainants, which have made themselves known in accordance with Article 5 (10), to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure

to do so shall not be prejudicial to that party's case. Oral information provided under this paragraph shall be taken into account in so far as it is subsequently reproduced in writing.

7. The complainants, importers and exporters and their representative associations, users and consumer organizations, which have made themselves known in accordance with Article 5 (10), as well as the representatives of the exporting country may, upon written request, inspect all information made available by any party to an investigation, as distinct from internal documents prepared by the authorities of the Community or its Member States, which is relevant to the presentation of their cases and not confidential within the meaning of Article 19, and that it is used in the investigation. Such parties may respond to such information and their comments should be taken into consideration, to the extent that they are sufficiently substantiated in the response.

8. Except in the circumstances provided for in Article 18, the information supplied by interested parties upon which findings are based, shall be examined for accuracy to the degree possible.

9. For proceedings initiated pursuant to Article 5 (9), an investigation shall, whenever possible, be concluded within one year. In any event, such investigations shall in all cases be concluded within 15 months of initiation, in accordance with the findings made pursuant to Article 8 for undertakings or the findings made pursuant to Article 9 for definitive action.

Article 7

Provisional measures

1. Provisional measures may be applied if proceedings have been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments in accordance with Article 5 (10), a provisional affirmative determination has been made of dumping and consequent injury to the Community industry, and the Community interest calls for intervention to prevent such injury. The provisional measures shall be imposed no sooner than 60 days from the initiation of the proceedings but not later than nine months from the initiation of the proceedings.

2. 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 Community industry.

3. Provisional measures shall take the form of a security and the release of the products concerned for free circulation in the Community shall be conditional upon the provision of such security.

4. The Commission shall take provisional action after consultation or, in cases of extreme urgency, after

informing the Member States. In this latter case, consultations shall take place 10 days, at the latest, after notification to the Member States of the action taken by the Commission.

5. Where a Member State requests immediate intervention by the Commission and the conditions in Article 7 (1) are met, the Commission shall within a maximum of five working days of receipt of the request, decide whether a provisional anti-dumping duty should be imposed.

6. The Commission shall forthwith inform the Council and the Member States of any decision taken under this article. The Council, acting by a qualified majority, may decide differently.

7. Provisional duties may be imposed for six months and extended for a further three months or they may be imposed for nine months. However, they may only be extended or imposed for a nine-month period, where exporters representing a significant percentage of the trade involved so request or do not object upon notification by the Commission.

Article 8

Undertakings

1. Investigations may be terminated without the imposition of provisional or definitive duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the Commission, after consultation, is satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping and they should be less than the margin of dumping if such increases would be adequate to remove the injury to the Community industry.

2. Undertakings may be suggested by the Commission, but no exporter shall be obliged to enter into such an undertaking. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, it may be determined that a threat of injury is more likely to be realized if the dumped imports continue. Undertakings shall not be sought or accepted from exporters unless a provisional affirmative determination of dumping and injury caused by such dumping has been made. Save in exceptional

circumstances, undertakings may not be offered later than the end of the period during which representations may be made pursuant to Article 20 (5).

3. Undertakings offered need not be accepted if their acceptance is considered impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. The exporter concerned may be provided with the basis on which it is intended to propose the rejection of the offer of an undertaking and may be given an opportunity to make comments thereon. The reasons for rejection shall be set out in the definitive decision.

4. Parties which offer an undertaking shall be required to provide a non-confidential version of such undertaking, so that it may be made available to interested parties to the investigation.

5. Where undertakings are, after consultation, accepted and there is no objection raised within the Advisory Committee, the investigation shall be terminated. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the investigation be terminated. The investigation shall stand terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

6. If the undertakings are accepted, the investigation of dumping and injury shall normally be completed. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases the authorities may require that an undertaking be maintained for a reasonable period. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Regulation.

7. The Commission shall require any exporter from which an undertaking has been accepted to provide, periodically, information relevant to the fulfilment of such undertaking, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertaking.

8. Where undertakings are accepted from certain exporters during the course of an investigation, they shall, for the purpose of Article 11, be deemed to take effect from the date on which the investigation is concluded for the exporting country.

9. In case of violation or withdrawal of undertakings by any party, a definitive duty shall be imposed in accordance with Article 9, on the basis of the facts

established within the context of the investigation which led to the undertaking, provided that such investigation was concluded with a final determination on dumping and injury and the exporter concerned, except in the case of withdrawal of undertakings by the exporter, has been given an opportunity to comment.

10. A provisional duty may, after consultation, be imposed in accordance with Article 7 on the basis of the best information available, where there is reason to believe that an undertaking is being violated, or in case of violation or withdrawal of undertaking where the investigation which led to the undertaking was not concluded.

Article 9

Termination without measures, imposition of definitive duties

1. Where the complaint is withdrawn, proceedings may be terminated unless such termination would not be in the Community interest.

2. Where, after consultation, protective measures are unnecessary and there is no objection raised within the Advisory Committee, the investigation or proceedings shall be terminated. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the proceedings be terminated. The proceedings shall stand terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

3. For proceedings initiated pursuant to Article 5 (9), injury shall normally be regarded as negligible where the imports concerned represent less than the volumes set out in Article 5 (7). For the same proceedings, there shall be immediate termination where it is determined that the margin of dumping is less than 2 %, expressed as a percentage of the export price, provided that it is only the investigation that shall be terminated where the margin is below 2 % for individual exporters and they shall remain subject to the proceedings and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11.

4. Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting by simple majority on a proposal submitted by the Commission after consultation of the Advisory Committee. Where provisional duties are in force, a proposal for definitive action shall be submitted to the Council not later than one month before

the expiry of such duties. 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 Community industry.

5. An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation shall specify the duty for each supplier or, if that is impracticable and, as a general rule, in the cases referred to in Article 2 (7), the supplying country concerned.

6. When the Commission has limited its examination in accordance with Article 17, any anti-dumping duty applied to imports from exporters or producers which have made themselves known in accordance with Article 17 but were not included in the examination shall not exceed the weighted average margin of dumping established for the parties in the sample. For the purpose of this paragraph, the Commission shall disregard any zero and *de minimis* margins, and margins established under the circumstances referred to in Article 18. The authorities shall apply individual duties to imports from any exporter or producer which is granted individual treatment, as provided for in Article 17.

Article 10

Retroactivity

1. Provisional measures and definitive anti-dumping duties shall only be applied to products which enter free circulation after the time when the decision taken pursuant to Articles 7 (1) or 9 (4), as the case may be, enters into force, subject to the exceptions set out in this Regulation.

2. Where a provisional duty has been applied and the facts as finally established show that there is dumping and injury, the Council shall decide, irrespective of whether a definitive anti-dumping duty is to be imposed, what proportion of the provisional duty is to be definitively collected. For this purpose, 'injury' shall not include material retardation of the establishment of a Community industry, nor threat of material injury, except where it is found that this would, in the absence of provisional measures, have developed into material injury. In all other cases involving such threat or retardation, any provisional amounts shall be released and definitive duties can only be imposed from the date

that a final determination of threat or material retardation is made

3. If the definitive anti-dumping duty is higher than the provisional duty, the difference shall not be collected. If the definitive duty is lower than the provisional duty, the duty shall be recalculated. Where a final determination is negative, the provisional duty shall not be confirmed.

4. A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures and not prior to the initiation of the investigation, provided that imports have been registered in accordance with Article 14 (5), the Commission has provided the importers concerned with an opportunity to comment, and:

- (i) there is, for the product in question, a history of dumping over an extended period, or the importer was aware of, or should have been aware of, the dumping as regards the extent of the dumping and the injury alleged or found; and
- (ii) in addition to the level of imports which caused injury during the investigation period there is a further substantial rise in imports which, in the light of its timing and volume and other circumstances, is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied.

5. In cases of violation or withdrawal of undertakings, definitive duties may be levied in accordance with this Regulation on goods entered for free circulation not more than 90 days before the application of provisional measures, provided that imports have been registered in accordance with Article 14 (5), and that any such retroactive assessment shall not apply to imports entered before the violation or withdrawal of the undertaking.

Article 11

Duration, reviews and refunds

1. An anti-dumping measure shall remain in force only as long as and to the extent necessary to counteract the dumping which is causing injury.

2. A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. Such an expiry review shall be initiated on the initiative of the

Commission, or upon request made by or on behalf of Community producers and the measure shall remain in force pending the outcome of such review.

- (a) An expiry review shall be initiated where the request contains sufficient evidence that the removal of the measures would be likely to result in a continuation or recurrence of dumping and injury. Such a likelihood may, for example, be indicated by evidence of continued dumping and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious dumping.
- (b) In carrying out investigations under this paragraph, the exporters, importers, the representatives of the exporting country and the Community producers shall be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request and conclusions shall be reached with due account taken of all relevant and duly supported evidence presented in relation to the question of whether the removal of measures would be likely, or unlikely, to lead to the continuation or recurrence of dumping and injury.
- (c) Pursuant to this paragraph, a notice of impending expiry shall be published in the *Official Journal of the European Communities* at an appropriate time in the final year of the period of application of the measures as defined in this paragraph. Thereafter, the Community producers shall, no later than three months before the end of the five-year period, be entitled to lodge a review request in accordance with paragraph 2 (a). A notice announcing the actual expiry of measures pursuant to this paragraph shall also be published.

3. The need for the continued imposition of measures may also be reviewed, where warranted on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request, by any exporter or importer or by the Community producers, which contains sufficient evidence substantiating the need for such an interim review.

- (a) An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.

(b) In carrying out investigations pursuant to this paragraph, the Commission may, *inter alia*, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established in accordance with Article 3 of this Regulation. In these respects, account shall be taken of all relevant and duly supported evidence in the final determination.

4. A review shall also be carried out for the purpose of determining individual margins of dumping for new exporters in the exporting country in question which have not exported the product during the period of investigation on which the measures were based.

(a) The review shall be initiated where a new exporter or producer can show that it is not related to any of the exporters or producers in the exporting country which are subject to the anti-dumping measures on the product, and where they have actually exported to the Community following the abovementioned investigation period, or where they can demonstrate that they have entered into an irrevocable contractual obligation to export a significant quantity to the Community.

(b) A review for a new exporter shall be initiated, and carried out on an accelerated basis, after consultation of the Advisory Committee and Community producers have been given an opportunity to comment. The Commission Regulation initiating a review shall repeal the duty in force with regard to the new exporter concerned by amending the Regulation which imposed the duty, and making imports subject to registration in accordance with Article 14 (5) in order to ensure that, should the review result in a determination of dumping in respect of such an exporter, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

(c) The provisions of this paragraph shall not apply where duties have been imposed under the provisions of Article 9 (6).

5. The relevant provisions of this Regulation with regard to procedures and the conduct of investigations, excluding those relating to time limits, shall apply to any review carried out pursuant to paragraphs 2, 3 and 4. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

6. Reviews pursuant to this Article shall be initiated by the Commission after consultation of the Advisory Committee. Where warranted by reviews, measures shall be repealed or maintained pursuant to paragraph 2, or repealed, maintained or amended pursuant to paragraphs 3 and 4, by the Community institution responsible for

their introduction. Where measures are repealed for individual exporters, but not for the country as a whole, such exporters shall remain subject to the proceedings and may, automatically, be reinvestigated in any subsequent review carried out for that country pursuant to this Article.

7. Where a review of measures pursuant to paragraph 3 is in progress at the end of the period of application of measures as defined in paragraph 2, such review shall also cover the circumstances set out in paragraph 2.

8. Notwithstanding paragraph 2, an importer may request reimbursement of duties collected where it is shown that the dumping margin, on the basis of which duties were paid, has been eliminated, or reduced to a level which is below the level of the duty in force.

(a) In order to request a refund of anti-dumping duties, the importer shall submit an application to the Commission. The application shall be submitted via the Member State of the territory in which the products were released for free circulation within six months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty. Member States shall forward the request to the Commission forthwith.

(b) An application for refund shall only be considered to be duly supported by evidence where it contains precise information on the amount of refund of anti-dumping duties claimed and all customs documentation relating to the calculation and payment of such amount. It shall also include evidence, for a representative period, on normal values and export prices to the Community for the exporter or producer to which the duty applies. In cases where the importer is not associated to the exporter or producer concerned and such information is not immediately available, or the exporter or producer is unwilling to release it to the importer, the application shall contain a statement from the exporter or producer that the dumping margin has been reduced or eliminated, as specified in this Article, and that the relevant supporting evidence will be provided to the Commission. Where such evidence is not forthcoming from the exporter or producer within a reasonable period of time the application shall be rejected.

(c) The Commission shall, after consultation of the Advisory Committee, decide whether and to what extent the application should be granted or it may decide at any time to initiate an interim review and

the information and findings from such review, carried out in accordance with the provisions applicable for such reviews, shall be used to determine whether and to what extent a refund is justified. Refunds of duties shall normally take place within 12 months, and in no case more than 18 months after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The payment of any refund authorized should normally be made by Member States within 90 days of the abovementioned decision.

9. In all review or refund investigations carried out pursuant to this Article, the Commission shall apply, in so far as circumstances have not changed, the same methodology as in the investigation which led to the duty, with due account being taken of the provisions set out in Article 2, and in particular paragraphs 11 and 12 thereof, and the provisions of Article 17 of this Regulation.

10. In any investigation carried out pursuant to this Article, the Commission shall examine the reliability of export prices in accordance with Article 2. However, where it is decided to construct the export price in accordance with Article 2 (9), it shall calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community.

Article 12

1. Where the Community industry submits sufficient information showing that measures have led to no movement, or insufficient movement, in resale prices or subsequent selling prices in the Community, the investigation may, after consultation, be reopened to examine whether the measure has had effects on the abovementioned prices.

2. During an investigation pursuant to this Article, exporters, importers and Community producers shall be provided with an opportunity to clarify the situation with regard to resale prices and subsequent selling prices and if it is concluded that the measure should have led to movements in such prices, in order to remove the injury previously established in accordance with Article 3, export prices shall be reassessed in accordance with Article 2 and dumping margins shall be recalculated to take account of the reassessed export prices. Where it is considered that a lack of movement in the prices in the Community is due to a fall in export prices which occurred prior to or following the imposition of

measures, dumping margins may be recalculated to take account of such lower export prices.

3. Where a reinvestigation pursuant to this Article shows increased dumping the measures in force shall be amended by the Council, by simple majority on a proposal from the Commission, in accordance with the new findings on export prices.

4. The relevant provisions of Article 5 and Article 6 shall apply to any review carried out pursuant to this Article, except that such review shall be carried out expeditiously and shall normally be concluded within six months of the date of initiation of the reinvestigation.

5. Alleged changes in normal value shall only be taken into account pursuant to this Article where complete information on revised normal values, duly substantiated by evidence, is made available to the Commission within the time limits set out in the notice of initiation of an investigation. Where an investigation involves a re-examination of normal values, imports may be made subject to registration in accordance with Article 14 (5) pending the outcome of the investigation.

Article 13

Circumvention

1. Anti-dumping duties imposed pursuant to this Regulation may be extended to apply to imports from third countries of like products, or parts thereof, when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification, other than the imposition of the duty, and there is evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

2. An assembly operation in the Community or a third country shall be considered to circumvent the measures in force where:

- (i) the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures; and
- (ii) the parts constitute 60 % or more of the total value of the parts of the assembled product except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25 % of the manufacturing cost; and
- (iii) the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

3. Investigations shall be initiated pursuant to this Article where the request contains sufficient evidence regarding the factors set out in paragraph 1. Initiations shall be made, after consultation of the Advisory Committee by Commission Regulation which shall also instruct the customs authorities to make imports subject to registration in accordance with Article 14 (5) or to request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities and shall be concluded within nine months. When the facts as finally ascertained, justify the extension of measures, this shall be done by the Council; acting by simple majority and on a proposal from the Commission, from the date that registration was imposed pursuant to Article 14 (5) or guarantees were requested. The relevant procedural provisions of this Regulation with regard to initiations and the conduct of investigations shall apply pursuant to this Article.

4. Products shall not be subject to registration pursuant to Article 14 (5) or measures where they are accompanied by a customs certificate declaring that the importation of the goods does not constitute circumvention. These certificates may be issued to importers, upon written application by the authorities following authorization by decision of the Commission after consultation of the Advisory Committee or decision of the Council imposing measures and they shall remain valid for the period, and under the conditions, set down therein.

5. Nothing in this Article shall preclude the normal application of the provisions in force concerning customs duties.

Article 14

General provisions

1. Provisional or definitive anti-dumping duties shall be imposed by Regulation, and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the Regulation imposing such duties. Such duties shall also be collected independently of the customs duties, taxes and other charges normally imposed on imports. No product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from export subsidization.

2. Regulations imposing provisional or definitive anti-dumping duties, or Regulations or Decisions accepting undertakings or terminating investigations or proceedings, shall be published in the *Official Journal of the European Communities*. Such Regulations or Decisions shall contain in particular and with due regard to the protection of confidential information, the names of the exporters, if practical, or countries involved, a

description of the product and a summary of the material facts and considerations relevant to the dumping and injury determinations. In each case, a copy of the Regulation or Decision shall be sent to known interested parties. The provisions of this paragraph shall apply *mutatis mutandis* to reviews.

3. Special provisions, in particular with regard to the common definition of the concept of origin, as contained in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ⁽¹⁾, may be adopted in, or pursuant to, this Regulation.

4. In the Community interest, measures imposed pursuant to this Regulation may, after consultation of the Advisory Committee, be suspended by a decision of the Commission for a period of nine months. The suspension may be extended for a further period, not exceeding one year, if the Council so decides, by simple majority, on a proposal from the Commission. Measures may only be suspended where market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension, and provided that the Community industry has been given an opportunity to comment and these comments have been taken into account. Measures may, at any time and after consultation, be reinstated if the reason for suspension is no longer applicable.

5. The Commission may, after consultation of the Advisory Committee, direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently be applied against these imports from the date of such registration. Imports may be made subject to registration following a request from the Community industry which contains sufficient evidence to justify such action. Registration shall be introduced by Regulation which shall specify the purpose of the action and, if appropriate, the estimated amount of possible future liability. Imports may not be made subject to registration for a period longer than nine months.

6. Member States shall report to the Commission on a monthly basis, on the import trade in products subject to investigation and subject to measures and the amount of duties collected pursuant to this Regulation.

Article 15

Consultations

1. Any consultations provided for in this Regulation shall take place within an Advisory Committee, which

⁽¹⁾ OJ No L 302, 19. 10. 1992, p. 1.

shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately at the request of a Member State or on the initiative of the Commission and in any event within a period of time which allows the time limits set by this Regulation to be respected.

2. The Committee shall meet when convened by its chairman. He shall provide the Member States, as promptly as possible, with all relevant information.

3. Where necessary, consultation may be in writing only; in such case the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation which the chairman shall arrange, provided that such oral consultation can be held within a period of time which allows the time limits set by this Regulation to be respected.

4. Consultation shall, in particular, cover:

- (i) the existence of dumping and the methods of establishing the dumping margin;
- (ii) the existence and extent of injury;
- (iii) the causal link between the dumped imports and injury;
- (iv) the measures which, in the circumstances, are appropriate to prevent or remedy the injury caused by dumping and the ways and means for putting such measures into effect.

Article 16

Verification visits

1. The Commission shall, where it considers it appropriate, carry out visits to examine the records of importers, exporters, traders, agents, producers, trade associations and organizations and to verify information provided on dumping and injury. In the absence of a proper and timely reply, a verification visit may not be carried out.

2. The Commission may carry out investigations in third countries as required, provided that it obtains the agreement of the firms concerned, it notifies the representatives of the government of the country in question and the latter does not object to the investigation. As soon as the agreement of the firms concerned has been obtained the Commission should notify the authorities of the exporting country of the names and addresses of the firms to be visited and the dates agreed.

3. The firms concerned shall be advised of the nature of the information to be verified during verification visits

and of any further information which needs to be provided during such visits, though this should not preclude requests from being made during the verification of further details to be provided in the light of information obtained.

4. In investigations carried out pursuant to this paragraph, the Commission shall be assisted by officials of those Member States who so request.

Article 17

Sampling

1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available.

2. The final selection of parties, types of products or transactions made under these sampling provisions shall rest with the Commission, though preference shall be given to choosing a sample in consultation with, and with the consent of, the parties concerned, provided such parties make themselves known and make sufficient information available, within three weeks of initiation, to enable a representative sample to be chosen.

3. In cases where the examination has been limited in accordance with this Article, an individual margin of dumping shall, nevertheless, be calculated for any exporter or producer not initially selected who submits the necessary information within the time limits provided for in this Regulation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and prevent the timely completion of the investigation.

4. Where it is decided to sample and there is a degree of non-cooperation by some or all of the parties selected which is likely to materially affect the outcome of the investigation a new sample may be selected. However, if a material degree of non-cooperation persists or there is insufficient time to select a new sample, the relevant provisions of Article 18 shall apply.

Article 18

Non-cooperation

1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits as provided for in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of facts available. Interested parties should be made aware of the consequences of non-cooperation.

2. A lack of a computerized response shall not be deemed to constitute non-cooperation, provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost.

3. Where the information presented by an interested party may not be ideal in all respects it should not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and provided the information is appropriately submitted in timely fashion, it is verifiable and the party has acted to the best of its ability.

4. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor and should be granted an opportunity to provide further explanations within the time limit specified. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information should be disclosed and given in any published findings.

5. If determinations, including those with respect to normal value, are based on the provisions of paragraph 1 of this Article, including the information supplied in the complaint, it should, where practicable and with due regard to the time limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation.

6. If an interested party does not cooperate, or only cooperates partially, and thus relevant information is being withheld, the result could be less favourable to the party than if it had cooperated.

Article 19

Confidentiality

1. Any information which is by nature confidential, (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities.

2. Interested parties providing confidential information shall be required to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

3. If it is considered that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information available or to authorize its disclosure in generalized or summary form, such information may be disregarded unless it can be satisfactorily demonstrated from appropriate sources that the information is correct. Requests for confidentiality should not be arbitrarily rejected.

4. This Article shall not preclude the disclosure of general information by the Community authorities and in particular of the reasons on which decisions taken pursuant to this Regulation are based, or disclosure of the evidence relied on by the Community authorities in so far as necessary to explain those reasons in court proceedings. Such disclosure must take into account the legitimate interest of the parties concerned that their business secrets should not be divulged.

5. The Council, the Commission and Member States, or the officials of any of these, shall not reveal any information received pursuant to this Regulation for which confidential treatment has been requested by its supplier, without specific permission from the supplier. Exchanges of information between the Commission and Member States or any information relating to consultations made pursuant to Article 15 or any internal documents prepared by the authorities of the Community

or its Member States shall not be divulged except as specifically provided for in this Regulation.

6. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.

Article 20

Disclosure

1. The complainants, importers and exporters and their representative associations, and representatives of the exporting country may request disclosure of the details underlying the essential facts and considerations, on the basis of which provisional measures have been imposed. Requests for such disclosure shall be made in writing immediately following the imposition of provisional measures and the disclosure shall be made in writing as soon as possible thereafter.

2. The parties mentioned in paragraph 1, may request final disclosure of the essential facts and considerations, on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, with particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.

3. Requests for final disclosure, as defined in paragraph 2, shall be addressed to the Commission in writing and be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty. Where a provisional duty has not been applied, parties shall be provided with an opportunity to request final disclosure within time limits set by the Commission.

4. Final disclosure shall be given in writing. It shall be made, with due regard being paid to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.

5. Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.

Article 21

Community interest

1. Pursuant to this Regulation, a determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers, and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied, where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.

2. In order to provide a sound basis on which the authorities can take account of all views and information in the decision on whether, or not the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organizations may, within the time limits specified in the notice of initiation of the anti-dumping investigation, make themselves known and provide information to the Commission. Such information, or appropriate summaries thereof, shall be made available to the other parties specified in this Article, and they shall be entitled to respond to such information.

3. The parties which have acted in conformity with paragraph 2 may request a hearing. Such requests shall be granted when they are submitted within the time limits set in paragraph 2, and when they set out the reasons, in terms of the Community interest, why the parties should be heard.

4. The parties which have acted in conformity with paragraph 2, may provide comments on the application of any provisional duties imposed. Such comments shall be received within one month of the application of such measures if they are to be taken into account and they, or appropriate summaries thereof, shall be made available to other parties who shall be entitled to respond to such comments.

5. The Commission shall examine the information which is properly submitted and the extent to which it is representative and the results of such analysis, together with an opinion on its merits, shall be transmitted to the Advisory Committee. The balance of views expressed in the Committee shall be taken into account by the Commission in any proposal made pursuant to Article 9.

6. The parties which have acted in conformity with paragraph 2 may request the facts and considerations on which final decisions are likely to be taken to be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission or the Council.

7. Pursuant to this Article, information shall only be taken into account where it is supported by actual evidence which substantiates its validity.

Article 22

Final provisions

This Regulation shall not preclude the application of:

- (i) any special rules laid down in agreements concluded between the Community and third countries;
- (ii) the Community Regulations in the agricultural sector and Regulation (EEC) No 1059/69 of the Council of 28 May 1969 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products ⁽¹⁾, Regulation (EEC) No 2730/75 of the Council of 29 October 1975 on glucose and lactose ⁽²⁾ and Regulation (EEC) No 2783/75 of the Council of 29 October 1975 on the common system of trade for ovalbumin and lactalbumin ⁽³⁾; this Regulation shall operate by way of complement to those Regulations

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 December 1994.

For the Council

The President

H. SEEHOFER

and in derogation from any provisions thereof which preclude the application of anti-dumping duties;

- (iii) special measures, provided that such action does not run counter to obligations pursuant to the GATT.

Article 23

Repeal of existing legislation

Regulation (EEC) No 2423/88 is hereby repealed. References to the repealed Regulation shall be construed as references to this Regulation.

Article 24

Entry into force

This Regulation shall enter into force on 1 January 1995. It shall apply to proceedings and interim review investigations initiated after 1 September 1994 and to expiry review investigations for which the notice of impending expiry of measures has been published after the same date. However, for proceedings initiated pursuant to Article 5 (9), the references to time limits shall only apply after a date which the Council shall specify in a Decision to be adopted by a qualified majority no later than 1 April 1995 on the basis of a Commission proposal to be submitted to the Council once the necessary budgetary resources have been made available.

⁽¹⁾ OJ No L 141, 12. 6. 1969, p. 1.

⁽²⁾ OJ No L 281, 1. 11. 1975, p. 20. Regulation as last amended by Commission Regulation (EEC) No 222/88 (OJ No L 28, 1. 2. 1988, p. 1).

⁽³⁾ OJ No L 282, 1. 11. 1975, p. 104. Regulation as last amended by Commission Regulation (EEC) No 4001/87 (OJ No L 377, 31. 12. 1987, p. 44).

ANNEX IV: EXCERPTS FROM THE KOREAN CUSTOMS ACT

(Translation by the Candidate)

Article 10 (Anti-dumping Duty)

(1) If it is confirmed by the investigation that the importation of foreign goods for sale at a price lower than the normal price causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry (hereinafter referred to as "material injury, etc."), and if deemed necessary to protect the domestic industry concerned, a duty may be imposed (hereinafter referred to as "anti-dumping duty") on the goods concerned in addition to the customs duty charged pursuant to Article 7 of this Act, in an amount equal to or less than the difference between the normal value and the dumping price (hereinafter referred to as "margin of dumping") of such goods by specifying the goods, exporter or exporting country of such goods prescribed by the Decree of the Ministry of Finance.

(2) Concerning those goods on which an investigation to decide whether or not to impose anti-dumping duty is initiated pursuant to Paragraph (1), if sufficient evidence (or as much information as is obtainable in the case of breach of undertaking mentioned in Paragraph (3) or failure to comply with a request to submit data or to verify it) is found to lead to the belief that the goods were imported for dumping and that material injury etc. has resulted therefrom, and if deemed necessary to eliminate injury that may occur during the investigation period, the Minister may, even before the completion of the investigation, either impose a provisional anti-dumping duty in an amount equal to or less than the provisionally estimated margin of dumping or order that a security be offered (hereinafter in this Article referred to as "provisional measures"), specifying the said goods, the exporting country or the exporter of the goods and the period.

(3) If an investigation is initiated pursuant to Paragraph (1) or if provisional measures are taken pursuant to Paragraph (2), the exporter of the goods concerned or the Minister may offer undertaking whereby prices are revised or exports are ceased or reduced to the extent that injury caused by dumping is eliminated.

(4) If the undertaking mentioned in Paragraph (3) is accepted, the Minister shall suspend or terminate the investigation without taking provisional measures or imposing an anti-dumping duty, and shall cancel the provisional measures already taken; however, the investigation may continue if the Minister deem it necessary, or if the exporter requests the continuation thereof.

(5) *The anti-dumping duty imposed pursuant to Paragraph (1) of the provisional measures taken pursuant to Paragraph (2) shall be applicable to the goods imported since the enforcement date of such duty or measures; however, among those goods on which the provisional measures were taken anti-dumping duty may be imposed where stipulated differently in international treaties or prescribed by the Presidential Decree.*

(6) If the result of the investigation pursuant to Paragraph (1) is a decision not to impose anti-dumping duty, the provisional anti-dumping duty paid in compliance with the provisional measure shall be refunded or the offered security shall be released. However, pursuant to a proviso of Paragraph (5), if the amount of the anti-dumping duty exceeds that of the provisional anti-dumping duty, the difference between them shall not be

collected, and if it is the other way around, the difference shall be refunded.

(7) The Minister, if deemed necessary, may review the imposition of the anti-dumping duty pursuant to Paragraph (1) and the acceptance of the undertaking pursuant to Paragraph (3), and may impose anti-dumping duty or change the content of undertaking or refund according to the result of review.

(8) The imposition of the anti-dumping duty under Paragraph (1) or the undertaking accepted under Paragraph (3) shall lapse after 5 years from the date on which they entered into force except in a case where the period of application therefor is fixed by the Decree of the Ministry of Finance. If the content of the anti-dumping duty or the undertaking is changed according to the result of review pursuant to Paragraph (7), the anti-dumping duty or undertaking shall lapse after 5 years from the date on which they were last modified or confirmed.

(9) Normal value and dumping price, investigation on material injury etc., details on undertaking, details on the term of validity and imposition method of anti-dumping duty and provisional measures shall be ruled by Presidential Decree.

**ANNEX V: EXCERPTS FROM THE ENFORCEMENT DECREE OF
THE KOREAN CUSTOMS ACT
(Translation by the Candidate)**

Article 4(2) (Request for the Imposition of Anti-dumping Duty)

(i) Any person having an interest in or the competent Minister having jurisdiction over the domestic industry subject to material injury, etc. prescribed in Article 10(1) may request the Minister of Finance to impose an anti-dumping duty on the goods concerned. This request shall be replaced by the request for investigation needed for the imposition of an anti-dumping duty to the KTC (Korean Trade Commission).

(ii) When Article 10(1) of the Act is applied, the term "domestic industry" means the whole domestic producers of goods identical, homogeneous or similar to the imported goods concerned or a group of domestic producers occupying a considerable portion of the gross domestic output, provided, that producers having a special relation with exporters and importers of such imported goods, producers importing them and their group, prescribed by a Decree of the Finance Ministry, are excluded.

(iii) The term "person having an interest in the domestic industry" in Paragraph (1) means domestic producers who belong to the domestic industry which considers itself materially injured etc., and corporations, organisations, and other individuals, composed by them or acting on behalf of them, as prescribed by a Decree of the Finance Ministry.

(iv) Any person who desires to request an investigation under Paragraph (1) shall submit to the Korean Trade Commission triplicate, respectively, an application specifying the following matters and sufficient documentary evidence concerning the fact of importing the dumping goods and that of actual injury, etc. caused thereby. In this case, the KTC shall report to the Minister and the chief of any administration agency concerned that it has received the request for anti-dumping investigation:

1. The denomination, standards, properties, destination and producers of such goods;
2. The exporting countries, exporters, actual exports and export possibility of such goods, and the importers and import possibility of the Republic of Korea;
3. The ex-factory and market prices of such goods in the exporting countries, and the export price to the Republic of Korea and the third country;
4. The denomination, standard, properties, destination, producers, ex-factory and market prices and cost accounting of identical, homogeneous or similar goods in Republic of Korea;
5. Actual injury etc. of domestic industry due to the imports of such goods.
6. If it is required to keep appended materials confidential, the reason for it; and
7. Other matters as deemed necessary by the Minister.

Article 4(3) (Commencement of Investigation of Dumping and Material Injury)

(i) The KTC shall, upon receiving a request for the investigation under Article 4 (2)(i) decide whether or not to initiate the investigation on dumping and material injury etc., and report the result of the investigation and the following matters to the Minister within 1 month from the date it received a request for investigation.

1. Product in question;

2. The period of investigation; and
3. The exporter of the product in question.

(ii) The KTC may dismiss the request for investigation when it decide whether or not to initiate investigation, if the request for investigation fall under one of the following matters;

1. where the person who submitted an application is not the person who can request imposition of duty under Article 4(2)(i);
2. where sufficient documentary evidence concerning the fact of dumping and that of material injury etc. is not submitted;
3. where margin of dumping, the quantity of imported dumping goods or material injury etc. is confirmed to be minimised; and
4. where the initiation of investigation is not necessary because measures to eliminate the injurious effect to the domestic industry were taken before the initiation of investigation.

(iii) The Minister shall notify petitioner, the exporter of the goods concerned, and the other interested parties of matters for imposition of anti-dumping duties and the initiation of investigations within 10 days after reported pursuant to Article 4(3)(1), and shall publish these matters in the Official Gazette.

Article 4(4) (Investigation of Dumping and Material Injury)

(i) When the existence of dumping and material injury etc. is investigated, the Office of Customs Administration (hereinafter referred to as "OCA") shall investigate the matters as to the existence of dumping and the KTC shall investigate the matters as to material injury etc. In this case, the OCA and the KTC (hereinafter referred to as "investigation authorities") may, if deemed to be necessary, have public officials belonging to the administrative agency concerned and experts concerned participated in the activities of investigation.

(ii) The investigation authorities shall carry out a preliminary investigation as to the existence of sufficient evidence on the existence of dumping and material injury etc., within three months from the date of the publication in the Official Gazette, the chief of the OCA shall submit a report on the result of the preliminary investigation and the KTC shall submit a letter of resolution on the preliminary determination to the Minister respectively.

(iii) The Minister shall decide the necessity of a measure prescribed in Article 10(2) of the Act and the matters on the content within 1 month from the date on which a report on the result of the preliminary investigation and a letter of resolution on the preliminary determination are submitted under Paragraph (ii). Provided, that if it is deemed to be necessary, the period for this determination may be postponed within the limit of 20 days.

(iv) The Minister may suspend or terminate the final investigation under Paragraph (5), if dumping margin, the quantity of the dumping goods, or material injury etc. is deemed to be minimised according to the result of the provisional investigation under Paragraph (ii).

(v) The investigation authorities shall initiate final investigations respectively, from the next date of the date on which a report on the result of the preliminary investigation or a letter of resolution on

the preliminary determination are submitted under Paragraph (ii) unless there are special reasons as prescribed in the Decree of the Finance Ministry, shall submit a report on the result of final investigation or a letter of resolution on final determination to the Minister respectively within 3 months from the date on which final investigation is initiated.

(vi) The investigation authorities, concerned with investigation as prescribed in Paragraphs (ii) and (v), after consultation with the Minister, may prolong the investigation period within the limit of 1 month, if it is deemed necessary to prolong the investigation period or if the interested person demand prolongation of the investigation period with justifiable reason.

(vii) The Minister shall decide whether or not to impose the anti-dumping duty and its content within 1 month from the date on which a report on the result of final investigation and a letter of resolution on final determination are received as prescribed in Paragraph (v), and then shall take a measure for the imposition of an anti-dumping duty as prescribed in Article 10(1) of the Act. Provided, That if it deemed necessary the period may be prolonged with the limit of 20 days.

(viii) The Minister shall take a measure for the imposition of an anti-dumping duty as prescribed in Paragraph (vii) within 1 year from the date of the request for investigation under Article 4(2)(i). However, in case it is deemed that there are special reasons, the Minister may prolonged the period for the imposition of an anti-dumping duty, notwithstanding the provisions of Article 4(3)(i), Article 4(4)(ii),(v) or (vii).

Article 4(5) (Withdrawal of the Request for the Imposition of Anti-dumping Duty)

(i) If the person who requested the imposition of an anti-dumping duty pursuant to Article 4(2)(i) desires to withdraw such request, he shall request the withdrawal of such request to the KTC. In this case, when the KTC receives the request for withdrawal before its decision on the initiation of investigation, the KTC may suspend its decision whether or not to initiate investigation, after consultation with the Minister and the chief of the administrative agency concerned, and when the KTC receives such a request after its decision on the initiation of investigation, it shall notify the Minister.

(ii) The Minister when he receives the notification pursuant to Paragraph (i), after consultation with the investigation authorities and the chief of the administrative agency concerned, may have the investigation under Article 4(4) not to initiate or to terminate, and may withdraw a provisional measure if it is taken as prescribed in Article 10(2).

(iii) In case where the Minister withdraws a provisional measure as prescribed in Paragraph (ii), he shall refund the provisional anti-dumping duty paid in compliance with such provisional measure or release the offered security.

Article 4(6) (Comparison of Normal Price and Dumping Price)

(i) The term "normal price" in Article 10(1) of the Act means the ordinary trade price of identical, homogeneous or similar goods which are consumed in the country exporting them: Provided that if there is no trade

of such identical, homogeneous or similar goods, or if it is impossible to apply the ordinary trade price due to a special market situation, the highest representative price of the prices at which such goods are exported to a third country from the exporting country or a price summed up the production cost in the country of origin, management, distribution costs and profit at a reasonable level (hereinafter referred to as "constructed price") shall be considered as a normal price.

(ii) If the goods are not imported directly from the country of origin, but through a third country, the ordinary trade price in the third country shall be considered as a normal price: Provided, that if the goods are merely transshipped in the third country, or there is no production such identical, homogeneous or similar goods or no price to be deemed as a normal price in the third country, the ordinary trade price in the country of origin shall be considered as a normal price.

(iii) If the goods are imported from a non-market economy country under a controlled economy, the ordinary trade price of identical, homogeneous or similar goods which are consumed in market economy countries excluding the Republic of Korea shall be, notwithstanding the provisions of Paragraph (1) and (2), considered as a normal value, or the export price or the constructed value at which such goods are exported from a market economy country to the third countries including the Republic of Korea, shall be considered as a normal price, but if it is impossible to deem the prices in such market economy countries as a normal price: Provided, that in cases where the Decree of the Finance Ministry prescribes, for instance a non-market country which is converting to a market economy country etc., the ordinary trade price of the goods pursuant to Paragraph (1) and (2) may be considered as a normal price.

(iv) The term "dumping price" in Article (10) of the Act means a price to have been actually paid or to be payable at a price lower than a normal price as referred to in Paragraph (1) to (3) with respect to goods which are imported from foreign countries: Provided, that if there exists a special relation or compensation agreement, prescribed in the Decree of the Finance Ministry, between the exporter and the importer or a third person, and it is thereby impossible to rely on the price which has been paid or is to be paid, it means the price at which such imported goods have been first resold to a buyer having no special relation or compensation agreement, but if there is no resale to such a buyer, or the goods are not resold in such a state as they were imported, it shall be the price which conforms to a reasonable criterion as prescribed by the Minister.

(v) A comparison between the normal and the dumping price shall be made at the same time and in the same trade level (referred ordinarily to the ex-factory level) as far as possible. In this case, if a physical characteristic, quantity or condition of sale, difference in taxation, etc. have an effect on such a comparison of prices, the Minister may adjust the normal and dumping prices.

(vi) If an interested person requests a price adjustment due to a difference in physical characteristic, selling quantity and condition, he shall prove the fact that such difference has a direct effect on manufacturing cost or market price.

Article 4(7) (Determination of material injury, etc.)

(i) The KTC shall be based on substantial evidence including the following matters, when it investigates and determines material injury etc. under Article 4(4):

1. The quantity of imported dumping goods (including whether or not the import of such goods has increased remarkably absolutely or relatively compared with the domestic production or consumption);
2. The price of dumping goods (including whether or not the price of dumping goods has fallen remarkably compared with that of domestic identical, homogeneous or similar goods);
3. The output, operating rate, stocks, selling quantity, market share, price (including the effect of depression of prices or prevention of price increases), profits, return on investments, cash receipts and payment, employment, wages, growth, finance, investment ability, and technology development of domestic industry; and
4. The substantial or potential effect of the content of Paragraph 1 and 2 on domestic industry.

(ii) When substantial injury etc. are investigated and determined under Paragraph (1), a determination of threat of injury shall be based on the following matters in addition to the matters in Paragraph (1) and injury caused by dumping goods shall be explicitly foreseeable and imminent:

1. remarkable increase rate of the dumping goods showing the possibility of substantial increase of imports;
2. substantial increase of production capacity causing the increase of dumping;
3. whether the price of the dumping goods depress price or prevent price increase of identical, homogeneous or similar goods, and the possibility of additional consumption of imported goods;
4. stocks and stocks of identical, homogeneous or similar goods of the dumping goods.

Article 4(8) (Request for Materials to the Interested Person)

(i) If the Minister or the investigation authorities deem it necessary to determine whether or not to initiate investigations or impose anti-dumping duty, they may request the administration agency concerned, domestic producers, exporters, importers, and other interested persons for necessary cooperation, such as presentation of related materials etc.

(ii) Materials of those submitted under Paragraph (1) and Article 4(2)(iv), which are deemed proper to be kept confidential by nature, or which are submitted by the interested person under a condition that they should be kept confidential, with a justifiable reason presented, shall not be disclosed without the express consent of the person who has submitted them.

(iii) The Minister or investigation authorities may demand the person who has submitted materials to be kept confidential to file a summary of such materials which is not confidential. In this case, if the person is unable to file such summary, he shall file a document in which the reason is mentioned.

(iv) If the request of the interested person to keep confidential under Paragraph (ii) is not deemed proper, or the person who has presented materials refuses to disclose them without any good reason or to submit a non-confidential summary pursuant to Paragraph (iii), the Minister or investigation authorities may not refer such materials unless the accuracy of materials is proved sufficiently.

(v) If an interested person fails to present relevant documents, or refuses or prevents an investigation of the investigation authorities, or it is difficult to verify the investigation or materials for any reason, the Minister or the investigation authorities may determine whether to take measures for preventing dumping using available materials, when deciding whether to impose anti-dumping duty.

(vi) The Minister or the investigation authorities shall not use for other purposes such information and materials acquired from the interested persons or facts informed in connection with a procedure for imposition of the anti-dumping duty.

(vii) If an interested person related to the investigation requests an inspection of relevant documentary evidence presented under Article 4(2)(iv) and materials submitted or informed under Paragraph (1) and (9) and Article 4(11), excluding those to be kept confidential, the Minister or the investigation authorities shall accept it unless there is any special circumstance. In this case, such request of the interested person for inspection of materials shall be made in writing with the reason therefor and list of documents specified.

(viii) The Minister and the investigation authorities, if it deemed necessary, or if an interested person requests, may give him an opportunity to address in the public hearing, or to consult an interested person with opposing views.

(ix) If superintendent of a customhouse, the head of a bank dealing with a foreign exchange business, the chief of a related agency or the head of an organisation having an interest deems that imported goods are dumped ones, he shall inform the Minister and the investigation authorities.

Article 4(9) (The Imposition of Anti-dumping Duty)

(i) The anti-dumping duty pursuant to Article 10(1) of the Act may be imposed to each exporter based on a fixed rate of anti-dumping duty or a fixed standard import price. However, to the exporter who fails to present relevant document, or refuses or prevents an investigation of the investigation authorities, or it is difficult to verify the investigation of materials for any reason under Article 4(8), without any justifiable reason, the anti-dumping duty may be imposed based on an unitary rate of anti-dumping duty or an unitary standard of import price.

(ii) The anti-dumping duty imposed to the exporter who is not subject to investigation as prescribed in Article 4(3)(i) shall be the rate of the anti-dumping duty applicable to the exporter who is subject to investigation, or the rate of the anti-dumping duty finding the weighted average of the standard import price, or the standard import price. However, among exporters who export during the period of investigation and are not subject to investigation, to the exporter who submits materials as

prescribed in provisions of Article 4(8) Paragraph (i) shall be applicable.

(iii) In case the anti-dumping duty is imposed by specifying a exporting country pursuant to Article 10(1) of the Act, when a new exporter of the exporting country who exports after the period of investigation as prescribed in Article 4(3)(i) has a special relation, as prescribed in the Decree of the Finance Ministry, with the exporter who is subject to the anti-dumping duty under Paragraph (i), the anti-dumping duty is imposed on the basis of the rate of anti-dumping duty or the standard import price applied to the latter, and if it is other way around, the anti-dumping duty is imposed as prescribed in Paragraph (1).

(iv) The standard import price prescribed in Paragraph (i) and (iii) shall be decided within the limits of the price adding the cost concerned with import to the adjusted normal price in the exporting country pursuant to Article 4(6)(v).

Article 4(10) (The Application of Provisional Measures)

(i) The provisional measure under Article 4(4)(iii), in case where the preliminary investigation is terminated as prescribed in Article 4(4)(ii), may be taken after the date on which at least 60 days have passed after the initiation of the preliminary investigation.

(ii) The maximum validity period of the provisional measure pursuant to Article 4(4)(iii) shall be 4 months. However, where exporters representing a significant proportion of the trade of such goods so request, a validity period for provisional measures may be prolonged for a further period of 2 months.

(iii) If the Minister deems it necessary, notwithstanding the provision of Paragraph (ii), he may prolong the validity period of the provisional measures according to international agreements.

(iv) In case when the Minister orders that a security be offered, the security offered shall be the amount equivalent to the amount of the provisional anti-dumping duty.

Article 4(11)(Undertaking of Price Revision, Export Cessation, etc.)

(i) When an exporter of the product, during the course of an investigation, offers an undertaking under Article 10(3) of the Act, or requests a continuation of investigation on injury under Article 10(4) of the Act, he shall present his intention in writing to the Minister.

(ii) When the undertaking offered under Paragraph (1) concerns an immediate revision of price, or a cessation of export or reducing the volume of export below a certain level in a term as determined after consultation with the Minister within 6 months from the day of undertaking, the Minister may accept such an undertaking: Provided, that in a case of the undertaking to cease an export, the volume of export between the day of undertaking and that of export cessation shall not exceed the level as deemed proper by the Minister.

(iii) The Minister shall, upon an offer of the undertakings as referred to in Paragraph (1), notify the contents of such undertakings to the chief of administration agency concerned, and the investigation authorities, and interested persons. In this case, the chief of administration concerned, and the investigation authorities, and interested persons who have been informed of the contents of undertaking, may state in writing to the Minister their opinions on the contents of undertaking within 20 days from the day on which they are informed thereof.

(iv) The Minister may not accept the undertaking offered under Paragraph (i), in case where the Decree of the Finance Ministry prescribes that it is deemed difficult to secure the fulfilment of the undertaking.

(v) The Minister, if deemed to be necessary, may offer the undertaking pursuant to Article 10(3) to the exporter specified. In this case, the exporter shall notify whether or not to accept the undertaking within 1 month from the date on which the undertaking is offered.

(vi) The Minister may not accept the undertaking mentioned in Paragraph (ii) or offer the undertaking as prescribed in Paragraph (v), before the report on the result of the preliminary investigation or the letter of resolution on the preliminary determination are submitted.

(vii) When accepting the undertaking mentioned in Paragraph (ii) or notified of the acceptance of the undertaking as prescribed in Paragraph (v), the Minister may require the exporter to provide periodically the data relevant to the fulfilment of such undertakings, and to permit verification of the said data.

(viii) When withdrawing the provisional measure pursuant to Article 10(4) of the Act, the Minister shall refund the provisional anti-dumping duty paid in compliance with the provisional measure or release the offered security. However, if it is confirmed that material injury, etc. have occurred as a result of investigation pursuant to Article 4(4), the Minister may not refund the provisional anti-dumping duty paid in compliance with the provisional measure or may collect the amount equivalent to the amount of the provisional anti-dumping duty.

(ix) If the exporter does not fulfil the undertaking accepted under Article 10(4), or fails to submit the materials under Paragraph (7), or refuses the demand to verify the materials, the Minister may continue to take measures for preventing the dumping on the basis of the facts available.

(x) When it turns out that there is no material injury etc., as a result of investigation under the proviso of Article 10(4) of the Act, the Minister may invalidate the effect of such an undertaking. However, if it is judged that a determination of no material injury etc. is due to the existence of such an undertaking, the exporter shall fulfil the undertaking in a period as deemed proper by the Minister. If the exporter refuses to fulfil the undertaking, the Minister may continue to take measures for preventing the dumping on the basis of the facts available.

Article 4(12) (Retroactive Effect of Anti-dumping Duty)

(i) Among the goods on which the provisional measures are taken pursuant to the proviso of Article 10(5) the following goods shall be subject to anti-dumping duty:

1. Goods imported during the period for which provisional measures were in effect, if a final determination is made that the material injury had occurred, or if it is deemed that a final determination might have been made, without the provisional measures, that material injury have occurred in spite of the fact that a final determination is made that the threat of material injury had occurred;
2. Goods imported after 90 days prior to the enforcement date of the provisional measures, where the retroactive imposition of the anti-dumping duty is required to prevent the recurrence of mass import of the goods in a relatively short period, if there is a history of dumping which caused material injury, etc. or if the importer was, or should have been aware of the fact of the dumping and the material injury, etc. which resulted therefrom;
3. Goods imported after 90 days prior to the enforcement date of the provisional measures if material injury, etc. is deemed to have occurred due to the import, in breach of the undertaking under Article 10(3) of the Act, of the goods on which the provisional measures were taken; however, this shall not apply to those goods imported before the date of the above breach of undertaking.
4. Goods imported in the period prescribed by the Minister according to the provisions under international agreements, etc.

(ii) The person having an interest in the domestic industry as prescribed in Article 4(2) may request the imposition of anti-dumping duty pursuant to the proviso of Article 10(5) of the Act, presenting evidence which fell under any Subparagraphs in Paragraph (i) within 7 days from the date on which the final investigation pursuant to Article 4(4)(v) is terminated.

Article 4(13)(Exact Account of the Amount of Anti-dumping Duty etc.)

(i) In case where the amount of the anti-dumping duty on the goods imported during the period for which the provisional measures were in effect as prescribed Article 4(12)(i), is equal to or exceeds that of the provisional anti-dumping duty, such provisional anti-dumping duty shall become the amount of the anti-dumping duty, and if it is other way around, the provisional anti-dumping duty which is equivalent to the difference shall be refunded as mentioned in Article 10(6) of the Act.

(ii) In case where the security is offered as mentioned in Article 10(2) of the Act, and in case where it comes under Article 4(12)(i), the amount of the anti-dumping duty imposed retroactively during the period for which the provisional anti-dumping duty were in effect shall not exceed the amount equivalent to the provisional anti-dumping duty.

Article 4(14) (Review of Anti-dumping Duty and Undertaking)

(i) If the Minister deems it necessary, or if the interested person or the competent Ministers having jurisdiction over the industry concerned so requests with related documentary evidence which fell under the following matters, the Minister may review the goods on which anti-dumping

duties are being imposed, or an undertaking is being fulfilled:

1. where there occurs enough change in situation to warrant to change the content of measure since the imposition of anti-dumping duty or the acceptance of undertaking;
2. where the domestic industries might be injured from a termination of the anti-dumping measure or the undertaking; and
3. where the amount of the anti-dumping duty collected exceeds the actual dumping margin.

(ii) Request for the review under Paragraph (1) may be made after 1 year has elapsed since the anti-dumping duty or the undertaking has entered into force, and shall be made 6 months before the effect of the anti-dumping measure or the undertaking is lost. In this case, the Minister shall decide whether or not to review within 1 month from the date of receiving request for the review.

(iii) The Minister may review the reasonableness of the rate of the anti-dumping duty being imposed and the undertaking being fulfilled, in addition to the review as prescribed in paragraph (1), and shall reappraise, annually, the dumping price in the month to which the enforcement date of an anti-dumping duty is belonged.

(iv) When the Minister decides the necessity of the review under Paragraph (i) or (iii), he may consult with the chief of the administration concerned and the investigation authorities, and when it is decided that review is warranted, the investigation authorities shall investigate. In this case, the investigation may be limited to a changed portion to justify a review.

(v) The investigation authorities shall conclude the investigation within 6 months from the date of the initiation of a review as prescribed in Paragraph (4) initiates, and submit a report on the dumping determination or on the injury determination to the Minister, and the Minister shall take a measure as prescribed in Article 10(7) of the Act within 1 month from the date when a report on the dumping determination and on the injury determination is submitted.

(vi) In case where the review is made for reason as referred to in Subparagraph 2 of Paragraph (1), if the period of application of the anti-dumping measures terminated during the review period, the effect of such anti-dumping measure shall be maintained in the period of review.

(vii) If the effectiveness of an undertaking is lost or is judged to be lost as a result of the review under Paragraph (1) or (3), the Minister may demand the exporter who is fulfilling it to revise the undertaking, and if the exporter refuses to do so, the Minister may take anti-dumping measures on the basis of the facts available.

Article 4(15) (Notification and Announcement to the Interested Person etc.)

i) When it falls under any of the following Subparagraphs, the Minister shall publish the contents thereof in the Official Gazette and notify it in writing to the interested person:

1. when he has decided to take or not to take measures as prescribed in Article 10(1) and (2) of the Act;

2. when he has accepted an undertaking as prescribed Article 10(3) of the Act, and ceases, terminates, or continues the investigation;
3. when he initiates a review as prescribed in Article 10(7) of the Act, or changes the contents of anti-dumping measures as a result of a review; or
4. when the initiation of the investigation is decided as prescribed in Article 4(3)(i).

(ii) When it falls under any of the following Subparagraphs, the Minister or the investigation authorities shall notify the contents thereof to the interested person:

1. when the request for investigation is dismissed as prescribed in Article 4(3)(ii) or investigation is suspended or terminated as prescribed in Article 4(4)(4);
2. when the period of investigation is prolonged under Article 4(4)(vi);
3. when the validity of the anti-dumping measures is prolonged as prescribed in Article 4(4)(viii);
4. when the decision on the initiation of investigation is suspended, or investigation is terminated as the request for an imposition of anti-dumping duty has been withdrawn;
5. when the period of provisional measures is prolonged as prescribed in Article 4(10)(ii) or (iii); or
6. when the Minister offers an undertaking under Article 4(11)(v).

(iii) If an interested person requests in writing in the course of investigation under Article 4(4), the Minister or the investigation authorities shall notify him of the progress of such investigation.