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UNITED STATES AND EUROPEAN COMMUNITY ANTIDUMPING LAW: SIMILARITIES AND DIFFERENCES

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I. INTRODUCTION

The purpose of this article is to provide a practical overview of the basics of United States and European Community antidumping law and practice.¹ Although both US and EC antidumping law are based on Article VI of the GATT,² and on the 1979 GATT Anti-Dumping Code,³ there are significant differences between the two systems which may affect the outcome of cases. Knowledge of both systems is, therefore, indispensable to modern-day businessmen because domestic industries in both jurisdictions continue to make heavy use of antidumping law to obtain protection against foreign competitors.⁴

¹ For critical analyses of the antidumping systems of the United States and the European Communities, as well as those of Australia and Canada, see ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY (Jackson & Vermulst eds. 1989).

² General Agreement of Tariffs and Trade, Article VI, Oct. 30, 1947, 61 Stat. (5),(6), T.I.A.S. No. 1700, 55 U.N.T.S. 194, (1948) as amended.

³ Vol. IV BISD; Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 2, 31 U.S.T. 4919, T.I.A.S. No. 9650, GATT, BISD 26 Supp. 171 (1980).

⁴ Almost five hundred antidumping petitions have been filed in the United States since 1980, resulting in nearly two hundred antidumping orders. While a considerable number of countervailing duty petitions were filed in the first half of the decade, the rate has dropped off precipitously. Only nineteen petitions have been filed in the last three years; only 62 petitions have been filed under Section 201 of the Trade Act of 1974, and import relief was imposed in less than a quarter of the cases. Comparatively, more than five hundred antidumping petitions have been filed in the EC since 1980.

Simply stated, the basic concept of antidumping law is this: if a foreign manufacturer sells products in the importing country at less than *normal* or *fair* value (*i.e.*, less than the price it charges for the same products in its home market, or another appropriate foreign market, or below its cost of production), and if those sales cause, or threaten to cause, material injury to an industry in the importing country producing like products, the authorities in the importing country may then impose an antidumping duty on those foreign products.

Two findings are required for an antidumping duty to be applied:

- (1) that the imported product is being, or is likely to be, sold in the importing country at less than *normal* or *fair* value; and
- (2) that an industry in the importing country is *materially injured* or *threatened with material injury*, or that the establishment of an industry in the importing country is being materially retarded, by reason of dumped imports of the product.⁵

In the United States, the *less than fair value* determination is made by the International Trade Administration, which is part of the Department of Commerce, while the *injury* determination is made by the International Trade Commission, an independent government agency. In the European Community, both determinations are essentially made by the EC Commission.

This article provides a brief overview of the major elements of these complex proceedings. Part II describes the United States system and analyzes in some detail issues that are common to US and EC antidumping law enforcement. Part III reviews the EC system with special focus on those aspects of EC law and practice that differ from the US system. Part IV provides a summary.

II. THE UNITED STATES

A. Initiation

Normally, an antidumping investigation is initiated when a U.S. manufacturer, a trade association, or a labor union acting on behalf of a domestic industry files a petition with the Department of Commerce (DC) and the International Trade Commission (ITC).⁶ The petition must allege the

⁵ 19 C.F.R. § 353.12(a).

⁶ Since the petition must be filed on behalf of an industry, an individual manufacturer cannot file an antidumping petition on its own behalf. The Department can refuse to initiate an investigation if there is evidence that a majority of the industry does not support the petition. *Gilmore Steel Corp. v. United States*, 585 F. Supp. 670 (Ct. Int'l Trade 1984). The Court of International Trade has held, however, that the petitioner is not required to demonstrate

existence of sales at less than fair value (LTFV) and injury to a domestic industry.⁷ Although the DC may self-initiate investigations,⁸ it very rarely does so.

Within twenty days of the filing of an antidumping petition, the DC must decide whether to initiate an investigation based upon the sufficiency of the petition.⁹ During this period, the DC may check the allegations in the petition against facts in the public domain, but it may not receive information from the respondent or the respondent's government.¹⁰ Generally, the DC refuses to initiate an investigation only when the petition is clearly defective, for example, where the information provided in the petition does not support the claim of sales at less than fair value.

B. Preliminary Injury Determination

Within 45 days of the filing of the petition, the ITC must determine whether there is a "reasonable indication" of injury, or threat of injury, to a domestic industry "by reason of" the imports in question.¹¹ The ITC staff gathers as much information as it can about the case, much of it from responses to questionnaires sent to domestic producers, importers, and purchasers, and prepares a summary of the data. Normally, the staff will gather information covering the most recent three years. Then, approximately three weeks after the filing of the petition, the staff will hold an informal hearing, at which both the domestic and foreign interests will be allowed to present evidence and legal argument.

affirmatively that it has the support of a majority of the industry, *Citrosuco Paulister, S.A. v. United States*, 704 F. Supp. 1075 (Ct. Int'l Trade 1988), and the Department will normally only investigate the question of standing if a significant number of domestic producers notify the Department that they oppose the petition. Final Determinations 54 Fed. Reg. at 19,004. According to one recent decision of the Court of International Trade, the Department may initiate an investigation even when a majority does not support the petition. *NTN Bearings Corp. of America v. United States*, 757 F.Supp. 1425 (Ct. Int'l Trade 1991). But see *Suramericana Aleaciones Laminadas, C.A. v. United States*, 746 F. Supp. 139 (Ct. Int'l Trade 1990), *appeal docketed*, No. 91-1015 (Fed. Cir. Oct. 5, 1990), in which the CIT held that a petition must be shown to be supported by a majority of the relevant domestic industry.

The DC has recently held that there is no standing to file a petition where products designed overseas, using foreign components, are merely assembled in the United States. See *Certain Portable Electric Typewriters From Singapore*, 56 Fed. Reg. 49880 (1991).

⁷ A detailed list of the information that a petition should contain can be found at 19 C.F.R. § 353.12(b) (1991).

⁸ 19 U.S.C. § 1673a(a)(1) (1991); 19 C.F.R. § 353.11(a)(1) (1991).

⁹ 19 U.S.C. § 1673a(c) (1991).

¹⁰ *U.S. v. Roses Inc.*, 706 F.2d 1563 (Fed. Cir. 1983).

¹¹ 19 U.S.C. § 1673b(a).

If the ITC determines that there is no reasonable indication of injury or threat of injury, the entire investigation is terminated. Fewer than twenty percent of cases, however, end in this manner, since the threshold that must be met by the petitioner is quite low.¹² If the ITC decides that there is a reasonable indication of injury or threat of injury, the investigation continues.

In making its determination, the ITC is required to consider the volume of imports (both absolute and relative to U.S. production and consumption), the effect of imports on prices in the United States, and their effect on U.S. industry.¹³ In considering the effect on prices, the ITC will determine whether imports are undercutting domestic products in terms of price, and whether they are causing price depression (i.e., absolute price declines) or price suppression (i.e., prevention of price increases). In evaluating the effect of imports on the domestic industry, the ITC will consider such factors as the sales, market share, profitability, employment, and productivity of the domestic industry. With respect to threat of injury, the ITC considers the rate of increase of imports, the production capacity of the foreign producers, their capacity utilization, and the likelihood that the exporting country will continue to direct its exports to the United States.

C. Preliminary and Final "Less Than Fair Value" Determination

The DC is required to make a preliminary determination of whether or not there are sales at less than fair value within 160 days of the filing of the petition.¹⁴ Shortly after the ITC's preliminary determination (assuming that it is affirmative), the DC sends out *questionnaires* to the foreign manufacturers seeking information relevant to the case. These are normally to be answered within thirty days, although two week extensions of time are routinely granted. An antidumping questionnaire generally requests information relating to sales during the six month period ending with the month in which the petition was filed, but the DC will use a different period if that seems more appropriate,

¹² The Commission will only issue a negative determination when "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation." *American Lamb Co. v. United States*, 785 F.2d 994, 1091 (Fed. Cir. 1986). The Commission is permitted to weigh the evidence presented by the different parties in reaching its conclusion, rather than relying solely on the evidence presented by the petitioner. *Id.* at 1003.

¹³ 19 U.S.C. § 1677(7)(b). For a detailed discussion of the factors considered by the Commission, see Section M below.

¹⁴ 19 U.S.C. § 1673b(b). The deadline may be extended by up to 50 days upon request by the petitioner or if the Department determines that the case is "extraordinarily complicated." Requests by petitioners are not uncommon, but "extraordinarily complicated" determinations are extremely rare.

e.g., if there is a seasonal pattern to sales.¹⁵ The questionnaire requests a large amount of data concerning sales transactions in the U.S., home or third country markets, including sales prices and related information such as delivery charges and selling expenses, and details of any physical differences between the products sold in the different markets. The questionnaire will also request cost information if the petitioner has alleged that sales in the home or third-country markets are below cost, or if the volume of sales in the home or third-country markets is too small to be used as the basis for foreign market value. The information must normally be presented in a specified computer format, unless the number of sales is very small. The DC attempts to examine at least 60 percent (and usually as much as 85 percent) of the dollar volume of exports to the United States during the time period in question, so small producers or exporters may not receive questionnaires.¹⁶

Information of a *confidential* nature (e.g., costs, prices, customer names) may be submitted with a request that it be treated as proprietary.¹⁷ If the request is granted, the information is made available only to the Commerce Department and to counsel for the petitioners (as well as experts such as economists under the supervision of counsel), subject to an administrative protective order.¹⁸ A nonconfidential version of the submission must be supplied for the public record.

The *Preliminary "Less Than Fair Value" Determination* (LTFV) is normally based on the information supplied to the DC, unless it contains obvious inconsistencies or errors. For each company which receives an affirmative preliminary LTFV determination (i.e., the LTFV margin is 0.5 percent or greater), the DC will order suspension of liquidation of all entries made on or after the date of publication in the *Federal Register* of the preliminary determination. These entries must be accompanied by bonds or cash deposits in the amount of the estimated dumping margin, and will be subject to assessment for antidumping duties in the event that an antidumping duty order is subsequently entered. A disclosure meeting will be held with each party, to explain the underlying calculations. Upon request of any party, a hearing will

¹⁵ See, e.g., *Certain Fresh Cut Flowers From Columbia*, 52 Fed. Reg. 6842, 6844 (1987) (period of investigation covered a full year, to take account of seasonal variations in prices and sales volumes); *Certain Internal-Combustion Industrial Forklift Trucks From Japan*, 53 Fed. Reg. 12,552 (1988) (period moved back by two months to take account of post-sale rebates).

¹⁶ A producer or exporter wishing to participate in the proceeding, even though it may be too small to be selected by the DC, may, within 30 days of the publication of the notice of initiation, submit a request for exclusion from any antidumping order that may be issued, in which case the DC will include the company in the investigation if possible. 19 C.F.R. § 353.14. A producer or exporter which is not investigated will be subject to the "all others" rate. See *infra*, pages 7-8.

¹⁷ See 19 C.F.R. § 353.32(a).

¹⁸ 19 U.S.C. § 1677f(c); 19 C.F.R. § 353.34. In-house counsel may be given access to confidential data under administrative protective order if they are not involved in competitive decision-making. See *U.S. Steel v. United States*, 730 F.2d 1465 (Fed. Cir. 1984); *Matsushita Electric Indust. Co. Ltd. v. United States*, 929 F.2d 1577 (Fed. Cir. 1991).

be held at which the parties may challenge the preliminary determination. Case briefs and rebuttal briefs may be filed before the hearing.

The DC will arrange for *verification* a few weeks after the Preliminary LTFV Determination. DC officials will visit the foreign manufacturers, and their related importers, to check the accuracy of the response against the company's records. Failure to allow verification, or an inability to verify information satisfactorily, will result in use of "the best information otherwise available," which may be the highest rate for any verified company, or even the margins alleged in the antidumping petition.¹⁹ While the DC will generally accept minor modifications to responses to reflect errors uncovered at verification, it will not permit wholesale changes or recalculations.²⁰ The verifier will prepare a detailed verification report which will become part of the record in the investigation and will be made available to the parties.

The DC will subsequently issue a *Final Determination*.²¹ The Final Determination must normally be issued within 75 days of the Preliminary Determination, but this deadline may be extended for up to 60 days upon request of the party adversely affected by the Preliminary Determination.²² The Preliminary and Final Determinations include the estimated amount of dumping margins. Each investigated company will receive its own margin rate. The DC will also publish an "all others" rate, which is a weighted average of the company-specific margins, and which applies to imports from all non-investigated companies.²³ Any company which receives a zero or *de minimis* (less than 0.5 percent) margin will be exempted from the antidumping order that will be issued, if the ITC reaches an affirmative final injury determination. Unlike the practice in the EC, the margin is always expressed as a percentage of the U.S. price.

¹⁹ 19 U.S.C. 1677e(b); 19 C.F.R. § 353.37. Punitive "best information available" rates will be used where the Department believes that the respondent refused to cooperate in the investigation. *See e.g.*, *Atlantic Sugar Ltd. v. United States*, 744 F.2d 1556 1560 (Fed. Cir. 1984); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 56 Fed. Reg. 31692 (1991). On the other hand, if the respondent's failure to supply satisfactory information was beyond its control, the Department will use a more reasonable approach, for example, information supplied by other respondents.

²⁰ *Photo Albums from Hong Kong*, 50 Fed. Reg. 43,754 (1985).

²¹ Even if the Preliminary Determination is negative, i.e., the Department finds that there were no sales at less than fair value, it must proceed to a Final Determination.

²² 19 U.S.C. §§ 1673d(a)(1)-(2) (1989); 19 C.F.R. § 353.20(b).

²³ Until recently, companies which began exporting to the United States after the issuance of an antidumping order were normally subject to the highest cash deposit rate of any investigated company. However, the Department recently changed this practice, and new manufacturers are now subject to the "all other" rate determined in the LTFV investigation or the most recent administrative review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 56 Fed. Reg. 31692 (1991).

If the DC finds that *critical circumstances* exist, it will order suspension of liquidation on all unliquidated entries made up to 90 days before the publication of the Preliminary Determination. If the ITC subsequently determines that in order to prevent material injury from recurring it is necessary to impose duties on these entries, they will be subject to the antidumping order. A critical circumstances determination will be made in an antidumping investigation where:

- (1) (i) there is a history of dumping of the merchandise under investigation in the United States or elsewhere; or
 - (ii) the importer should have known that the exporter was selling the merchandise at less than fair value;²⁴
- and
- (2) there have been massive imports of the merchandise under investigation within a relatively short period.²⁵

The purpose of this provision is to deter importers from rushing in imports after the filing of a petition, but before the Preliminary LTFV Determination has been made, in order to beat the date on which liability for duties normally first arises. Although the DC has quite frequently found the existence of "critical circumstances," the ITC has only ruled affirmatively in a handful of cases. In each case, the increase in imports since the filing of the petition had been very large, ranging from 80 to 330 percent, and, apparently, the increase had not been the result of normal market forces.²⁶

D. Final Injury Determination

If the Preliminary LTFV Determination is affirmative, the ITC will commence its final investigation to determine whether the imports in question have caused or threaten to cause material injury to a U.S. industry. The determination must normally be made within 45 days of the DC's Final LTFV

²⁴ LTFV margins of 25 percent or more will normally satisfy the requirement that the importer should have known that the merchandise was being sold at less than fair value. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Italy*, 52 Fed. Reg. 24,198 (1987). A lower margin may suffice where the importer is related to the exporter. *Certain Internal-Combustion Industrial Forklift Trucks from Japan*, 53 Fed. Reg. 12,552 (1988).

²⁵ 19 U.S.C. § 1673d(a)(3) (1989). A finding of "massive imports" over a relatively short period will normally be made where imports increased by at least 15 percent in the three months following the initiation of the proceeding. 19 C.F.R. § 353.16(f) (1990).

²⁶ See *Potassium Permanganate From the Peoples' Republic of China*, USITC Pub. 1480, Inv. No. 731-TA-125 (January 1984); *Certain Flat-Rolled Carbon Steel Products From Brazil*, USITC Pub. 1499, Inv. No. 731-TA-123 (March 1984); *Oil Country Tubular Goods From Argentina and Spain*, USITC Pub. 1694, Inv. No. 731-TA-191 (May 1985).

Determination.²⁷ As in the preliminary injury phase, the ITC staff gathers information by sending out questionnaires to domestic producers, importers, and purchasers. This information is made available to the parties in a staff report that is published a few weeks before the hearing. A hearing is held before the ITC itself, rather than before the staff, as in the case of the preliminary investigation. A detailed discussion of the factors considered by the ITC in making its determination will be found in Section M below.

E. Antidumping Duty Order

If, following an affirmative Final LTFV Determination, the ITC issues an affirmative injury, or threat of injury determination, the DC will issue an antidumping order. From this point on, all imports must be accompanied by cash deposits, rather than bonds, in the amount of the estimated margin or subsidy. Any company for which the margin or subsidy was zero or *de minimis* (less than 0.5 percent) will be excluded from the order.

F. Settlement Possibilities

The statute provides for settlement of an antidumping duty case either by a suspension agreement or by withdrawal of the petition. Unlike the EC, however, which frequently accepts price undertakings as a means of settling cases, settlement of U.S. cases is extremely rare. A suspension agreement does not require the consent of the petitioner; withdrawal of the petition obviously does.

The DC may *suspend* an antidumping investigation if the exporters who account for "substantially all of the merchandise"²⁸ which is the subject of the investigation agree either (1) to cease exports to the United States within 180 days after the date of the publication of the suspension;²⁹ (2) to "revise their prices promptly to eliminate completely any amount by which the foreign market value of the merchandise . . . exceeds the United States price of that merchandise;" or (3) to eliminate "the injurious effect" of the imports in

²⁷ If the Preliminary LTFV Determination is negative, but the Final Determination affirmative, the ITC investigation begins on the date of the Final Determination and must be completed within 75 days of that date.

²⁸ "Substantially all" is defined by the regulations as 85 percent.

²⁹ An agreement to cease exports could be attractive to a company contemplating moving its operations to the United States. Not only does the company have a six month grace period following the effective date of such a suspension agreement, during which no antidumping duties will be assessed, if imports do not increase above customary levels; in addition, any suspension of liquidation of entries of merchandise already in effect will be canceled. Thus, a company could effectively enjoy nine months or more of imports, without paying antidumping duties, while making its transition to U.S. operations.

question.³⁰ The DC is very reluctant to settle cases on this basis, especially where price assurances are involved, because of the burden of monitoring suspension agreements to ensure that the parties agree with their terms.

The suspension must be requested at least 45 days before the expected date of the Final Determination.³¹ The petitioner is given an opportunity to comment on the proposed suspension agreement,³² but the DC is free to proceed over the petitioner's objection. The parties are entitled to request that the ITA and the ITC continue the investigation after entry of a suspension agreement. If both agencies make affirmative findings, an antidumping order is not issued, but the agreement remains in effect. If, on the other hand, the exporters prevail before either agency, then the undertaking lapses. Thus, by entering a suspension agreement, the respondents do not give up the opportunity of winning the case on the merits. If it is determined at any point that a suspension agreement is being violated, the ITA will immediately reopen the investigation and suspend liquidation of entries.³³ (The suspension of liquidation can apply to entries made as much as 90 days before the reopening of the investigation.)

Under the statute, an investigation may be *terminated* at any time if the petitioner withdraws its petition, provided that the DC determines that the withdrawal is in the public interest.³⁴ In a few cases, a petition has been withdrawn in return for an agreement by the country of exportation to impose quantitative restraints on exports.³⁵ The present Administration does not look favorably on such arrangements because of their anticompetitive nature. Concern over antitrust issues usually leads parties to an antidumping case to ensure that all discussions designed to lead to an agreement of this sort are carried out on a government-to-government basis.

G. Prevention of Circumvention of Antidumping Orders

The Omnibus Trade and Competitiveness Act of 1988 contained an amendment to the antidumping statute designed to prevent circumvention of antidumping orders by means of assembly operations in the United States or third countries, or by modifying the merchandise in question. To a considerable

³⁰ 19 U.S.C. § 1673c(b),(c). The standards required for an agreement of the third kind are spelled out in detail in the statute and are extremely difficult to meet. Only one such agreement has ever been entered. Potassium Chloride from Canada, 53 Fed. Reg. 1393 (1988).

³¹ 19 C.F.R. § 353.18(g)(1)(i) (1990).

³² 19 U.S.C. § 1673c(e)(3) (1989); 19 C.F.R. § 353.18(i) (1990).

³³ See e.g., Sheet Piling From Canada, 56 Fed. Reg. 25695 (1991).

³⁴ 19 C.F.R. § 353.17(a).

³⁵ Most of these cases involved steel. See also Lightweight Polyester Filament Fabrics From Japan, 49 Fed. Reg. 4021 (1984).

extent, the amendment reflected existing DC practice. The amendment covers three basic types of *circumvention*: (1) assembly in the United States or third countries, (2) minor alterations in form or appearance, and (3) later-developed merchandise.

1. Assembly Operations in the United States or Third Countries

Under the 1988 amendment, merchandise produced in the United States or a third country using imported components may be treated as subject to an antidumping order, if:

- (i) the finished merchandise is subject to an order;
- (ii) parts or components from the country subject to the order are used; and
- (iii) the difference between the value of the parts and components from the country subject to the order and the value of the finished product is "small."³⁶

In determining whether to subject components to an order, the DC must consider (a) the pattern of trade, (b) whether the manufacturer or exporter of the components is related to the U.S. manufacturer, and (c) whether imports of the parts or components in question have increased since the issuance of the order.³⁷ The DC must also consult with the ITC, which may advise whether inclusion of the parts or components would be inconsistent with the original injury determination.

The key term "small" is not defined in the statute or the regulations, and the legislative history merely states that "small" is not to be interpreted as "insignificant."³⁸ The DC, however, has indicated that the question of what is "small" is to be decided on a case-by-case basis. In *Certain Internal-Combustion, Industrial Forklift Trucks From Japan*,³⁹ the DC held that the assembly of forklift trucks in the United States using Japanese components was not covered by the anticircumvention provision where between 25 percent and 40 percent of the value of the trucks was non-Japanese.

³⁶ 19 U.S.C. § 1677j(a), (b) (1988).

³⁷ The Department also considers the nature of the processing performed in the United States, the level of investment in the U.S. facility, and the extent of the U.S. production facilities. See *Portable Electric Typewriters From Japan*, 56 Fed. Reg. 46594 (1991).

³⁸ Report of the Senate Finance Committee on the Omnibus Trade Act of 1987, S. Rep. 100-71 (100th Cong. 1st Sess.) at 100.

³⁹ 55 Fed. Reg. 6028 (1990).

2. Minor Alterations in Form or Appearance

The 1988 amendment also provides that the class or kind of merchandise covered by an order is to include "articles altered in form or appearance in minor respects," unless the DC concludes that it is not necessary to treat them as covered.⁴⁰ The legislative history indicates that the DC should consider such factors as the overall characteristics of the merchandise, the expectations of ultimate users, the use of the merchandise, the channel of marketing, and the cost of any modification relative to the total value of the imported product.⁴¹ In *Brass Sheet and Strip From Germany*,⁴² the DC preliminarily held that imports of a particular form of brass sheet and strip that was chemically distinguishable from the type subject to the order were not circumventing the order. The decision was based primarily on the differing properties and uses of the non-covered form, and the fact that it had existed at the time the petition was filed.⁴³

3. Later-Developed Merchandise

The DC may also include later-developed merchandise within the scope of an order if the new merchandise has the same physical characteristics as the original merchandise, the expectations of the purchasers are the same, the new merchandise is sold through the same channels of trade, and it is advertised and displayed in a similar manner.⁴⁴ The DC is required to notify the ITC of the proposed inclusion, and the DC and the ITC must consult as to whether inclusion of the later-developed merchandise is consistent with the ITC injury finding.

H. Administrative Reviews

Although the margin rate published in an antidumping order determines the rate of the cash deposits levied against imports, it does not necessarily determine the amount of the actual dumping duty that will ultimately be assessed against an exporter's merchandise.⁴⁵ Upon request by the petitioner, an exporter, or an importer, the DC will conduct an administrative review on an

⁴⁰ 19 U.S.C. § 1677j(c).

⁴¹ S. Rep. No. 71 (100th Cong., 1st Sess.) 100 (1987).

⁴² 55 Fed. Reg. 32655 (1990).

⁴³ See *Electrical Conductor Aluminum Redraw Rod From Venezuela*, 56 Fed. Reg. 42310 (1991).

⁴⁴ 19 U.S.C. § 1677j(d).

⁴⁵ It should be noted that the duty must be paid by the importer of record, and not by the exporter. Indeed, the importer is required to file with the Customs Service a certificate that it is not being reimbursed for the antidumping duties by the foreign manufacturer or exporter. 19 C.F.R. § 353.26. Failure to provide such a certificate may result in a doubling of the duties.

exporter-by-exporter basis each year to determine the actual amount of duties to be paid on each entry of merchandise covered by the order during the review period.⁴⁶ Administrative reviews are conducted in the same way as the original DC's investigation.⁴⁷ The DC sends questionnaires to the foreign manufacturers and publishes preliminary and final results of the review. In the absence of good cause, verification is only required - if requested - in every third review,⁴⁸ but the DC may choose to verify in any review where there are particular problems.

In order to permit exporters who promptly change their prices after the Preliminary LTFV Determination to reduce or eliminate dumping margins, the statute contains a provision for expedited reviews.⁴⁹ Under this provision and the implementing regulations, an exporter may submit a request for an expedited review within one week of the issuance of the antidumping order. The request must be accompanied by all the data necessary for the DC to conduct a review of imports from the date of the Preliminary LTFV Determination to the date of publication of the Final Injury Determination. If the DC concludes that it can complete the review within 90 days, the importer is permitted to continue posting bonds rather than cash deposits for the 90-day period. The DC found that it was impossible to complete reviews within 90 days, and it now refuses to act under this provision.

Requests for regular administrative reviews must be made during the anniversary month of the publication of the antidumping duty order.⁵⁰ The review will cover all unreviewed entries made up to the last day of the previous month. The statute directs the DC to complete each review within one year, but in practice the DC frequently fails to meet this deadline. Following completion of the review, the Customs Service will collect or refund, as appropriate, the difference between the cash deposits and the liquidated amount, together with interest.⁵¹ The interest rate is the rate in effect under Section 6621 of the Internal Revenue Code of 1954.⁵² The cash deposits on subsequent entries are at the new rates. Duties on non-reviewed imports will be assessed at the cash

⁴⁶ 19 U.S.C. § 1675(a); 19 C.F.R. § 353.22 (1990).

⁴⁷ Annual administrative reviews do not include an injury investigation by the ITC.

⁴⁸ 19 C.F.R. § 353.36 (1990).

⁴⁹ 19 U.S.C. § 1673c(c); 19 C.F.R. § 353.22(g).

⁵⁰ 19 C.F.R. § 353.22(a) (1990).

⁵¹ The cash deposit rate, however, establishes a ceiling on the amount of duty that can be collected on entries made prior to the Final Injury Determination by the ITC. 19 U.S.C. § 1673f(a)(1). The DC has applied the same "cap" to imports accompanied by a bond, 19 C.F.R. § 353.23, but the Court of International Trade has recently ruled that the cap only applies in the case of cash deposits. *Zenith Electronics Corp. v. United States*, ____ F. Supp. ____ (Ct. Int. Trade 1991), Slip Op. 91-66 (July 29, 1991).

⁵² 19 U.S.C. § 1677g(b); 19 C.F.R. § 353.24 (1990).

or bonding deposit rate and the same rate will apply to cash deposits on future entries.

I. Revocation

An interested party can apply to the DC for modification or revocation of an antidumping order (or termination of a suspension agreement), either in conjunction with an annual administrative review or by requesting a "changed circumstances" review. A revocation application based on the absence of LTFV sales will not normally be considered unless there have been no sales at less than fair value for a period of at least three consecutive years and the DC is satisfied that there is no likelihood that LTFV sales will resume in the future.⁵³ An antidumping order can also be revoked if, within the last four years, there have been no imports.

In addition, the DC may revoke an antidumping order on the ground of "changed circumstances" where, *inter alia*, the petitioner is no longer interested in enforcement of the order.⁵⁴ If no administrative review is requested for four consecutive years, the DC will publish a notice of intent to revoke. The revocation, however, will not take place if the petitioner objects. A simple objection is enough; reasons do not have to be given.

An order may also be revoked if the ITC concludes that circumstances have changed sufficiently so that lifting of the order would not harm the U.S. industry.⁵⁵

J. Judicial Review

Appeals from determinations by the DC and the ITC can be made to the United States Court of International Trade.⁵⁶ Only determinations which have final effect, such as decisions not to initiate an investigation and final LTFV or injury determinations, can be appealed. The appeal takes the form of a review of the administrative record, with no new evidence being introduced. The standard for review is normally whether the determination was "unsupported by substantial evidence on the record or otherwise not in accordance with law."⁵⁷

⁵³ 19 C.F.R. § 353.25(a) (1990).

⁵⁴ 19 C.F.R. §§ 353.25(d) (1990).

⁵⁵ 19 C.F.R. § 353.25(e) (1990). See 19 C.F.R. § 207.45 for the procedures governing "changed circumstances" reviews by the ITC.

⁵⁶ Under a special provision in the United States/Canada Free Trade Agreement, decisions involving imports from Canada may, instead, upon request of either country, be reviewed by a binational panel established under the Agreement. 19 U.S.C. § 1516a(g).

⁵⁷ 19 U.S.C. § 1516a(b)(1)(B). The standard of review of decisions by the DC not to initiate an investigation is whether the determination was "arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(A).

Despite this apparently rather narrow standard, the Court has quite often reversed the DC and the ITC, frequently on highly technical issues. Appeals from the Court of International Trade are made to the Court of Appeals for the Federal Circuit, and thence to the United States Supreme Court by writ of certiorari.

K. Price Comparisons in Antidumping Investigations

In order to determine whether there have been sales at less than fair value, the DC compares the "U.S. Price" with the "Fair Value." Although the DC has authority to base U.S. Price on average prices,⁵⁸ it normally compares U.S. Price on a transaction-by-transaction basis with a Fair Value that is based on average prices or costs over a significant period of time, usually six months.⁵⁹ This technique can create margins even where the producer is selling to the U.S. market at higher prices than in its home or third country market.⁶⁰

1. U.S. Price

U.S. Price is based on the transaction price between the foreign exporter and the U.S. importer, known as the *Purchase Price*, where they are unrelated. Where they are related, the *Exporter's Sales Price* (ESP), based on the importer's sale to an unrelated party, is normally used. In each case, the transaction price is subject to certain adjustments, designed, *inter alia*, to reduce the price to an ex-factory basis. Any costs incurred in bringing the merchandise

⁵⁸ 19 C.F.R. 353.59(b) (1990).

⁵⁹ The Department has only used average U.S. prices in investigations involving highly perishable agricultural products in which the perishability of the product and the lack of market power of individual sellers result in rapidly fluctuating prices. *See, e.g.,* Certain Freshly Winter Vegetables From Mexico, 45 Fed. Reg. 10,512, 10,515 (1980), *aff'd sub nom* Southwest Florida Winter Vegetable Growers Assn. v. United States, 584 F. Supp. 10, (Ct. Int'l Trade 1984), in which the Department used a regression analysis technique which was similar to averaging; Certain Cut Flowers From Columbia, 521 Fed. Reg. 6842 (1987), *aff'd sub nom* Asociacion Columbiana de Exportadores de Flores v United States, 704 F. Supp. 1114 (Ct. Int'l Trade 1989), in which the Department based U.S. price on monthly average prices.

⁶⁰ The following example illustrates this point:

	U.S. Price	Home Market Price
January	10	9
February	12	11
March	14	13
April	16	15
May	14	13
June	12	11

$$\text{Fair value} = \frac{9 + 11 + 13 + 15 + 13 + 11}{6} = 12$$

Although in each month, the U.S. price is higher than the home market price, under the DC's methodology, the January sale would have an LTFV margin of $12 - 10 = 2$.

from the factory to the point of sale, such as inland freight, ocean freight, marine insurance, U.S. duties and brokerage charges, are deducted from the price to the extent that those charges are included in the price. An addition is made for the amount of any import duties and indirect taxes imposed by the country of exportation on domestic sales which have been rebated or not collected because of the exportation,⁶¹ and for any countervailing duty imposed by the United States to offset an export subsidy. Where ESP is used, additional deductions are made for sales commissions, selling expenses incurred by the importer, and any value added in the United States before its sale by the importer.⁶²

The additional ESP deductions are not made where the related importer is acting as a mere conduit, as when the price to the unrelated U.S. customer is established before exportation, and the importer does not maintain inventory in the United States.⁶³ In this case, for example, the related importer's price to its customer, on which U.S. Price is based, is known as *Indirect Purchase Price*.

Where the foreign manufacturer sells to an *unrelated middleman* (e.g., a trading company) in the country of origin, the DC will use the manufacturer's price to the middleman as the Purchase Price, if the manufacturer knew at the time of sale that the merchandise was destined for the United States. Otherwise, it will use the middleman's price to the United States. The DC, however, may use the middleman's price even where the manufacturer is aware of the ultimate destination at the time of the sale to the middleman, if the middleman is selling below its acquisition costs.⁶⁴

A *lease* that is equivalent to a sale will be treated as a sale.⁶⁵ Factors to be considered in determining whether a lease is equivalent to a sale include the terms of the lease, the circumstances of the transaction, whether the product is integrated with the operations of the lessee, commercial practice in the industry, whether there is a likelihood that the lease will be continued for a

⁶¹ In *Zenith v. United States*, 633 F. Supp. 1382 (Ct. Int'l Trade 1986), the Court of International Trade held that the adjustment for the rebate or non-collection of indirect taxes must be limited to the amount of the taxes that are actually passed through to customers in the home market. This case, however, is still in progress, and the DC continues to assume that all indirect taxes are passed through. See, e.g., *Television Receivers, Monochrome and Color, From Japan*, 53 Fed. Reg. 4050 (1988).

⁶² No deduction is made for any profit earned by the importer on its selling activities. *Portable Electric Typewriters From Japan*, 52 Fed. Reg. 1504 (1987). The DC, however, does deduct profit attributable to any value added by the importer.

⁶³ See *Frozen Concentrated Orange Juice from Brazil*, 52 Fed. Reg. 8324 (1987).

⁶⁴ See *Fuel Ethanol from Brazil*, 51 Fed. Reg. 5592 (1986).

⁶⁵ 19 U.S.C. § 1673(1)(2)(b).

significant period of time, and other relevant factors, including whether the lease transaction would permit avoidance of antidumping duties.⁶⁶

2. Fair Value

The term "fair value" is not defined in the statute, but the legislative history and the regulations indicate that it is intended to be an estimate of "foreign market value," which is the basis used for duty assessment and which is defined in detail in the statute.⁶⁷ The preferred basis for fair value is the price in the home market at which such or similar merchandise is sold or offered for sale in the usual wholesale quantities and in the ordinary course of trade for home consumption. Home market price will be used unless the volume of sales is "so small in relation to the quantity sold for exportation to countries other than the United States" as to be inadequate as the basis for fair value.⁶⁸ The cut-off point normally used is five percent, *i.e.*, if home market sales constitute less than five percent of all non-U.S. exports, then third country sales or constructed value will be used.⁶⁹ Constructed value consists of the sum of:

- (i) the cost of materials and of fabrication or other processing;
- (ii) general expenses, at least 10 percent of (i);
- (iii) profit, at least 8 percent of (i) and (ii);⁷⁰ and
- (iv) cost of packing.⁷¹ If home market sales are equal to or greater than five percent of third country sales, they will normally be used as the basis for foreign market value, although occasionally the Department has rejected their use where they were so small in relation to U.S. sales that they could not be considered "viable."⁷²

⁶⁶ 19 U.S.C. § 1677(19).

⁶⁷ See H.R. Rep. 96-317 (96th Cong. 1st Sess.) at 59. 19 C.F.R. § 353.1.

⁶⁸ 19 U.S.C. § 1677b(a)(1)(B). This seems a curious test for determining whether home market sales provide an adequate basis for comparison with U.S. sales. The EC, by contrast, applies the much more straight-forward comparison of home market sales with EC sales.

⁶⁹ 19 C.F.R. § 353.48. Neither the statute nor the regulations call for a comparison between the volume of third country market sales and the volume of sales to the United States in determining whether or not third country sales are adequate. In practice, however, the same five percent test may be used. See, *e.g.*, Certain Fresh Cut Flowers From Columbia, 55 Fed. Reg. 20491 (1990).

⁷⁰ Profit and general expenses will be based on (i) home market sales by the producer in question; (ii) third country sales by the producer in question; or (iii) home market sales of comparable merchandise by the industry. Strontium Nitrate from Italy, 46 Fed. Reg. 25,496 (1981).

⁷¹ 19 U.S.C. § 1677b(e)(1).

⁷² See High Information Content Flat Panel Displays and Display Glass Therefor From Japan, 56 Fed. Reg. 32376 (1991).

Prior to 1970, the statute required use of third country sales in preference to constructed value where home market sales were inadequate. The mandatory preference no longer exists, although the legislative history and the relevant regulation direct that third country sales are still to be preferred where adequate information is available and can be verified in time.⁷³ The criteria used to select the third country are, in order of importance, similarity of product, volume of sales, and similarity of market to the United States in terms of organization and development.⁷⁴

In the absence of a sufficient quantity of home or third country sales at or above cost, the DC will use constructed value as the basis for fair value. Sales which are made *below* (a) "over an extended period of time and in substantial quantities" and (b) "are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade" will be disregarded in determination of fair value.⁷⁵ If the remaining sales at or above cost are inadequate for the determination of "fair value," constructed value will be used instead. Cost of production differs from constructed value in that there is no statutory minimum for general expenses, and profit is not included.⁷⁶

The provision that sales below cost will only be disregarded if they are made "over an extended period of time and in substantial quantities" is intended to reflect the fact that in some situations sales below cost are normal and should not be disregarded, e.g., end-of-model-year sales. The DC has ruled that sales below cost will not normally be disregarded where they constitute less than 10

⁷³ 19 C.F.R. § 353.48(b); H.R. Rep. No. 317, 96th Cong., 1st Sess. 76 (1978); S. Rep. No. 249, 96th Cong., 1st Sess. 76 (1978). In one case, the DC chose to use constructed value rather than third country sales even though third country sales information was available, on the ground that the third country markets displayed very different seasonal pricing patterns than the U.S. market, and that these could have given rise to artificial dumping margins. *Certain Cut Flowers From Columbia*, *supra* note 62, aff'd ____ F. Supp. ____, slip op. 91-90 (Ct. Int'l Trade 1991).

⁷⁴ 19 C.F.R. § 353.49(b).

⁷⁵ 19 U.S.C. § 1677b(b). This provision was added to the antidumping law as an indirect means of ensuring that below-cost sales to the United States were treated as dumped sales, even if they were not priced lower than home market or third country prices. A provision requiring a direct comparison of U.S. prices with cost would violate Article VI of the GATT, which requires use of home market sales "in the ordinary course of trade" as the pricing comparison, and only permits resort to constructed value (cost of production plus profit) if there are no such home market sales. The United States takes the somewhat questionable position that sales below cost are not "in the ordinary course of trade." The U.S. approach — which has been adopted by the EC — ensures that all below-cost sales to the United States will be treated as dumped. If the foreign market sales are not below cost, then, by definition, they are at higher prices than the U.S. sales, and dumping exists. If they are not higher than U.S. prices, they are by definition below cost, and will, therefore, be disregarded, in which case constructed value will be used as the basis for fair value and margins will also exist.

⁷⁶ 19 C.F.R. § 351.51(c).

percent of total sales in the home or third-country market.⁷⁷ Where sales below cost constitute between 10 percent and 90 percent of total sales, the DC will disregard those sales, but it will use the sales, at or above cost, as the basis for fair value. If more than 90 percent of the sales are below cost, the DC will ignore the above cost sales, and instead use third-country sales or constructed value as the basis for fair value. The Court of International Trade, however, has held that the 90 percent test is invalid, and that the DC should, instead, determine whether the remaining sales satisfy the normal five percent home market viability test.⁷⁸ The proviso concerning recovery of costs over a reasonable period of time is intended to reflect the fact that products such as commercial aircraft require large R&D costs which cannot be recovered in the first year or two of sales.⁷⁹

When an investigation involves merchandise from a *nonmarket economy country* (NME),⁸⁰ the DC will only base foreign market value on the sales of comparable merchandise in that country if it determines that a "bubble of capitalism" exists within the NME, and that all prices and costs faced by the individual producers are market-determined.⁸¹ In practice, it has never made such a finding. The alternative approach is to use a constructed value calculation, based, to the extent possible, on the factors of production used in producing the merchandise. In calculating the constructed value, the DC will use the producer's actual input prices where the inputs were purchased from a market economy, compared with those purchased within the NME if the DC is satisfied the prices of those inputs are determined by market forces.⁸² In the case of inputs whose prices are not set by market forces within the NME, the DC will first determine the factors of production, e.g., the number of labor-hours and the amounts of material and energy required to produce the merchandise in the nonmarket economy. It then values these factors on the basis of costs in a market economy country or countries at a level of development

⁷⁷ See *Certain Steel Wire Nails from the Republic of Korea*, 47 Fed. Reg. 27,392, 27,395 (1982). In cases involving highly perishable produce, the DC includes sales below cost in the foreign market value calculation where they constitute up to fifty percent of total sales. *Certain Fresh Winter Vegetables from Mexico*, 45 Fed. Reg. 10,512, 20,512 (1980), *aff'd sub nom* *Southwest Florida Winter Vegetable Growers Ass'n. v. United States*, 584 F.Supp. 10, (Ct. Int'l Trade 1984); *Fall-Harvested Round White Potatoes from Canada*, 48 Fed. Reg. 51,669 (1983).

⁷⁸ *Timken v. United States*, 673 F. Supp. 495 (Ct. Int'l Trade 1987).

⁷⁹ See S. Rep. No. 1298, 93rd Cong., 2d Sess. 173 (1974); *Toho Titanium Co. v. United States*, 657 F. Supp. 1280 (Ct. Int'l Trade 1987).

⁸⁰ "*Nonmarket economy country*" is defined as any foreign country which does not operate on market principles of cost or pricing structures, so that sales of the merchandise in that country do not reflect the fair value of the merchandise. 19 U.S.C. § 1677(18) (1991). A determination by the DC that a country is a nonmarket economy country will remain in effect until revoked, and is exempt from judicial review. *Id.*

⁸¹ *Chrome-Plated Lug Nuts From the People's Republic of China*, 56 Fed. Reg. 46153 (1991).

⁸² *Id.*

comparable to that in the country whose products are under investigation.⁸³ When adequate cost data are not available, the DC will use the sales price of comparable merchandise produced in one or more market economy countries that are economically comparable to the nonmarket economy country.

Where the merchandise in question is produced by a *multinational corporation* which produces similar merchandise in another country, the sales in the home market of the country of exportation are inadequate, and the foreign market value of the merchandise produced in the third country is higher than in the country of exportation, the DC is to use the foreign market value in the third country, making adjustments for differences in production costs.⁸⁴

3. Adjustments in the Determination of Fair Value

The various adjustments made to fair value is one of the most critical aspects of an LTFV investigation. The regulations specify four types of adjustments: for circumstances of sales, for physical differences, for differences in quantities sold, and for differences in level of trade. The first two of these are usually the most important.

Adjustments will be made for differences in *circumstances of sale* "which bear a direct relationship to the sales which are under consideration."⁸⁵ Examples of directly-related circumstances of sale include credit terms, guarantees, warranties, commissions, and product-specific advertising directed at potential customers.⁸⁶ Expenses which are more in the nature of overhead expenses, such as salesmen's salaries and pre-sale warehousing costs, are not considered to be directly-related and do not qualify for an adjustment. The amount of the adjustment can be based on reasonable allocation of selling costs shown in the records of the narrowest corporate accounting group.⁸⁷

Since all of the importer's selling expenses are deducted in the determination of ESP, a deduction will be made for actual direct and indirect selling expenses, incurred in the home market up to the amount of the selling

⁸³ 19 U.S.C. § 1677(b) & (c) (1991).

⁸⁴ 19 U.S.C. § 1677(d) (1991). *See also* Certain Steel Wire Nails from the Republic of Korea, 47 Fed. Reg. 27,492 (1982); Small Business Telephone Systems From Taiwan, 54 Fed. Reg. 42543 (1989).

⁸⁵ 19 C.F.R. § 353.56 (1991).

⁸⁶ In recent years, the DC has only treated as a directly-related expense the "variable" portion of warranty expenses, for example, the cost of replacement parts and payments made to unrelated parties. Overhead-type expenses, such as salaries of company employees in the warranty department, are not regarded as directly-related. This distinction has been disapproved by the Court of International Trade in *AOC International, Inc. v. United States*, 721 F.Supp. 314 (Ct. Int'l. Trade 1989), but the DC has so far refused to act in accordance with this decision.

⁸⁷ *Television Receiving Sets from Japan*, 46 Fed. Reg. 30,163 (1981); *Bicycle Speedometers from Japan*, 47 Fed. Reg. 28,978 (1982).

expenses incurred on U.S. sales. This adjustment is made where fair value is based exporter's sales price.⁸⁸ A similar rule applies where a commission is paid in one market but not the other. In order to give combined effect to this rule and to the rule permitting adjustments for directly-related circumstances of sale, the DC generally makes a full deduction for all directly-related expenses incurred in the home market, together with a deduction for actual home market indirect selling expenses up to the amount of indirect selling expenses incurred on U.S. sales.⁸⁹

Adjustments will also be made for *differences in the physical characteristics* of the merchandise being compared.⁹⁰ The adjustment is usually based on the variable cost of the difference (*i.e.*, labor, materials and variable factory overhead), with no allowance for profit or fixed factory overhead. The DC will normally use sales of comparable quantities of merchandise in making the price comparisons.⁹¹ Allowance will be made for *quantity discounts* granted in the U.S. market where either:

- (i) during the period of investigation the exporter granted discounts of at least the same magnitude with respect to at least 20 percent of its home market or third-country sales; or
- (ii) the exporter can demonstrate that the discounts are warranted on the basis of "savings which are specifically attributable to the production of the different quantities involved."⁹²

⁸⁸ 19 C.F.R. § 353.41(d). The validity of the ESP offset, which has frequently been challenged by domestic manufacturers, was upheld by the Court of Appeals for the Federal Circuit in *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983). The Court of Appeals has also upheld the practice of limiting the offset to the amount of U.S. indirect selling expenses. *Consumer Products Division, SCM Corporation v. United States*, 753 F.2d 1033 (Fed. Cir. 1985).

⁸⁹ This is best illustrated with a simple example:

	Home Market	U.S. Market
Price	80	78
Credit (direct expense)	5	4
Warranty (direct expense)	3	3
Indirect selling expenses	10	8

U.S. price = $(78 - 4 - 3 - 8) = 63$

Home market value = $(80 - 5 - 3 - 8) = 64$

⁹⁰ 19 C.F.R. § 353.57 (1991).

⁹¹ 19 C.F.R. § 353.55(a).

⁹² 19 C.F.R. § 353.55(b).

Given the type of proof required by the DC, it is difficult to satisfy the second of these two alternative tests.⁹³

The price comparisons will be made at the same *level of trade* wherever possible (*e.g.*, wholesaler to wholesaler, retailer to retailer). Where this is not possible, "the comparison will be made at the nearest comparable commercial level of trade and appropriate adjustments will be made for differences affecting price comparability."⁹⁴ In practice, however, this provision has very little meaning, since the DC has placed an almost impossible burden of proof on respondents claiming a level-of-trade adjustment.⁹⁵

L. Currency Conversion

The exchange rate on the date of the U.S. sale will be used for currency conversions.⁹⁶ The exchange rate used is the quarterly exchange rate published by the Treasury Department, unless the official rate on the date in question deviates from the quarterly rate by more than five percent, in which case the daily rate will be used.

The applicable regulation provides that for purposes of LTFV investigations, but not administrative reviews, exporters and importers are expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in exchange rates. It also provides that the DC will not find LTFV margins where any price differences are solely the result of temporary exchange rate fluctuations.⁹⁷ Where margins are low and appear to result from exchange rate changes, the DC has given effect to this regulation by applying the exchange rate for the previous quarter ("the lag rule") to determine whether this eliminates the margins. If it does, the DC will make a negative determination. This practice was approved by the Court of Appeals for the Federal Circuit in *Melamine Chemicals Inc. v. United States*.⁹⁸ The DC will, however, only apply the lag rule in cases involving sustained exchange rate changes where the exporter adjusted its prices to all customers and the price

⁹³ *But see* Brass Sheet and Strip from Sweden, 52 Fed. Reg. 819 (1987).

⁹⁴ 19 C.F.R. § 353.58.

⁹⁵ *But see* American Permac Inc. v. United States, 703 F. Supp. 97, Slip Op. 88-164 (Ct. Int'l Trade, Dec. 1, 1988), in which the Court of International Trade directed the Department to make a level-of-trade adjustment. In the remand decision, the DC allowed an adjustment for bad debt and for some sales office expenses. Drycleaning Machinery From West Germany, 54 Fed. Reg. 35,363 (1989). *See also* Drycleaning Machinery From Germany, 56 Fed. Reg. 2902 (1991); Tapered Roller Bearings from Japan, 52 Fed. Reg. 30,700 (1987).

⁹⁶ 19 C.F.R. §353.60(a).

⁹⁷ 19 C.F.R. § 353.60(b).

⁹⁸ 732 F.2d 924 (Fed. Cir. 1984)

adjustments approximated the amount of the change in the currency value.⁹⁹ In a few cases, the DC has taken the exchange rate issue into account where the issues did not fall within the strict confines of the currency conversion regulation.¹⁰⁰

M. The Injury Determination

1. Definition of Domestic Industry

The first task faced by the International Trade Commission (ITC) is to define the domestic industry which is allegedly being injured or threatened by the imports under investigation. The statute defines the industry as "the domestic producers as a whole of the like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."¹⁰¹

The term "like product" is rather unartfully defined as a product which is "like, or in the absence of like, most similar in characteristics and uses with" the imported article.¹⁰² Factors considered by the ITC in deciding the like product issue include the physical characteristics of the merchandise, whether the imported and the domestic product compete, whether they are interchangeable, whether they are sold through the same channels of distribution, whether they are similarly priced, and whether they are perceived as "like" by customers.¹⁰³

The ITC has authority to exclude from the domestic industry under consideration producers which are related to exporters or importers of the product under investigation. In deciding whether to exercise this authority, the ITC examines such factors as the proportion of domestic production accounted for by the importing producer, whether the firm is being forced to import in

⁹⁹ See *Tapered Roller Bearings from Japan*, 52 Fed. Reg. 30,700 (1987).

¹⁰⁰ See *Tubeless Steel Disc Wheels From Brazil*, 53 Fed. Reg. 34,566 (1988), *aff'd sub nom.*, *Budd Co. Wheel and Brake Div. v. United States*, 746 F. Supp. 1093 (CIT 1990) (circumstance of sale adjustment made to counter the effects of hyperinflation on exchange rates); *Antifriction Bearings from the Federal Republic of Germany*, 54 Fed. Reg. 18,992 (1989) (circumstance of sale adjustment allowed to take account of difference between official exchange rate and hedged rate); *Antifriction Bearings from Japan*, 54 Fed. Reg. 19,101 (1989).

¹⁰¹ 19 U.S.C. § 1677(4)(A) (emphasis added).

¹⁰² 19 U.S.C. § 1677(10).

¹⁰³ The statute authorizes the ITC to consider producers of raw agricultural products as part of the industry producing the finished product if (a) there is a single continuous line of production from the raw to the finished product, and (b) the economic interests of the producers of the raw and finished products are closely tied together even if they are not legally related. See 19 U.S.C. § 1677(4)(E).

order to remain competitive, and whether its exclusion will skew the data for the rest of the industry.¹⁰⁴

2. Regional Industry

The statute permits the ITC to treat producers in a single region in the United States as a domestic industry if (a) the producers in that region sell all or almost all of their production of the like product in question in that market, and (b) the demand for that market is not supplied by producers located elsewhere in the United States, to any substantial degree. The "all or almost all" standard has been held to have been met by eighty percent of production.

Even if the ITC finds that such an isolated region exists, it may not make an affirmative finding unless two additional conditions are met. First, there must be a concentration of imports into such an isolated market and, second, the producers of all, or almost all, of the production in the market must be materially injured or threatened with material injury.¹⁰⁵ The first of these conditions is necessary because, even where the ITC makes an affirmative determination based on imports to a regional industry, all imports of the merchandise in question, no matter whether they are imported into the region or into other parts of the United States, will be subject to antidumping duties. Clearly, it would be inappropriate to impose antidumping duties on a large percentage of imports which had not been found to be injuring a domestic industry.

3. Material Injury

The statute defines the term "material injury" as "harm which is not inconsequential, immaterial, or unimportant."¹⁰⁶ In considering whether the domestic industry is suffering from, or threatened with, material injury, the ITC is directed to examine the following factors:

- whether the volume of imports, or any increase in imports, is significant in absolute or relative terms compared with domestic production or consumption.¹⁰⁷
- whether imports are underselling the domestic product, or whether they have depressed or suppressed domestic prices.¹⁰⁸

¹⁰⁴ See, e.g., *Certain All-Terrain Vehicles From Japan*, Inv. No. 731 TA-388 (Final, USITC Pub. 2163 at 17-18 (1989)).

¹⁰⁵ 19 U.S.C. § 1677(4)(c).

¹⁰⁶ 19 U.S.C. § 1677(7)(A).

¹⁰⁷ 19 U.S.C. § 1677 (7)(B) and (C)(i).

¹⁰⁸ 19 U.S.C. § 1677(7)(C)(ii).

- what the impact of imports on the domestic industry is, including (1) actual or potential decline in output, sales, market share, profits, productivity, return on investment, and capacity utilization; (2) factors affecting domestic prices; (3) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and investment; and (4) actual and potential negative effects on the existing development and production efforts of the domestic industry.¹⁰⁹

4. Threat of Material Injury

Even if the ITC determines that the domestic industry is not currently being injured by imports, it may nevertheless make an affirmative determination if it finds that the industry is being threatened with material injury.¹¹⁰ The statute requires the ITC to examine a number of factors in considering this question, including

- Any increase in production capacity or existing unused capacity in the exporting country which is likely to result in a significant increase in imports of the investigated merchandise.¹¹¹
- Any rapid increase in import penetration.
- The probability that imports will enter the United States at prices which will depress or suppress domestic prices.
- Any substantial increase in inventories of the product in the United States.

The ITC may not make an affirmative determination based on threat, unless the threat is "real and . . . actual injury is imminent." The Court of Appeals for the Federal Circuit has held that a threat determination cannot be based on events, unless they will take place within three years.¹¹²

5. Causation

If the ITC finds that the domestic industry is suffering from or threatened with material injury, it then proceeds to determine whether this was "by reason

¹⁰⁹ 19 U.S.C. § 1677(7)(C)(iii).

¹¹⁰ An affirmative injury determination may also be based on a determination that "the establishment of an industry in the United States is materially retarded" by reason of the imports. There have been very few cases based on material retardation.

¹¹¹ Unused capacity or planned capacity expansion is often the critical factor in a threat determination.

¹¹² *Atlantic Sugar Ltd. v. United States*, 744 F.2d 1556 (1984).

of" the less-than-fair-value imports.¹¹³ In making this determination, the ITC is not permitted to weigh the injury caused by the imports against injury caused by other factors;¹¹⁴ if the dumped imports have contributed in any appreciable way to the injury, the ITC will find affirmatively. Factors of particular importance in the causation analysis include price undercutting by imports, and sales lost by the domestic industry to imports.

Until about ten years ago, the ITC generally considered the size of the dumping margins in its analysis. Where the imported product had a very small dumping margin, say, 1 percent, but the imported product was significantly underselling the domestic product, by say, 20 percent, the ITC would reason that the dumping could not have contributed appreciably to the underselling. Since 1982, however, a majority of the ITC has abandoned this so-called "margin analysis," and pays no attention to the size of the margin.¹¹⁵ The Court of International Trade has held that while the ITC may consider the size of the margins if it wishes, it is not obliged to do so.¹¹⁶

6. Cumulation

The statute provides that in determining whether material injury exists, "the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market."¹¹⁷ The provision is designed to prevent the situation where imports from an individual country are not large enough to cause injury to the domestic industry, but the collective effect of imports from a number of countries is injurious.

¹¹³ This two-step, or "bifurcated," approach is followed by three of the four Commissioners sitting at the time of writing (October, 1991). The fourth, Acting Chairman Brunsdale, follows the so-called "unitary," or comparative, approach, which compares the domestic industry's actual performance with what it would have been had there been no LTFV imports. See, e.g., 3.5 Microdisks and Media Therefor From Japan, Inv. 731-TA-389, USITC Publ. 2170 (March 1989), at 52 (Views of Commissioner Cass). The unitary approach relies heavily on a rather sophisticated economic analysis known as "Comparative Analysis of the Domestic Industry's Condition (CADIC)."

¹¹⁴ See S. Rep. No. 249, 96th Cong., 1st Sess., 74-75 (1979).

¹¹⁵ The last case in which the ITC explicitly relied on margin analysis was Anhydrous Sodium Metasilicate From France, Inv. No. 731-TA-251 (Final), USITC Pub. 1118 (Dec. 1980). The first case in which a majority of the ITC rejected margin analysis was Certain Carbon Steel Products From Spain, Inv. No. 701-TA-155, 157-160 and 163 (Final), USITC Pub. 1331 (Dec. 1982).

¹¹⁶ *Maine Potato Council v. United States*, 613 F. Supp. 1237 (Ct. Int'l Trade 1985); *Hyundai Pipe Co. v. Int'l Trade Commission*, 670 F. Supp. 357 (Ct. Int'l Trade 1987).

¹¹⁷ 19 U.S.C. 1677(7)(c)(iv). The ITC may, but is not required to, cumulate when considering threat of material injury. See 19 U.S.C. § 1677(7)(F)(iv).

The ITC has been given discretion to decline to cumulate imports from a particular country if the imports are negligible and have no discernable impact on the domestic industry.¹¹⁸

III. THE EUROPEAN COMMUNITY

A. Initiation and Investigation

An antidumping proceeding usually starts with a complaint by the EC industry to the EC Commission.¹¹⁹ A written complaint can be filed by any natural or legal person, or any association which lacks legal personality, acting on behalf of a Community industry¹²⁰ which considers itself injured or threatened by dumped imports.

Regulation 2176/84 provides that the term Community industry "shall be interpreted as referring to the Community producers as a whole of the like product or to those of them whose collective output of the products constitutes a major proportion of the total community production of those products."¹²¹

Antidumping complaints are usually filed by European trade associations¹²² on behalf of one or more of their members. Such associations may be formed for the exclusive purpose of filing an antidumping complaint. Use of trade associations allows the European industry to compile the necessary data on the situation of the industry while safeguarding confidentiality of business secrets and facilitating avoidance of anti-trust violations.

¹¹⁸ 19 U.S.C. § 1177(7)(c)(v). *See, e.g.*, Coated Groundwood Paper From Austria, Belgium, Finland, France, Germany, Italy, The Netherlands, Sweden and the United Kingdom, USITC Pub. 2359 (Feb. 1991) (Preliminary).

¹¹⁹ Theoretically, the EC Commission may initiate an antidumping proceeding at its own initiative. *See* Article 7(1) of Council Regulation 2176/84, Council Regulation 2176/84 of 23 July 1984 on Protection Against Dumped or Subsidized Imports from Countries Not Members of the European Economic Community, 1984 O.J. (L 201) 1, [hereinafter Regulation 2176/84]. In practice, however, it has never done so.

¹²⁰ *Id.* Art. 5(1).

¹²¹ *Id.* Art. 4(5).

¹²² *See, e.g.*, Conseil Européen des Federations de l'Industrie Chimique (European Council of Chemical Manufacturers' Federations)(CEFIC), Glycine from Japan, 1984 O.J. (C 265) 5 (initiation); European Confederation of Iron and Steel Industries (EUROFER), Certain Iron or Steel Coils, Hot Rolled, from Argentina and Canada, 1988 O.J. (C 158) 3 (initiation); European Association of Consumer Electronics Manufacturers (EACEM), Small Screen Colour Televisions from Korea, 1988 O.J. (C 44) 2 (initiation); International Rayon and Synthetic Fibres Committee (IRSFC), Certain Acrylic Fibres from Mexico, 1988 O.J. (C 117) 3. Other, more uncommon, examples include: European Confederation of Wood Working Industries for the EEC Countries, Standard Wood Particle Board from Bulgaria, Czechoslovakia, Poland, Rumania, Spain and USSR, 1984 O.J. (C 305) 6 (initiation); European Malleable Tube Fittings Development Association, Tube and Pipe Fittings from Brazil, Taiwan, Yugoslavia, Japan, 1985 O.J. (C 77) 3 (initiation).

The complaint must contain prima facie evidence of the existence of dumping and resulting injury to the EC industry. The complaining EC industry is required to file not only the (confidential) complaint, but also a non-confidential version thereof.¹²³ The non-confidential version of the complaint is put in the file and can be accessed by other interested parties, but only after the notice of initiation of the proceeding has been officially published in the Official Journal of the European Communities. This is an important difference from U.S. law where the complaint is publicly available as of the moment that it is filed.

If the Commission decides that the complaint does not contain sufficient evidence, it will inform the complainant of its conclusions and the reasons on which they are based. An estimated 50 percent of complaints are said to be rejected by the Commission. This should be contrasted with the situation in the United States where it is very unusual for the Commerce Department to reject a complaint.

If the Commission, after consultation with the Advisory or Antidumping Committee, decides to initiate a proceeding, it will publish a notice of initiation in the Official Journal.¹²⁴ The notice of initiation will contain a description of the product and an enumeration of the countries subject to the investigation. It serves as a notice to all parties. The Commission will also send questionnaires to all known exporters and importers of the dumped merchandise and to the Community producers.

There are essentially four types of questionnaires: one for EC producers, one for foreign producers/exporters, one for unrelated importers and one for related importers. The questionnaires tend to be fairly standard, although they are prepared by the case handlers put in charge of the proceeding and therefore, may be varied depending on the product under investigation and the (exporting) country concerned.

The questionnaires for foreign producers/exporters are designed to obtain the information necessary to determine whether dumping has taken place and whether such dumping has caused injury. Therefore, the questionnaires typically

¹²³ Unlike U.S. law and practice, EC antidumping law does not contain a system of disclosure of confidential information under protective order. This means that confidential data submitted by a party is not available to the other parties in the proceeding or to their counsel. Rather, every party has to submit, at all times, both confidential and non-confidential versions of any submissions it makes. For more detail see Taylor & Vermulst, *Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings Under United States Law: A Framework for the European Communities*, 21 INT'L LAW. 43 (1987). In his opinion in *Al-Jubail Fertilizer Co. et. al. v. Council*, Case 49/88, presented Feb. 7, 1991, Advocate-General Darmon suggested that the EC explore whether it might be feasible to adopt a system of disclosure of confidential information under protective order. This suggestion was not taken up by the European Court of Justice, although the Court criticized the inadequate procedural safeguards provided by EC antidumping law.

¹²⁴ See *supra* note 119, Art. 7(1).

request general information on EC export sales prices and quantities over the last four to five years and detailed information (on a transaction-by-transaction basis) on prices charged by the foreign producers in their home market and the Community market during the investigation period,¹²⁵ and on direct selling expenses deductible from both sides to bring the prices back to the ex factory level.¹²⁶ The questionnaires also routinely ask for cost of production information on a model-by-model basis,¹²⁷ and, increasingly, for operating statistics, such as production capacity and capacity utilization, stocks, debt-equity ratios, etc.¹²⁸ Finally, the producers/exporters will normally be requested to put the transaction-by-transaction information (and sometimes the information on adjustments) on a computer tape or diskette in the format indicated by the questionnaire.

Normally, only those producers/exporters whose names and addresses were identified in the complaint receive a questionnaire. As any antidumping duties will apply to all exports of the dumped product from a certain country, it is in the interests of unknown exporters to make themselves known to the Commission. Otherwise, the Commission will use the best information available (typically the highest antidumping duty imposed) to determine the level of the antidumping duties applicable to them.¹²⁹

The questionnaires for related importers request information on purchase prices, resale prices, purchase costs, and costs incurred by the importers between importation and resale. Such information is necessary for the construction of the CIF export price and the netting back of the constructed export price to the ex factory level.

The questionnaires for unrelated importers ask for information on importations from the country under investigation and from other sources. They are the simplest of the four types, probably in recognition of the fact that the

¹²⁵ The investigation period is typically the one year period immediately preceding the date of publication of the notice of initiation of the proceeding in the Official Journal. The data for the investigation period are used to calculate dumping and injury margins.

¹²⁶ Detailed information on third country exports during the investigation period is practically never requested, so that a company wishing to argue that normal value be based on such exports should volunteer such information itself.

¹²⁷ This is different from U.S. practice, where information on cost of production is only requested if allegations by the U.S. petitioner have been made that sales in the domestic or third country markets have been made below the cost of production, or if there is no viable home or third country market.

¹²⁸ These operating statistics are sometimes used by the Commission to determine whether a threat of injury exists.

¹²⁹ This is an important difference with U.S. practice, where the duty imposed on non-investigated parties is normally the weighted average of the duties imposed with respect to the investigated producers.

interests of unrelated importers in cooperating with the Commission are limited.¹³⁰ The questionnaire responses are used to double-check the information submitted by the foreign producers/exporters and to impute a profit margin to any related importers, necessary for the construction of the export price.

The questionnaires for EC producers are designed to enable the Commission to determine whether they are suffering injury as a result of the allegedly dumped imports. They ask information over a four to five year period on quantities produced and prices charged by EC producers, on their imports of the product under investigation, and on facts which will enable the Commission to assess their health, such as their capacity, capacity utilization, stocks, employment, costs of production and profits. The information provided in the questionnaire responses is subject to verification.¹³¹ It is therefore extremely important that all the information can be traced back to original source documents and that good records of the paper trail are maintained over time.

The deadline for all questionnaire responses is the later of thirty days after the date of publication of the notice of initiation in the Official Journal or, for exporters and importers known to be concerned, after which the questionnaire was received. Such receipt is deemed to have occurred within seven days following the date of its dispatch. The date of dispatch is assumed to be the date on the cover letter. In practice, this means that exporters and importers, represented by counsel, have 37 days to respond to the Commission's questionnaire, to make known their views in writing, and to apply for a hearing, because counsel will normally be able, upon showing of a power of attorney, to receive a copy of the questionnaires on the day of publication of the notice of initiation in the Official Journal.

The Commission will usually extend this deadline for a period of two weeks if good reasons for such an extension can be provided. Examples of good reasons in the past have been public holidays, strikes in the exporting country, computerizing of manually-kept records, etc. The same deadline normally also applies to injury submissions, although individual case handlers are often willing to grant a separate extension for the injury submissions.

In contrast to the usual American practice, the Commission practically always verifies the information submitted in the questionnaire responses, before

¹³⁰ Although importers eventually will have to pay the duties, unrelated importers tend to wait and see what happens in a proceeding and may switch sources of supply if the results of the proceeding are bad for their foreign suppliers.

¹³¹ "Verifications" are visits to the premises of the interested parties that responded to the questionnaires by Commission officials in order to check whether the data in the questionnaire response match with the company's source documents. They normally take approximately two days and are considerably less rigorous than the typical U.S. Department of Commerce verification. Rather than meticulously checking all details, the Commission officials tend to focus on the logic of the data submitted.

it issues its preliminary findings. Verification at an early stage of the proceeding has the advantage for all parties involved that provisional measures are taken on the basis of verified facts. The practical consequence is that in the Community, the definitive determinations tend to mirror the provisional determinations.

On-the-spot investigations are only possible if the foreign firms concerned give their consent and the Government of the country concerned has been notified and does not object. However, firms rarely refuse to cooperate because, to do so, would result in the Commission using the best information available.¹³²

Unlike the U.S. Department of Commerce practice, no detailed verification reports are provided to the verified producers/exporters and importers, although such reports are prepared by the case handlers for internal purposes. It is therefore important for the companies concerned and/or their counsel to prepare their own reports as counter-evidence.

B. Preliminary Determination By the EC Commission

If the Commission decides that protective measures cannot be justified, it may terminate the proceeding, unless the Advisory Committee raises objections. If objections are raised, the Commission must forthwith submit a report to the Council on the results of the consultation, together with a proposal that the proceeding be terminated. The proceeding will be terminated unless, within one month, a qualified majority in the Council decides otherwise.

The complaining industry can withdraw its complaint during any phase of the proceeding.¹³³ If the industry decides to do so, the Commission may terminate the proceeding, unless such termination would not be in the interests of the Community. In practice, the Commission has always terminated the proceedings in such cases. In recent years, Community industries have often withdrawn complaints notably after having been informed by the Commission that it had found insufficient evidence of injury.¹³⁴

¹³² See, e.g., Aspartame from the USA, Japan, 1990 O.J. (L 330) 16 (provisional), where Swiss authorities refused to let the Commission carry out an investigation on the premises of a related Swiss company, and the Commission used the best information available.

¹³³ See Regulation 2176/84, *supra* note 119, Art. 5(4).

¹³⁴ See, e.g., NPK Fertilizers From Hungary, Poland, Rumania, Yugoslavia, 1990 O.J. (L 188) 63 (termination); Polyester Film from Korea, 1989 O.J. (L 305) 31 (termination); Wheeled Loaders from Japan, 1989 O.J. (L 39) 35 (termination); Cellular Mobile Telephones from Canada, Hong Kong, Japan, 1988 O.J. (L 362) 59 (termination). See also Microwave Ovens from Japan, Singapore, Korea, 1988 O.J. (L 343) 33 (termination), where the complaint was withdrawn because of "profound changes in the market place;" Low Carbon Ferrochromium from South Africa, Turkey, Zimbabwe, 1989 O.J. (L 39) 33 (termination), where a review request by the EC industry was withdrawn after the industry had been informed by the EC Commission that there was no dumping.

If the Commission decides that there is dumping and resulting injury to the EC industry and the Community interests require that measures be taken, it will impose provisional antidumping duties unless the foreign producers/exporters offer undertakings which the Commission considers acceptable.¹³⁵

Antidumping duties must be imposed by Regulation.¹³⁶ As a consequence, they are directly applicable in all the Member States. The basic Regulation provides that the amount of antidumping duties may not exceed the dumping margin and should be less if a lesser duty would be adequate to remove the injury.¹³⁷ This lesser duty rule is a very important feature of Community antidumping law and should be contrasted with U.S. law where the antidumping duty must always be equal to the dumping margin found by the Department of Commerce. The practical importance of the lesser duty rule as a means of tempering the level of antidumping duties is indicated by the fact that in approximately half of the cases, many of them involving imports from non-market economies and from Japan, the level of the injury margin was indeed lower than the dumping margin. Consequently, a lesser duty was deemed to be sufficient to eliminate the injury. On the other hand, in case of imports from less developed countries, injury margins tend to be much higher than the dumping margins and, therefore, do not play a significant role.

Antidumping duties take several forms. Most common are *ad valorem* duties (the duty is expressed as a percentage of the CIF value of the imported product)¹³⁸ or specific duties (fixed duty amounts per unit, weight, measure, etc.).¹³⁹ However, variable duties, set at the level of the difference between the price of the imported product and a minimum price determined by the Commission during the investigation, can also be imposed.¹⁴⁰

¹³⁵ For a description of undertaking possibilities, see Section E, *infra*.

¹³⁶ See Regulation 2176/84, *supra* note 119, Art. 13(1).

¹³⁷ See Regulation 2176/84, *supra* note 119, Art. 13(3).

¹³⁸ See, e.g., Glycine from Japan, 1985 O.J. (L 107) 8 (provisional) where the amount of duty was equal to 14.5 percent of the price per ton net, free at the Community frontier, before duty.

¹³⁹ See, e.g., Certain Flat-Rolled Product, of Iron or Non-Alloy Steel, Cold-Rolled, from Yugoslavia, 1989 O.J. (L 78) 14 (provisional) (ECU 54/ton); Certain Iron or Steel Coils from Algeria, Mexico, Yugoslavia, 1988 O.J. (L 188) 18 (definitive); Certain Sheets and Plates, of Iron or Steel, from Yugoslavia, 1988 O.J. (L 188) 14 (definitive); Angles, Shapes, and Sections, of Iron or Steel from the GDR, 1984 O.J. (L 109) 11 (1984) (provisional) (ECU 110/1000 kilograms).

¹⁴⁰ See, e.g., Potassium Permanganate from the USSR, 1989 O.J. (C 192) 8 (initiation), 1990 O.J. (L 145) 9 (provisional); Paracetamol from PRC, 1988 O.J. (L 348) 1 (definitive); Roller Chains for Cycles from PRC, 1986 O.J. (L 40) 25 (definitive; definitive collection provisional) where the duty imposed was equal to the amount by which the free-at-Community-frontier net price per meter, before duty, was less than 0.56 ECU. The variable duty imposed in Kraftliner from USA, 1983 O.J. (L 64) 25 (definitive), was upheld by the European Court of Justice in *Cartorobica v. Ministero delle Finanze dello Stato*, Case C-189/88, Judgment of 27 March 1990, not yet reported.

The obligation to pay the antidumping duties is incurred in accordance with Directive 79/623/EEC,¹⁴¹ namely upon release for free circulation of the goods into the Community. The antidumping duties must be paid by the Community importer. They are collected by the customs authorities of the Member States in the form, at the rate, and in accordance with the other criteria laid down by the Commission/Council when the duties are imposed.¹⁴² In other words, the Member States have no discretion with respect to the collection of antidumping duties.

An important difference between U.S. and EC practice is that the assessment of antidumping duties in the Community is prospective. This means that, once an antidumping duty is set, the duty will be levied on all exports of the product from the country, subject to the duty, whether or not specific transactions were actually dumped. An importer who arranges to raise the export prices to non-dumped levels can only get his money back by applying for a refund.¹⁴³ For various reasons,¹⁴⁴ the refund procedure does not work well in practice and refund applications are fairly uncommon.

If the Commission decides to impose provisional duties, release of the allegedly dumped products for free circulation in the Community will be conditional upon the provision of a security (usually a bank guarantee) for the amount of the duty.¹⁴⁵ Provisional duties are usually imposed for a period of four months.¹⁴⁶ They may be extended for a further period of two months where exporters representing a significant percentage of the trade involved so request or, following a notice of intention from the Commission, do not object.¹⁴⁷ Provisional duties are often extended in this way. Such extensions are seldom contested by foreign exporters because they normally find it in their interest to have more time to analyze the provisional findings.

1. Dumping: The Basis for the Export Price and the Normal Value

The determination of dumping consists of a comparison between the price of a product as exported to the Community (export price) and the normal value of the like product. The dumping margin is the difference between the two.

¹⁴¹ 1979 O.J. (L 179) 31.

¹⁴² See Regulation 2176/84, *supra* note 119, Art. 13(8).

¹⁴³ The only exception to this occurs if the antidumping duty is set in the form of a minimum price. In that case, the importer can avoid payment by having his supplier raise the price to the level of the minimum price. However, such variable duties are rare and tend to be limited to steel proceedings.

¹⁴⁴ See *infra* § H.

¹⁴⁵ See Regulation 2176/84, *supra* note 119, Art. 11 (1).

¹⁴⁶ See Regulation 2176/84, *supra* note 119, Art. 11(5).

¹⁴⁷ *Id.*

Normal value is a term of art which encompasses a number of situations and may be calculated in ten different ways.¹⁴⁸ Normal value must be compared with the export price of the product to the Community. Therefore, the extent to which the export price is lower than the normal value constitutes the dumping amount.

The export price is defined as the price which is actually paid or payable¹⁴⁹ for the product sold for export to the Community¹⁵⁰ net of all taxes, discounts, including deferred discounts, and rebates actually granted and directly related to the sales under consideration.¹⁵¹

In the normal situation where the foreign exporter sells directly to an independent EC importer, the price that the exporter charges the importer constitutes the export price. This price has been used in the majority of cases to date.¹⁵²

¹⁴⁸ The ten ways of calculating normal value are the following:

- (a) home market price in the country of export;
- (b) exports of the product to third countries;
- (c) constructed value;
- (d) remaining sales in the home market, if certain sales in the home market have been made at a loss;
- (e) adjusted sub-production-cost price of sales which have been made at a loss;
- (f) home market price in an analogue country in the case of non-market economy countries;
- (g) export price to third countries of the producers in an analogue country;
- (h) constructed value of analogue country producers' like products;
- (i) prices in the Community of the like products; and
- (j) any other reasonable basis under the best information available rule.

All these options will be explained more fully below.

¹⁴⁹ This term makes it clear that, under Regulation 2176/84, the Commission is authorized to consider sales that have been concluded even though the products that are the subject of the sales have not yet entered the Community. See J. BESELER & A. WILLIAMS, *ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES* 82 (1986). In *Herbicide from Rumania*, 1988 O.J. (L 26) 107 (undertaking), the Commission used an offer for sale for purposes of calculating the export price.

¹⁵⁰ See Regulation 2176/84, *supra* note 119, Art. 2(8)(a). This definition makes clear that the export price is the price at which the merchandise leaves the country of exportation, not the price at which it enters Community traffic. See J. BESELER & A. WILLIAMS, *supra* note 149, at 81.

¹⁵¹ Free goods are generally treated as rebates-in-kind and are deducted if they can be proven to be directly related to the sales of the products under investigation. See, e.g., Video Cassette Recorders from Japan and Korea, 1988 O.J. (L 240) 5 (provisional). An interesting question is whether such goods should be valued at the cost to the producer or the benefit to the purchaser. The Commission would generally seem to accept the former. But see Case 301/85, *Sharp Corp. v. Council*, Judgment of 5 October 1988, not yet reported, where, in a constructed export price situation, the European Court of Justice held that "... the institutions were not wrong in holding that the value of the credit granted on sales to be taken into account was the value expressed in the national currency of the customers" (and not the cost of borrowing the amount in German marks).

¹⁵² In some cases, the foreign producer does not sell the product directly to an independent importer, but instead to an intermediate company located in the exporting country (e.g. a trading house) which, in turn, sells it to an EC importer. In most cases, the producer will know at the time of sale to the trading house that the product is destined for export to the EC. A distinction has to

Where no export price exists, an association or compensatory arrangement between the exporter and the importer or a third party exists, or the export price is unreliable for other reasons, the Commission may construct the export price on the basis of the price at which the imported product is first resold to an independent buyer.¹⁵³ If the product is not resold to an independent buyer, or not resold in the condition imported,¹⁵⁴ the Commission may construct the export price on any reasonable basis. In practice, the Commission routinely constructs the export price where a foreign exporter exports the products under investigation to a related importer within the EC, typically a distributor, which re-sells to local dealers. As the local dealer then is the first independent customer, it is the price charged by the related subsidiary to the dealer which will be used.

The Regulation provides that where the export price is constructed, allowance must be made for all costs incurred between importation and resale and for a reasonable profit margin for the importer. This construction of the export price must be distinguished from the process of netting back;¹⁵⁵ its objective is merely to establish an export price as if the product had been sold to an independent importer, typically a distributor.¹⁵⁶ As far as the calculation of the reasonable profit for the related importer is concerned, it should be noted that the Commission will not take into account the actual profit of the related importer, but will use a profit margin realized by independent importers in the same branch.

In a standard antidumping investigation, the normal value is the comparable price actually paid or payable in the ordinary course of trade for the

be made between sales to related and sales to unrelated trading houses. Where sales have been made to an unrelated trading house, the Commission normally uses the price which the foreign producer charges to the trading house. Where sales have been made to a related trading house, the Commission will use the price charged by the trading house to the EC customers. It follows from the above that the Commission will normally not calculate a separate dumping margin for trading houses. This means that such trading houses tend to be subjected to the residual duty, unless specific provisions to the contrary are made in the Regulations imposing provisional and - later - definitive duties.

¹⁵³ See Regulation 2176/84, *supra* note 119, Art. 2(8)(b).

¹⁵⁴ Dynamic Random Access Memories from Japan, 1990 O.J. (L 20) 5 (provisional); Styrene Monomer from the USA, 1987 O.J. (L 258) 20 (termination); Propan-1-ol from the USA, 1984 O.J. (L 106) 55 (undertaking).

¹⁵⁵ For example, the process of calculating prices at the ex-factory level.

¹⁵⁶ See Housed Bearing Units from Japan, 1987 O.J. (L 35) 32 (definitive): It should be remembered that the aim of this mechanism [construction of the export price], which applies in particular where there is a link between the exporter and the importer, is to enable a price at the Community frontier which is not influenced by the relationship between the producer/exporter and its associated importers. This explains why the criterion generally used to determine the reasonable profit margin is not the profit margin that a group such as Koyo has achieved or would like to achieve but that which independent importers achieve when reselling the products concerned within the Community.

like product intended for consumption in the exporting country or the country of origin.¹⁵⁷ This home market price is used by the Commission in the majority of cases involving products imported from market economy countries.

The Commission takes the position that in order for domestic sales to be used as the basis for normal value, they must have been made in sufficient quantities. In *Typewriters*,¹⁵⁸ the Commission decided to set a threshold of five percent of exports to the Community on a producer-by-producer and model-by-model basis.¹⁵⁹

For the purpose of determining normal value, transactions between parties which appear to be associated or have a compensatory arrangement 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 are comparable to transaction costs between non-linked parties. In practice, the Commission normally determines that the producers and their related sales organizations constitute one economic entity and uses the prices charged by the related sales organizations to their unrelated customers for the establishment of normal value.¹⁶⁰ This has happened in many antidumping cases involving products from Japan.

¹⁵⁷ See Regulation 2176/84, *supra* note 119, Art. 2(3)(a).

¹⁵⁸ *Typewriters from Japan*, 1984 O.J. (L 335) 43 (provisional). Cf. *Linear Tungsten Halogen Lamps from Japan*, 1991 O.J. (L 14) 1 (definitive), 1990 O.J. (L 188) 10 (provisional); *Dense Sodium Carbonate from the USA*, 1990 O.J. (L 283) 38 (termination); *Dot Matrix Printers from Japan*, 1988 O.J. (L 317) 33 (definitive); *Video Cassette Tapes and Reels from Korea, Hong Kong*, 1989 O.J. (L 174) 1 (definitive); *Plain Paper Photocopiers Originating in Japan*, 1986 O.J. (L 239) 5 (provisional); 1987 O.J. (L 54) 12 (definitive); *Silicon Carbide from the PRC, Norway, Poland, USSR*, 1986 O.J. (L 287) 25 (termination; undertaking); *Electronic Typewriters from Japan*, 1985 O.J. (L 163) 1 (definitive).

¹⁵⁹ Domestic sales below cost of production will be excluded for purposes of calculating whether domestic sales constitute at least five percent of export sales. See *Dot Matrix Printers from Japan*, *supra* note 158. In *Joined Cases 277 and 300/85, Canon France, Canon Rechner Deutschland, Canon (U.K.) v. Council*, Judgment of the Court of 5 October 1988, (1988) ECR, 5731 [hereinafter *Canon v. Council*], the European Court of Justice upheld the application of the five percent test on a model-by-model basis:

It must be observed . . . that Canon's argument that the threshold below which sales should be disregarded must be calculated by reference to the total volume of exports of all models of electronic typewriters cannot be accepted since, as a result of the considerable differences between the characteristics of the various models, each model necessarily has its own normal value. The domestic sales of each of the two models produced by Canon for which reference was made to the domestic prices exceed 5% of the applicant's exports to the Community on a model-by-model basis, whereas they account for barely 1.4% of Canon's total exports to the Community.

¹⁶⁰ In previous cases, the Commission had sometimes used the prices charged to the related suppliers. See, e.g., *Sensitized Paper for Colour Photographs from Japan*, 1984 O.J. Eur. Comm. (L 124) 45 (undertakings, termination).

If there are no sales of the like products in the home market of the exporting country or the country of origin, such sales have not been made in the ordinary course of trade, or otherwise do not permit a proper comparison.¹⁶¹ home market sales must be ignored, and, instead, normal value must be based on either the comparable price of the like product when exported to any third country, which may be the highest such export price, but must be a representative price,¹⁶² or the constructed value.¹⁶³

Export prices to third countries, *i.e.* to countries other than the countries under investigation and other than the Member States, have hardly ever been used.¹⁶⁴ The Commission's logic seems to be that export prices to third countries are unacceptable because such sales may also be dumped¹⁶⁵ or because the export prices to such countries would have to be constructed (since the exporters sold through related importers).¹⁶⁶ The Commission therefore has a clear preference for use of the constructed value where domestic sales do not exist, are insufficient, or unreliable.¹⁶⁷ The U.S. Department of Commerce, by contrast, prefers to use third country exports.

¹⁶¹ See Regulation 2176/84, *supra* note 119, Art. 2(3)(b).

¹⁶² *Id.* Art. 2(3)(b)(i).

¹⁶³ *Id.* Art. 2(3)(b)(ii).

¹⁶⁴ *But see* Polyester Yarn from the USA, 1983 O.J. (L 50) 1 (definitive) (export sales of one exporter); Paraxylene from Puerto Rico, 1981 O.J. (L 158) 7 (provisional), 1981 O.J. (L 296) 1 (definitive), (export sales to the United States); Orthoxylene from Puerto Rico, 1981 O.J. (L 141) 29 (provisional), 1981 O.J. (L 270) 1 (definitive) (export sales to the United States). *Cf.* Binder and Baler Twine from Brazil and Mexico, 1987 O.J. (L 34) 55 (termination; undertakings), where the Commission in fact

... suggested to the companies concerned the possibility of determining normal value . . . by comparing prices to the Community with the prices charged for exports to third countries, in particular to the United States of America, where the situation appeared to be such as to make it unlikely that dumping had taken place. However, the companies concerned appeared not to be ready for the new investigation that this would have required.

In *Canon v. Council*, *supra* note 159, the European Court of Justice acknowledged the "margin of discretion" that the Community institutions have in determining whether to use third country exports of constructed value.

¹⁶⁵ Styrene Monomer from the USA, 1988 O.J. (L 221) 57 (refund); Urea from Libya, Saudi Arabia, Czechoslovakia, GDR, Kuwait, USSR, Trinidad and Tobago, Yugoslavia, 1987 O.J. (L 317) 1 (definitive: Libya, Saudi Arabia) (undertakings: Czechoslovakia, GDR, Kuwait, USSR, Trinidad and Tobago, Yugoslavia); Silicon Carbide from PRC, Norway, Poland, USSR, 1986 O.J. (L 287) 25 (termination; undertaking); Codeine from Czechoslovakia, Hungary, Poland, Yugoslavia, 1983 O.J. (L 16) 30 (termination); Copper Sulphate from Poland, Bulgaria, Hungary, Spain, 1984 O.J. (L 275) 12 (provisional: Poland) (termination; undertakings: Bulgaria, Hungary) (termination: Spain); Ballbearings from Japan and Singapore, 1984 O.J. (L 79) 8 (provisional); Isopropylidenediphenol from the USA, 1983 O.J. (L 23) 9 (provisional). *Cf.* J. BESELER & A. WILLIAMS, *supra* note 149, at 57. This argument would appear to be nonsensical to the extent that the question whether products are dumped depends in part on the determination of the normal value.

¹⁶⁶ Typewriters from Japan, 1985 O.J. (L 163) 1 (definitive). In the submission of the Council in the Report for the Hearing in *Canon v. Council*, *supra* note 159, this aspect was once more stressed.

¹⁶⁷ *Cf.* J. BESELER & A. WILLIAMS, *supra* note 149, at 58.

Normal value based on constructed value is to approximate the price at which the exported product would have been sold in the domestic market of the producers under investigation.¹⁶⁸ This has two consequences. First, cost of manufacture should reflect the cost of the exported product.¹⁶⁹ Second, selling, administrative, and other general expenses [SGA] and profit should reflect the domestic SGA and the domestic profit.

The constructed value consists of two components: the cost of production (including SGA or overheads) and a reasonable margin of profit. The cost of production must be computed on the basis of all costs, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative, and general expenses.¹⁷⁰ Cost calculations must be based on available accounting data, normally allocated, where necessary, in proportion to the turnover for each product and market under consideration.¹⁷¹ Where raw materials are purchased from a related supplier, the Commission will normally require proof that the purchase prices are at arm's length or, where such evidence cannot be provided, for example, because the producer only purchases from related suppliers, that the purchase price covers the cost of production of the raw materials. If this is not the case, the purchase price may be adjusted to reflect all costs plus a reasonable profit.¹⁷² Unlike the U.S. statute, EC law does not contain statutory minima for overhead expenses and profit.

¹⁶⁸ See, e.g., *Linear Tungsten Halogen Lamps from Japan*, 1991 O.J. (L 14) 1 (definitive), 1990 O.J. (L 188) 10 (provisional); *Plain Paper Photocopiers from Japan*, 1986 O.J. (L 239) 5 (provisional); *Electronic Scales from Japan*, 1986 O.J. (L 97) 1 (definitive); *Electronic Typewriters from Japan*, *supra* note 158; *Canon v. Council*, *supra* note 159, the European Court of Justice stated that,

In that connexion, it must be borne in mind that, according to the scheme of [the basic] Regulation . . . the purpose of constructing the normal value is to determine the selling price of a product as it would be if that product were sold in its country of origin. Consequently, it is the expenses relating to sales on the domestic market which must be taken into account.

Cf. Cases 273/85, 107/86, *Silver Seiko v. Council*, (1988) ECR, 5927. In past cases, the Commission had sometimes taken the position that the constructed value was the cost of production of the exported product. See, e.g., *Cotton Yarns from Turkey*, 1981 O.J. (L 347) 19.

¹⁶⁹ Cost of manufacture should include import and other duties paid on the raw materials. However, in the netting back process, such duties will be deducted if they are refunded or not collected on exported products.

¹⁷⁰ See Regulation 2176/84, *supra* note 119, Art. 2(3)(b)(ii).

¹⁷¹ See Regulation 2176/84, *supra* note 119, Art. 2(11).

¹⁷² *Titanium Mill Products from Japan, USA*, 1985 O.J. (L 113) 30 (termination).

Since 1988,¹⁷³ the Regulation has provided that the amount for SGA and profit is to be calculated by reference to the expenses incurred and profit realized by the producer or exporter on above-cost sales of like products on the domestic market. If such data is unavailable or unreliable or not suitable for use, SGA and profit is to be calculated by reference to the expenses incurred and profit realized by other producers or exporters in the country of origin or export on above-cost sales of the like product.¹⁷⁴ If neither of these two methods can be applied, SGA and profit will be calculated by reference to the sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export or on any other reasonable basis.

Whenever the Commission has 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, *i.e.* less than all costs, in the ordinary course of trade, both fixed and variable, of materials and manufacture plus a reasonable amount for overhead, such sales may be regarded as not having been made in the ordinary course of trade, provided that they have been made in substantial quantities during the investigation period at prices which do not permit recovery of all costs in the normal course of trade during such period.

It should be noted that the questionnaires for foreign producers/exporters routinely request cost of production information and, more and more often, a profitability/loss analysis with respect to domestic sales on a model-by-model basis. If the Commission finds that sales have been made at a loss in substantial quantities during the investigation period, it may calculate normal value on the basis of the remaining sales in the domestic market, *i.e.* the sales which have not been made at a loss, export sales to third countries, the constructed value, or adjustment of the below-cost price in order to eliminate the loss and provide for a reasonable profit.

In practice the Commission routinely compares the transaction-by-transaction report for domestic sales with the weighted average domestic cost of production and analyzes whether substantial quantities are sold at a loss. Although there are no guidelines for this, Commission practice tends to be that

- if 20 percent or less of domestic sales are made below cost and if the weighted average price is above the weighted average cost, normal value

¹⁷³ See Art. 2(3)(b)(ii) of Regulation 2423/88, Council Regulation 2423/88 of July 1988 on Protection Against Dumped or Subsidized Imports from Countries Not Members of the European Economic Community, 1988 O.J. (L 209) 1 [hereinafter Regulation 2423/88]. For more detail on the 1988 amendments, see Bellis, Vermulst & Waer, *Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies*, 23 J. WORLD TRADE 21-34 (1989).

¹⁷⁴ See, *e.g.*, Dot Matrix Printers from Japan, *supra* note 158.

will be based on domestic prices, including those of transactions at a loss;¹⁷⁵

- if more than 20 percent of domestic sales are made at a loss and if the weighted average price is above the weighted average cost, the Commission will tend to base normal value on remaining domestic sales above cost;¹⁷⁶
- if the weighted average price is below the weighted average cost, the Commission will construct the normal value.

2. Dumping: Adjustments

The basic Regulation provides that the normal value and the export price must be compared as nearly as possible at the same time and that, 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:

- (1) physical characteristics;
- (2) import charges and indirect taxes;
- (3) selling expenses resulting from sales made:
 - at different levels of trade;
 - in different quantities; or
 - under different conditions and terms of sale.

The burden of proof is on the party claiming the adjustment,¹⁷⁷ and is often a considerable hurdle. However, the Commission has occasionally made adjustments even where the foreign exporters did not claim them. Adjustments offer very important opportunities for minimizing the dumping margin and foreign producers/exporters should prepare the supporting evidence carefully.

Unlike the U.S. practice, where domestic complainants have an opportunity to express their views on adjustment, the dialogue in the EC is usually confined to the foreign exporters and the Commission. This appears to be a direct result of the confidentiality provisions in the basic Regulation which

¹⁷⁵ See Bellis, *The EEC Antidumping System*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* 75 (J.H. Jackson & E.A. Vermulst eds. 1989).

¹⁷⁶ See *Dense Sodium Carbonate from the USA*, 1990 O.J. (L 283) 38 (termination); *Video Cassette Tapes and Reels from Korea, Hong Kong*, *supra* note 158; *Kraftliner from the USA*, 1983 O.J. (L 64) 25 (definitive).

¹⁷⁷ See Regulation 2176/84, *supra* note 119, Article 2(10).

effectively preclude the Community industry (and its counsel) from access to the information supplied by the foreign exporters. Thus, once the complaint has been lodged and the proceeding initiated, the domestic industry plays a very limited role in the determination of dumping.

Article 2 (10) (e) provides that insignificant adjustments, *i.e.* ordinarily adjustments having an ad valorem effect of less than 0.5 percent of the price or value, shall be disregarded.¹⁷⁸ This provision is largely ignored in practice.

In practice, the Commission compares domestic prices or costs with export prices at the ex factory level. This means that on both sides the Commission will deduct all expenses incurred as of the moment that the product left the factory plus packing. This process is generally referred to as netting back. The netting back will produce an ex factory normal value and an ex factory export price.

Article 2 (10) (a) provides for adjustment of the normal value by an amount equal to a reasonable estimate of the value of the difference in the physical characteristics of the product concerned. In most cases, it tends to be very difficult to prove that the physical difference resulted directly in a difference in price. The Commission will therefore normally estimate the physical difference on the basis of the difference in cost of production, including SGA, plus profit.¹⁷⁹ Most of the adjustments that have been granted under this heading involved quality differences. On occasion, allowances have been made for differences in chemical composition or appearance.

The Regulation provides that normal value shall be reduced by an amount corresponding to any import charges¹⁸⁰ or indirect taxes,¹⁸¹ 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. The Commission makes these adjustments routinely if they can be proven.¹⁸² In practice, proof

¹⁷⁸ This does not apply to insignificant costs incurred by related importers as a similar provision does not exist with regard to the process of constructing the export price.

¹⁷⁹ See Small Screen Colour Televisions from Korea, 1990 O.J. (L 107) 56 (definitive); Dot Matrix Printers from Japan, 1988 O.J. (L 130) 12 (provisional). Cf. Iron or Steel Coils from Algeria, Mexico, Yugoslavia, 1988 O.J. (L 18) 31 (provisional); Ferro-Silico-Calcium/Calcium Silicide from Brazil, 1987 O.J. (L 129) 5 (provisional); Sensitized Paper for Colour Photographs from Japan, 1984 O.J. (L 124) 45 (undertaking, termination).

¹⁸⁰ For example, tariffs, duties, and other fiscal charges levied on imports.

¹⁸¹ For example, sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges.

¹⁸² See, *e.g.*, Photo Albums from South Korea, Hong Kong, 1990 O.J. (L 138) 48 (undertaking, termination); Small Screen Colour Televisions from Korea, 1989 O.J. (L 314) 1 (provisional); 1990 O.J. (L 107) 56 (definitive); Compact Disc Players from Japan and South Korea, 1989 O.J. (L 205) 5 (provisional); 1989 O.J. (L 331) 45 (extending the provisional anti-dumping duty); Video Cassette

concerning the existence and the working of the scheme will be relatively easy because the exemptions or refunds are generally well documented.¹⁸³ However, a variety of practical problems may arise as far as the quantification of the adjustment is concerned. For example, proof must be provided both that the products sold in the domestic market actually incorporate the duties and that the products exported to the EC actually receive an exemption from or a refund of such duties. In case of discrepancies between the two, the Commission will normally apply the lower of the two amounts. Thus, in *Video Cassette Recorders*,¹⁸⁴ the Commission held that:

The duties and other import charges borne by VCRs sold on the Korean market differ from the amounts refunded for exported VCRs. This is due to the fact that VCRs sold on the domestic market have a higher content of Korean-produced parts than those exported This claim therefore had to be rejected since, according to Community legislation, such refunds can only be taken into consideration if these import charges are borne by the like product and by materials physically incorporated therein when destined for consumption in the country of origin.

Producers that sell merchandise in several markets will generally adapt their terms and conditions of sale to those prevailing in the market where the product is sold. Since 1988, the basic Regulation provides an exhaustive list of selling expenses, based on experience with the direct relationship test: this means that no adjustment will be made for any and all overhead expenses because such expenses are not directly related to the sales under consideration. It should be noted that in the process of constructing the export price, the Commission will subtract the direct and indirect expenses of the EC subsidiary. However, it does not make an adjustment for indirect selling expenses of related

Recorders from Japan, Korea, 1988 O.J. (L 240) 5 (provisional), 1989 O.J. (L 57) 55 (definitive); Polyester Yarn from Mexico, South Korea, Taiwan and Turkey, 1988 O.J. (L 151) 39 (provisional); Standardized Multi-Phase Electric Motors from Yugoslavia, 1987 O.J. (L 102) 5 (provisional); Acrylic Fibres from Israel, Mexico, Romania, Turkey, 1986 O.J. (L 272) 29 (undertaking, termination) (adjustment for exemption of entry duties and domestic turnover taxes on the raw materials used for manufacturing the exported acrylic fibres); Wire Rod from Brazil, Portugal, Trinidad and Tobago, Venezuela, 1985 O.J. (L 299) 18 (termination); Polystyrene Sheets from Spain, 1985 O.J. (L 97) 30 (provisional); Copper Sulphate from Spain, 1984 O.J. (L 275) 12 (termination); Pentaerythritol from Spain, 1984 O.J. (L 88) 74 (undertaking, termination); Ceramic Tiles from Spain, 1984 O.J. (L 168) 35 (termination); Fibre Building Board from Brazil, 1983 O.J. (L 47) 30 (undertaking); Hermetic Compressors from Brazil, Spain, Hungary, Japan, Singapore, 1981 O.J. (L 113) 53 (termination).

¹⁸³ But see, e.g., Paraformaldehyde from Spain, 1984 O.J. (L 282) 58 (undertaking, termination); Trichloroethylene from Czechoslovakia, Romania, Spain, 1982 O.J. (L 223) 76 (termination), in which adjustments were refused because of lack of proof.

¹⁸⁴ Video Cassette Recorders from Japan, Korea, 1988 O.J. (L 240) 5, 10 (provisional).

domestic sales organizations for purposes of the comparison¹⁸⁵ on the basis that the construction of the export price is a different issue from the netting back. As of 1988, only the following selling expenses are allowable as directly related: transport, insurance, handling, loading and ancillary costs; packing; credit; warranties, guarantees, technical assistance and other post-sale services; and commissions and salesmen's salaries.¹⁸⁶

The Commission does not make allowances for overhead and general expenses, because they do not bear a direct relationship to sales of the product under investigation. On this basis, adjustments have been refused for (pre-sale) warehouse and storage charges, packing machinery, royalties, personnel expenses for the development of applications of the product under investigation, administrative costs for forwarding in the domestic market, inventory costs, personnel expenses for pre-sale technical assistance and servicing,¹⁸⁷ provision for doubtful debt,¹⁸⁸ administrative expenses of sales offices,¹⁸⁹ R & D,¹⁹⁰ and advertising and sales promotion.¹⁹¹

3. Dumping: Currency Conversions

The Commission will normally convert the currencies used in sales of the exported products into the currency of the country of origin/export on the basis of the weighted average exchange rate prevailing during the investigation period.¹⁹² This practice has been upheld by the European Court of Justice.¹⁹³ On occasion, however, the Commission has used monthly average

¹⁸⁵ See, e.g., Plain Paper Photocopiers from Japan, 1986 O.J. (L 239) 5, 6 (provisional); Ball Bearings and Tapered Roller Bearings from Japan, 1985 O.J. (L 167) 3, 5 (definitive); Electronic Scales from Japan, 1985 O.J. (L 275) 5, 6 (provisional); 1985 Electronic Typewriters from Japan, O.J. (L 163) 1, 2 (definitive).

¹⁸⁶ This is different from U.S. practice where Commerce does not treat salesmen's salaries as a direct selling expense.

¹⁸⁷ All in Glycine from Japan, 1985 O.J. (L 107) 8, 9 (provisional).

¹⁸⁸ Synthetic Fibre Hand-Knitting Yarn from Turkey, 1984 O.J. (L 67) 60 (undertaking, termination).

¹⁸⁹ Sensitized Paper for Colour Photographs from Japan, 1984 O.J. (L 124) 45, 47 (undertaking, termination).

¹⁹⁰ Housed Bearing Units from Japan, 1986 O.J. (L 221) 16, 18 (provisional).

¹⁹¹ See, e.g., Video Cassette Recorders from Japan, Korea, *supra* note 164, at 9; Daisy Wheel Printers from Japan, 1988 O.J. (L 177) 1, 5 (provisional); Housed Bearing Units from Japan, 1986 O.J. (L 221) 16, 18 (provisional); Sensitized Paper for Colour Photographs from Japan, 1984 O.J. (L 124) 45, 47 (undertaking, termination).

¹⁹² This exchange rate is typically provided in the questionnaire for foreign producers or exporters.

¹⁹³ Nachi Fujikoshi v. Council, 1987 E. Comm. Ct. J. Rep. 1861, 1878.

exchange rates.¹⁹⁴ It is not uncommon for producers/exporters to hedge exchange rates. Thus far, however, the Commission has refused to take hedging into account on the grounds that, as a financial practice, it does not directly relate to the commercial transaction and is too easily subject to manipulation.¹⁹⁵

4. Dumping: Final Comparison of the Export Price and the Normal Value

Article 2 (13) provides that where prices vary (which will nearly always be the case), normal value shall typically be established on a weighted average basis, while export prices shall typically be compared with the normal value on a transaction-by-transaction basis except where the use of weighted averages would not materially affect the results of the investigation.¹⁹⁶ In practice, the Commission routinely calculates one weighted average domestic sales price or constructed value and compares this normal value with export sales on a transaction-by-transaction basis,¹⁹⁷ although it has sometimes used monthly average,¹⁹⁸ or quarterly domestic prices, especially in countries with hyper-inflationary economies, and then compared these with the prices of export transactions made in the same month or quarter.

¹⁹⁴ See, e.g., *Fibre Building Board from Brazil*, 1983 O.J. (L 47) 30.

¹⁹⁵ In *Polyester Yarns from Mexico, Korea, Taiwan and Turkey*, 1988 O.J. (L 151) 39 (provisional), "An adjustment was requested for the hedging of exchange rates which Taiwanese firms practice so as to avoid losses from a possible dollar devaluation. Such allowance was not granted because Regulation 2176/84, *supra* note 119, does not provide for such adjustments." Furthermore, the European Commission considered that "hedging is a financial device which is external to the commercial transaction, and which, in the framework of an antidumping investigation, is likely to be disclosed by the exporter only if it works to his advantage." *Compare Synthetic Fibres of Polyesters from Mexico, Rumania, Taiwan, Turkey, the USA or Yugoslavia*, 1988 O.J. (L 151) 47 (definitive); *Acrylic Fibres from Israel, Mexico, Rumania and Turkey*, 1986 O.J. (L 272) 29 (undertaking, termination). See also MCGOVERN, *EUROPEAN COMMUNITY ANTIDUMPING LAW AND PRACTICE* 24:8 (1990) for an extensive discussion of this issue.

¹⁹⁶ See, e.g., *Woven Polyolefin Sacks from China*, 1990 O.J. (L 318) 2 (definitive); *Electronic Typewriters from Japan*, 1984 O.J. (L 335) 43 (1984) (provisional).

¹⁹⁷ But see *Glass from Turkey, Yugoslavia, Romania, Bulgaria, Hungary and Czechoslovakia*, 1986 O.J. (L 51) 73 (undertaking, termination) (average export prices); *Electronic Typewriters from Japan*, *supra* note 196.

¹⁹⁸ See, e.g., *Welded Tubes, of Iron or Non-Alloy Steel, from Turkey, Venezuela*, 1990 O.J. (L 351) 17 (provisional, undertaking) (for Turkey); *Dense Sodium Carbonate from the USA*, 1990 O.J. (L 283) 38 (termination); *Denim Fabrics from Turkey, Indonesia, Hong Kong and Macao*, 1990 O.J. (L 222) 50 (termination) (for Turkey); *Oxalic Acid from Brazil*, 1990 O.J. (L 184) 16 (undertaking, termination); *Welded Tubes from Yugoslavia and Rumania*, 1989 O.J. (L 294) 10 (provisional); 1990 O.J. (L 91) 8 (definitive, acceptance undertakings); *Dicumyl Peroxide from Japan, Taiwan*, 1989 O.J. (L 317) 49 (termination); *Glycine from Japan*, *supra* note 138, 1985 O.J. (L 218) 1 (definitive); *Polystyrene Sheet from Spain*, 1985 O.J. (L 97) 30 (provisional), 1985 O.J. (L 198) 1 (definitive); *Acrylic Fibres from the USA*, O.J. (L 209) 1 (amendment definitive); *Electronic Typewriters from Japan*, *supra* note 196 (provisional).

A comparison of a weighted average normal value with a weighted average export price would automatically offset export prices above normal value against export prices below normal value. However, a comparison of a weighted average normal value with export prices on a transaction-by-transaction basis raises the question how export sales made at prices above the weighted average normal value should be treated, and, more specifically, whether such transactions should be allowed to offset export sales made at prices below the normal value. Like the Commerce Department, the Commission does not allow such an offset and therefore does not take into account negative dumping. Export transactions made at prices above normal value are not ignored altogether, however, but are imputed a zero margin.

Article 2 (14) (a) provides that the dumping margin means the amount by which the normal value exceeds the export price. In practice, dumping margins are nearly always¹⁹⁹ expressed as a percentage of the CIF export price.²⁰⁰ This involves the following calculation:

(Normal value - Export price): CIF export price x 100 = dumping margin as a percentage of the CIF price.

The reason why the difference between the normal value and the export price is divided by the CIF export price is because antidumping duties - like normal customs duties - are normally levied as a percentage of the CIF price.

The following simplified examples show how the Commission calculates dumping margins:

Example I: Direct sales to unrelated customers

Normal value	Export price
Producer X --> unrelated customer	Producer X --> unrelated EC customer
Sales price: <u>100</u>	CIF sales price: <u>100</u>
- inland freight: 2	- ocean freight/insurance: 5.04
- credit: 3	- credit: 0.96
= ex factory price: <u>95</u>	= ex factory price: <u>94</u>

¹⁹⁹ But see *Scales from Japan*, 1984 O.J. (L 80) 9 (provisional).

²⁰⁰ See, e.g., *Plasterboard from Spain*, 1985 O.J. (L 89) 65 (undertaking, termination); *Fibre Building Board from Finland and Sweden*, 1986 O.J. (L 46) 23 (undertaking, termination).

The dumping margin therefore is: $95 - 94 : 100 \times 100 = 1$ percent. This example illustrates that while the domestic and export sales price are the same, there is nevertheless a dumping margin because the ex factory export price is lower than the ex factory normal value.

Example II: Direct sales to unrelated customers

Normal value	Export price
Producer X --> unrelated customer	Producer X --> unrelated EC customer
Sales price: <u>100</u>	CIF sales price: <u>105</u>
- inland freight: 2	- ocean freight/insurance: 5.04
- credit: 3	- credit: 0.96
= ex factory price: <u>95</u>	= ex factory price: <u>99</u>

The dumping margin on this transaction is $95 - 99 : 105 \times 100 = -3.81$ percent. The Commission will give no credit for this negative dumping in the computation of the weighted average dumping margin and attribute a zero value to it. However, the CIF price will be taken into account in the denominator (see below).

Example III: Sales through related subsidiaries

Normal value	Export price
X ---> subs. ---> unrelated customer	X ---> EC subs. ---> unrelated customer
100 <u>140</u>	100 <u>140</u>
- freight from subs. = 2	- ocean freight: 5
- credit by subs. = 3	- insurance: 1
- salesmen's salaries subs. = 3	- customs duties: 8.2
	- SGA subs.: 10
	- reasonable profit subs. (5%): 7
= ex factory price ex subs. = <u>132</u>	= ex factory price = <u>108.8</u>

The dumping margin on this transaction is $132 - 108.8 = 23.2 : 100 \times 100 = 23.2$ percent. This example well illustrates how, from an EC antidumping law perspective, it is extremely disadvantageous to sell through related subsidiaries in the home market and in the EC. On the export side, the EC deducts all direct and indirect expenses of, as well as a reasonable profit for, the EC subsidiary from the export price (construction of the export price), thereby effectively constructing a price to an unrelated distributor. The EC further deducts all costs incurred as of the moment that the product left the factory, as well as the packing (netting back). The end result is an ex factory export price. On the normal value side, however, the Commission will only deduct direct selling expenses incurred by the home market subsidiary or the producer from the normal value (netting back), thereby creating an ex factory normal value which still includes all overhead expenses of the domestic sales subsidiary. It is, therefore, not really an ex factory price, but rather a price ex distributor.

Finally, Article 2(14)(b) states that, where dumping margins vary, weighted averages may be established. The Commission routinely calculates one weighted average margin for each exporter.²⁰¹ In the examples above, these would be the weighted average dumping margins:

Example IV: Weighted average dumping margin

N.V. T-by-T	N.V. W.A.	E.P. T-by-T	Dumping amount
95	107.3	94	13.3
95	107.3	99	8.3
132	107.3	108.8	-1.5 = 0

The weighted average dumping margin as a percentage of the CIF export price will be 21.6 (total dumping amount): 305 (total CIF price) $\times 100 = 7.08$ percent.

It should be noted that if the Commission would have compared the weighted average export price with the weighted average normal value, the dumping margin would have been: 322 ($95 + 95 + 132$) $- 301.8$ ($94 + 99 + 108.8$) $= 20.2 : 305 \times 100 = 6.62$ percent. The Commission practice of

²⁰¹ See, e.g., Glycine from Japan, *supra* note 138 (provisional); Plasterboard from Spain, 1985 O.J. (L 89) 65 (undertaking, termination); Chromium Sulphate from Yugoslavia, 1985 O.J. (L 205) 12 (provisional); Skates from Czechoslovakia, Yugoslavia, Romania, Hungary, 1985 O.J. (L 52) 48 (termination); Excavators from Japan, 1985 O.J. (L 68) 13 (provisional); Sodium Carbonate from the USA, O.J. (L 206) 15 (provisional).

dumping margin would have been: $322 (95 + 95 + 132) - 301.8 (94 + 99 + 108.8) = 20.2 : 305 \times 100 = 6.62$ percent. The Commission practice of comparing a weighted average normal value with export prices on a transaction-by-transaction basis may therefore have a significant effect on the level of the dumping margin.

C. Injury

In order to impose antidumping duties, there must be a finding not only of dumping, but also of injury caused by the dumped imports to the EC industry producing the like product.²⁰² This finding may involve the causation of injury, the threat of material injury, or a material retardation of the establishment of a Community industry. It has been noted above that the same institution, the EC Commission, conducts both the dumping and the injury investigation. This has the advantage that, if one of the two conditions is not met, the case can be terminated without a detailed investigation into the other condition. This results in cost savings for all parties involved. Indeed, a number of cases have been terminated on the basis of a negative injury finding without further investigation of the dumping allegations and without verification at the premises of the foreign producers/exporters.

With respect to the injury determination, Article 4 (2) of the basic Regulation provides that

[a]n examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

- (a) volume of dumped . . . imports, in particular whether there has been a significant increase, 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 the price of a like product in the Community;
- (c) the consequent impact on the industry concerned as indicated by actual or potential trends in the relevant economic factors.

In order to ascertain whether injury has been generated by reason of the dumped imports, the Commission dispatches questionnaires to the EC producers, typically requesting detailed information on production, production capacity, sales, exports, imports, profitability, etc. This occurs over a four to five year

²⁰² For more detail see Vermulst, *Injury Determinations in Antidumping Investigations in the United States and the European Community*, 7 N.Y.L. SCH. J. INT'L & COMP. L. 301 (1986).

period, concluding with the end of the investigation period. In the questionnaires sent to foreign producers, detailed information on costs and prices during the investigation period is requested. For previous years, the questionnaires commonly confine the information asked for to general information on quantities and prices (and sometimes costs).²⁰³ These two collections of data are compared with each other in order to determine whether the dumping during the investigation period has resulted in material injury to the EC industry. The Community institutions ordinarily assume that if dumping has taken place during the investigation period, it has also taken place during the preceding years.

The Commission attaches special importance to absolute increases of imports and increases in market share (imports as a percentage of Community consumption).²⁰⁴ Proof of either will be a strong indicator of injury. In most affirmative injury findings, price undercutting had also been ascertained. As far as the impact on the Community industry is concerned, the factors most often mentioned in EC determinations are price depression and/or suppression, loss of profits,²⁰⁵ and decreases in production²⁰⁶ and sales.²⁰⁷

²⁰³ See, e.g., questionnaires in Polyester Staple Fibers from India and Korea, 1990 O.J. (C 291) 20 (initiation).

²⁰⁴ Cf. J. BESELER & A. WILLIAMS, *supra* note 149 at 156 ("It will be found that, in by far the great majority of injury determinations in the Community, there was an increase in absolute terms").

²⁰⁵ A decrease in profits, however, is not an absolute necessity. See, e.g., Tungsten Carbide and Fused Tungsten Carbide from China, 1990 O.J. (L 83) 36, where the EC Commission found that the Community industry was suffering material injury despite the fact that it had improved profitability during the reference period. The Commission noted that the improvement was not genuine or lasting. The improved profitability was in fact the result of the activity of importing and processing the product in question; it did not arise out of EC production of the product in question. In Tungstic Oxide and Tungstic Acid from China, 1990 O.J. (L 85) 29, the Commission imposed an antidumping duty despite an improvement in the financial result of the Community industry in 1987 and 1988, because profits had fallen in absolute terms during the period in question as a result of decreasing sales.

²⁰⁶ A decrease in production, however, is not an absolute requirement for a finding of injury, see Linear tungsten halogen lamps from Japan, 1990 O.J. (L 188) 10, where the Commission found that the Community industry had suffered material injury, despite the fact that Community industry had increased production by no less than 72 percent between 1985 and the investigation period (1 July 1988 to 30 June 1989). The issue was that consumption of the lamps had increased by 300 percent during this period and that the Community industry had lost considerable market share. In Oxalic acid from Brazil, GDR and Spain, 1984 O.J. (L 239) 8, the Commission concluded that the Community industry was suffering material injury although it had increased production. The increase in production had been attributable mainly to antidumping measures applied to imports from two countries not subject to the proceeding in question and the Community industry's capacity utilization had remained low (below 50 percent) which resulted in a high cost of production per unit and losses incurred by the Community industry from sales in the EC.

²⁰⁷ In *Canon v. Council*, *supra* note 159, the European Court of Justice held that, "although Community producers increased their sales in absolute terms, they did not maintain their percentage share in a market which was expanding very rapidly. The institutions were therefore entitled to conclude that dumping by Japanese producers had prevented a much more favourable trend in sales by European companies."

A general decision is then made whether the dumped imports have caused injury.²⁰⁸ If the reply is affirmative, the Community institutions will commence to determine whether an anti-dumping duty²⁰⁹ lower than the dumping margin would suffice to alleviate the injury.

D. Injury Margins

In older cases, the Community institutions tended to found their decision on a general appraisal of the situation without making any calculations with respect to the level of prices necessary to remove injury.

More recently, however, for the purpose of calculating injury margins, the Commission compares the weighted average resale prices of the foreign producers with the prices of exactly similar models/products of the EC producers or, if the latter have been depressed or suppressed, with target prices covering Community producers' costs of production plus a reasonable profit (which can be as low as a few percent and as high as 20 percent). The difference between the two is the amount of the injury, the comparison of the prices of foreign and EC producers being one for identical models/products. As a percentage of the CIF export price, it constitutes the injury margin. This method suggests that, if a foreign producer sells above the target price of identical models/products of the EC producers, his injury margin is zero.²¹⁰ It should be noted, however, that this method is not prescribed by the Regulation and that the EC institutions have virtually complete freedom to determine how to calculate the injury margins.²¹¹ In some recent cases involving Japanese imports of compact disc players and audio cassettes, for example, the Commission used other methods for the calculation of injury margins. Injury margins are normally calculated on a producer-by-producer basis.²¹²

²⁰⁸ The Commission has determined repeatedly that if the dumped imports are a contributory cause to an injury, caused in part by other reasons, this is sufficient to reach an affirmative determination.

²⁰⁹ Injury margins may also play a role in the establishment of a minimum price undertaking. However, as the terms of undertakings are confidential, it is difficult to assess their importance in this respect.

²¹⁰ See, e.g., Sensitized Paper for Colour Photographs from Japan, *supra* note 169 (undertaking, termination), where the Commission found a dumping margin of 12.2 percent and an injury margin of 0.54 percent for Mitsubishi. The Commission determined that any injury caused by such a small injury margin was *de minimis*. Cf. the determination with respect to the producers, Tokyo Electric and Tokyo Juki, in Daisy Wheel Printers from Japan, 1988 O.J. (L 177) 1 (provisional), 1989 O.J. (L 5) 23 (definitive).

²¹¹ The calculation of injury margins and the evolution therein is described in more detail in Vermulst & Waer, *Injury Margins in EC Antidumping Proceedings*, to be published in the Journal of World Trade (1991).

²¹² Sometimes, however, global injury margins have been calculated. See, e.g., Photocopiers from Japan, 1987 O.J. (L 54) 12 (definitive).

E. Final determination by the Council

Any proposal for definitive action, or for extension of provisional duties, must be submitted by the Commission to the Council not later than one month before expiry of the provisional duties.²¹³ The Council must act by a qualified majority. A qualified majority requires 54 out of 76 votes, divided among the Member States as follows:

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

Where a provisional duty has been applied, the Council decides (by a qualified majority) if and to what extent the provisional duties shall be definitively collected. This occurs whether or not definitive duties are imposed.²¹⁴ Provisional duties may be collected definitively only where the facts, as finally established, show that there has been injurious dumping.²¹⁵ Provisional duties are routinely collected by the Council, but do not exceed the amount of the definitive duty. This means that if the definitive duties are lower than the provisional duties, the former will serve as a cap.²¹⁶ If, on the other hand, the definitive duties are higher than the provisional duties, the ceiling will be based on the level of the provisional duties.

The Council has on occasion definitively collected provisional duties if the investigation was terminated as the result of acceptance of undertakings.²¹⁷ In most cases, however, no definitive collection took place.

Antidumping duties can only be imposed retroactively if the Council determines:

²¹³ See Regulation 2176/84, *supra* note 119, Art. 11(6).

²¹⁴ *Id.* Art. 12(2)(a).

²¹⁵ *Id.* Art. 12(2)(b). In this context, "injury" shall not include material retardation, nor threat of injury, unless this would have developed into material injury in the absence of provisional measures.

²¹⁶ See, e.g., Standardized Multi-Phase Electric Motors from Bulgaria, Czechoslovakia, GDR, Hungary, Poland, Rumania, USSR, 1987 O.J. (L 83) 1 (definitive).

²¹⁷ Copper Sulphate from Poland, 1985 O.J. (L 41) 11 (definitive collection); Roller Chains for Cycles, 1985 O.J. (L 335) 61 (definitive collection); Hardboard from Sweden, 1983 O.J. (L 361) 6 (definitive collection); Welded Steel Tubes from Rumania, 1982 O.J. (L 150) 1 (definitive collection).

- (1) that there is a history of dumping which caused injury, or
- (2) that the importer was, or should have been, aware that the exporter practiced dumping and that such dumping would cause injury, and
that the injury is caused by sporadic dumping, *i.e.* massive dumped imports of a product over a relatively short period, to such an extent that, in order to prevent it from recurring, it appears necessary to impose an antidumping duty retroactively on those imports, or
- (3) that an undertaking has been violated.²¹⁸

Duties can be applied retroactively only up to 90 days prior to the date of application of provisional duties. In the case of a violation of an undertaking, retroactive assessment may not apply to imports which were released for free circulation in the Community before the violation. Thus far, no retroactive antidumping duties have ever been imposed in the Community, although requests for imposition of such duties are increasingly made by the EC industry.²¹⁹ This is different from U.S. practice.

The basic Regulation, as amended on 11 July 1988,²²⁰ contains a new rule²²¹ which requires that exporters pass antidumping duties on to customers. The new rule provides that additional antidumping duties (anti-absorption duties) may be imposed where it is found that the antidumping duty has been borne by the exporter in whole or in part. In 1991, two anti-absorption proceedings were initiated but no measures have been taken yet.

F. Settlement Possibilities

Undertakings are agreements between the Commission and producers and/or exporters²²² of dumped merchandise where the latter agree to revise their prices or cease exports to the Community so that (to the Commission's

²¹⁸ See Regulation 2176/84, *supra* note 119, Art. 13(4)(i), (iii).

²¹⁹ See, e.g., Video Cassette Tapes from Korea, Hong Kong, 1988 O.J. (C 212) 11; Compact Disc Players from Japan and Korea, *supra* note 182; Certain Iron or Steel Sections from Yugoslavia and Turkey, 1988 O.J. (C 216) 2; Polyester Yarn from Mexico, South Korea, Taiwan and Turkey, 1987 O.J. (C 173) 11; Mercury from the USSR, 1987 O.J. (C 67) 3, O.J. (L 346) 27; Urea from Czechoslovakia, GDR, Kuwait, Libya, Saudi Arabia, USSR, Trinidad and Tobago and Yugoslavia, 1987 O.J. (C 34) 3. In *Urea*, the Commission proposed retroactive duties, but the Council rejected the proposal.

²²⁰ For a more detailed discussion of the 1988 amendments see Bellis, Vermulst & Waer, *Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies*, 23 J. WORLD TRADE 21, 34 (1989).

²²¹ See Regulation 2423/88, *supra* note 173, Art. 13(11).

²²² The Commission does not normally accept undertakings from importers. See Photocopiers from Japan, 1987 O.J. (L 54) 12.

satisfaction) either the dumping margin or the injurious effects of the dumping are eliminated. Unlike U.S. suspension agreements which have virtually lapsed into disuse, undertakings play an important role in EC antidumping proceedings.²²³

Undertakings may be offered during the course of an investigation, but, save in exceptional circumstances, not later than 30 days after the date of publication of the provisional duties. Undertakings may be offered by the exporters themselves or suggested by the Commission.²²⁴ The Commission generally only accepts undertakings after it has decided that dumping and resulting injury exist.²²⁵ This enables the Commission to immediately impose provisional duties, based on the results in the original investigation if the producers/exporters were subsequently found to have violated the undertakings.

The standard price undertaking is a written document²²⁶ in which a producer/exporter²²⁷ agrees to charge a minimum CIF export price, duty unpaid (on a model-by-model basis), on its EC export sales.²²⁸ Normally, the same minimum price is set for all producers/exporters in a given country and, in multi-country proceedings, for all producers/exporters involved in the proceeding. Undertakings typically contain a revision clause enabling the EC Commission and the producers/exporters to enter into consultations with a view to adjusting the price (normally downwards). Exceptionally, undertakings may even contain an automatic revision clause,²²⁹ as was the case for the undertakings accepted from Norwegian and Swedish producers in the Ferrosilicon proceeding.²³⁰

²²³ See J. BESELER & A. WILLIAMS, *supra* note 149, at 213.

²²⁴ See Regulation 2176/84, *supra* note 119, Art. 10(3).

²²⁵ See *Third Annual Report of the Commission to the European Parliament on the Community's Antidumping and Anti-Subsidy Activities*, para. 7 (3 June 1986); See also J. BESELER & A. WILLIAMS, *supra* note 149, at 221.

²²⁶ The Commission has "standard" undertakings that it will give to exporters interested in providing one.

²²⁷ In practice, problems often arise in cases where an undertaking is provided by a producer who is not the exporter, as is often the case in countries such as Japan and Korea where the exporter on the record is a trading house. The name on the customs clearance documents will then be that of the exporter (and not the producer) and customs authorities in the EC Member States may take the position that, as the exporter is not covered by the undertaking, the transaction should be subjected to the residual duty imposed in the proceeding. To prevent such problems, the Commission has sometimes used the formula produced and sold for export by, e.g (with respect to duties) in Polyester Yarn from Korea, Taiwan, Turkey and Mexico, 1988 O.J. (L 347) 10 (definitive).

²²⁸ The undertakings sometimes also include minimum prices ex-EC-subsidiaries to unrelated customers.

²²⁹ See J. BESELER & A. WILLIAMS, *supra* note 149, at 216.

²³⁰ Ferrosilicon from Iceland, Norway, Sweden, Yugoslavia, Venezuela, 1983 O.J. (L 57) 20 (undertaking).

An undertaking normally applies to all shipments made after the date of acceptance. This may create problems in case of long-term contracts, the terms of which have been negotiated and fixed before the undertaking entered into force, and in case of shipments which have already left the port in the exporting country, but which have not yet cleared customs at the EC frontier. In such cases, the Commission has tended to adopt a flexible attitude.

The parties from whom an undertaking has been accepted will have to provide periodic reports on their compliance with the terms of the undertaking, normally twice a year, thirty to sixty days after the end of the preceding six months period. Failure to comply with the procedural or substantive requirements of an undertaking will be construed as a violation of the undertaking.²³¹ The Commission has sometimes accepted undertakings under which the foreign producers/exporters agree to limit the quantity of their export sales to the EC,²³² or stop exporting altogether.²³³

The Commission may, after consultation, and after having given the exporters concerned an opportunity to comment, immediately apply provisional antidumping duties on the basis of the facts established before the acceptance of the undertaking, if undertakings are withdrawn or renounced, or the Commission has reason to believe that they have been violated.²³⁴ In this respect, the Commission is not dependent upon a complaint by the EC industry. Indeed, the Commission has sometimes found violations in the course of verifying monitoring reports.²³⁵ Analysis of case law reveals that withdrawal from,²³⁶

²³¹ See J. BESELER & A. WILLIAMS, *supra* note 149, at 222.

²³² Urea from Czechoslovakia, GDR, Kuwait, USSR, Trinidad and Tobago and Yugoslavia, 1987 O.J. (L 317) 1 (definitive, undertakings) where the Commission stated that "[t]hese undertakings were acceptable to the Commission on the grounds that they were considered to provide adequate relief to the Community industry because they will reduce future imports of urea from these countries to a reasonable share of the Community consumption of urea." See also Sheets and Plates, of Iron or Steel, from Yugoslavia, 1988 O.J. (L 23) 13 (provisional); 1986 O.J. (L 371) 84 (undertaking); Paint, Distemper, Varnish and Similar Brushes from the PRC, 1987 O.J. (L 46) 45 (acceptance undertaking); 1988 O.J. (C 257) 5.

²³³ See, e.g., Copper Sulphate from Bulgaria, USSR, 1988 O.J. (C 200) 9 (initiation review); Plain Paper Photocopiers from Japan, 1987 O.J. (L 54) 36 (undertaking, Kyocera Corp.).

²³⁴ See Regulation 2176/84, *supra* note 119, Art. 10(6).

²³⁵ See, e.g., Standardized Multi-Phase Electric Motors from Bulgaria, Czechoslovakia, GDR, Hungary, Poland, Rumania, USSR, 1986 O.J. (L 280) 68 (provisional): "[a]lthough the complainants had not suggested that the price undertakings had not been complied with, the Commission's investigation discovered evidence warranting a detailed check on compliance with the price undertakings, by type of motor and for each market." Compare Hardboard from Czechoslovakia, Poland and Sweden, 1983 O.J. (L 241) 9.

²³⁶ See, e.g., Chemical Fertilizer from the USA, 1982 O.J. (L 214) 7 (provisional); 1982 O.J. (L 322) 4 (extension provisional); 1983 O.J. (L 15) 1 (definitive); 1983 O.J. (L 211) 1 (undertaking; termination).

or violation of,²³⁷ undertakings has occurred sporadically. It should be noted that, during the past few years, the Commission has been reluctant to accept undertakings in cases involving exports from Japan.

G. Administrative Review

Regulations imposing antidumping duties and decisions to accept undertakings are subject to administrative review, where warranted. The review procedure may be initiated by the Commission at its own initiative, at the request of a Member State, or at the request of an interested party who submits evidence of changed circumstances sufficient to justify the need of review and, in the latter case, provided that at least one year has lapsed since the conclusion of the investigation.²³⁸ Where, after consultation of the Advisory Committee, it becomes clear that review is warranted, the investigation must be re-opened in accordance with Article 7.²³⁹ Re-opening does not per se affect the measures in operation,²⁴⁰ and in practice never does.

Most investigations have been re-opened following review requests by interested parties. In the case of Community producers, such requests are typically based on evidence of increased or renewed dumping²⁴¹ or violation

²³⁷ See, e.g., Potassium Permanganate from Czechoslovakia, 1988 O.J. (L 35) 13 (provisional); 1989 O.J. (C 216) 7 (89) (notice of re-opening), 1989 O.J. (L 245) 5 (provisional); 1990 O.J. (L 42) 1 (definitive); Paint, Distemper, Varnish and Similar Brushes from the PRC, 1988 O.J. (C 257) 5 (notice of re-opening); Roller Chains for Cycles from the PRC, 1988 O.J. (L 3) 5 (provisional), 1988 O.J. (L 115) 1 (definitive); Sheets and Plates, of Iron or Steel, from Yugoslavia, 1988 O.J. (L 23) 13 (provisional); Copper Sulphate from Yugoslavia, 1985 O.J. (C 284) 3 (re-opening); 1985 O.J. (L 296) 26 (provisional); 1986 O.J. (L 62) 1 (extension provisional); 1986 O.J. (L 113) 4 (definitive); Hardboard from the USSR, 1984 O.J. (L 61) 21 (re-opening & provisional); 1984 O.J. (L 170) 68 (definitive); Hardboard from Czechoslovakia, Poland, Sweden, 1983 O.J. (L 241) 9 (re-opening & provisional); 1983 O.J. (L 361) 6 (definitive Czechoslovakia, Poland; definitive collection provisional Sweden); 1983 O.J. (L 361) 47 (undertaking, termination: Sweden); Sodium Carbonate from Bulgaria, 1981 O.J. (L 246) 14 (provisional); O.J. (C 220) 2 (notice re-opening); 1981 O.J. (L 337) 5 (revocation provisional because the undertaking had not been violated).

²³⁸ A review can be conducted only if protective measures are imposed. This means that if a proceeding is terminated without protective measures, the EC industry can immediately lodge a new complaint, as indeed happened in the second *Polyester Film* proceeding, 1990 O.J. (C 24) 7 (notice of initiation).

²³⁹ The reference to Article 7 would seem designed to guarantee interested parties the normal procedural safeguards under the Regulation.

²⁴⁰ See Regulation 2176/84, *supra* note 119, Art. 14(2).

²⁴¹ See, e.g., Acrylic fibres from Mexico, 1988 O.J. (C 117) 3 (initiation review); Ferrochromium from South Africa, Turkey, Zimbabwe, 1988 O.J. (C 57) 3; Ferrosilicon from Iceland, Norway, Sweden, Venezuela, Yugoslavia, 1988 O.J. (C 145) 4; Ball Bearings from Japan, 1988 O.J. (C 159) 2; Sodium Carbonate from Bulgaria, GDR, Poland, Rumania, the USSR, 1988 O.J. (C 162) 9; Hardboard from Czechoslovakia, Poland, USSR, Rumania, Sweden, Brazil, 1988 O.J. (C 165) 2; Oxalic Acid from China, Czechoslovakia, 1987 O.J. (C 137) 4; Copper Sulphate from Czechoslovakia, Hungary, Poland, USSR, 1986 O.J. (C 200) 4; Styrene Monomer from USA, 1986 O.J. (C 231) 5; Housed Bearings Units from Japan, 1985 O.J. (C 132) 2; Standardized Multiphase Electric motors from Bulgaria, Czechoslovakia, GDR, Hungary, Poland, Rumania and the USSR, 1985 O.J. (C 305) 2; Outboard Motors from Japan, 1985 O.J. (C 305) 3; Sodium Carbonate from the USA, 1984 O.J. (C 101) 10; Ball Bearings from Japan, 1984 O.J. (C 101) 11;

of an undertaking.²⁴² Foreign exporters or Community importers will request review if they think they can prove decreased dumping or injury margins. The Commission does not publish refusals of review requests.

If the Commission decides to initiate a review, it will generally update the investigation period and conduct a new investigation on the basis of which the existing measures may be amended, repealed or annulled by the Community institutions competent for their introduction.²⁴³ This new investigation follows the format of the original proceeding, including the sending of questionnaires and the verification of information received.

Reviews tend to be initiated on a country-wide basis. Where reviews are initiated at the request of one exporter or a group of exporters, this may lead to a situation where other exporters end up with a worse result than was originally the case.

Contrary to U.S. (annual) reviews, reviews in the EC only have future effects. If, for example, the dumping margin for company A in country A was 15 percent, and during the review investigation period the dumping margin was 10 percent, the 10 percent duty will be applied only as of the moment that the review determination is published. It should also be noted that any measures imposed in the review will apply for five years; in other words, the review stops the sunset expiry of the original measures.²⁴⁴

H. Newcomer Review

Newcomers, *i.e.* producers that did not export to the EC during the investigation period, are subject to the highest duty imposed with respect to any cooperating producer. This Commission policy seems dictated by circumvention considerations. However, the consequence is that it often prevents "genuine" newcomers from being able to export at all. In 1989,²⁴⁵ the Commission changed its policy vis-à-vis newcomers by allowing them to file newcomer review applications as soon as the Regulation imposing definitive duties is published. In other words, newcomers do not have to wait until at least one year has passed.

Sodium Carbonate from Bulgaria, GDR, Poland, Rumania, USSR, 1983 O.J. (L 32) 1; Kraft Liner from Austria, Canada, Finland, Portugal, Sweden, USA, USSR, 1983 O.J. (L 64) 25; Ferrochromium from South Africa, Sweden, 1983 O.J. (L 161) 17; Lithium Hydroxide from the USA, USSR, 1980 O.J. (L 185) 5, and 1983 O.J. (L 294) 3; Fibre Building Board from Czechoslovakia, Finland, Poland, Norway, Rumania, Spain, Sweden, USSR, 1982 O.J. (L 181) 19; Herbicide from Rumania, 1982 O.J. (L 218) 17.

²⁴² Copper Sulphate from Bulgaria, USSR, 1988 O.J. (L 205) 68 (provisional).

²⁴³ See Regulation 2176/84, *supra* note 119, Art. 14(3).

²⁴⁴ See *infra* § H.

²⁴⁵ Video Cassette Tapes and Reels from Korea, Hong Kong, 1989 O.J. (L 174) 1. (definitive).

In order to qualify as newcomers, producers have to meet three conditions:

- they must be unrelated to any producer that cooperated or did not cooperate in the original proceeding;
- they must not have exported to the EC during the investigation period; and
- they must be able to prove that they have plans to start exporting to the EC in the near future, *e.g.* through evidence of contacts with EC customers.

I. Sunset Review

One of the 1984 amendments to the basic Regulation added the so-called sunset clause, providing that antidumping duties and undertakings are to lapse five years²⁴⁶ from the date on which they entered into force or were last modified or confirmed.²⁴⁷ The Commission must normally, after consultation, and within six months prior to the end of the five year period, announce the impending expiry of the measure concerned in the Official Journal and inform the Community industry known to be concerned.²⁴⁸ If an interested party (the Community industry) shows that the expiry would lead again to injury or threat thereof, the Commission, after consultation of the Advisory Committee, will publish a notice of its intention to carry out a review of the measure prior to the end of the five year period. It must then publish a notice of initiation of the review within six months after the end of the five year period. If this is not done, the measures will lapse at the end of the six month period. The measures are to remain in force pending the outcome of the review. Where antidumping duties or undertakings lapse as a consequence of application of the sunset clause, the Commission must publish a notice to that effect in the Official Journal.

²⁴⁶ A suggestion of Mr. Metten of the European Parliament that "in the consumer electronics sector, where market conditions change very rapidly, it would seem natural to impose levies for a much shorter duration than the present customary five-year period," was rebuffed by Commissioner Andriessen as follows :

Rapid changes occur in many economic sectors and are not confined to the consumer electronics sector. This is recognized in Article 14....where provision is made for the review of regulations and decisions imposing antidumping duties or accepting price undertakings to be subject to review at the request of an interested party, providing that party submits sufficient evidence of changed circumstances to justify such action. Given the provisions of Article 14, there is no reason why the exporters of dumped consumer electronic products should be placed in a more favourable position than exporters of other dumped products by curtailing the time span over which the duties are imposed."

See Answer by Commissioner Andriessen to Written Question No. 75/90, 1990 O.J. (C 233) 12.

²⁴⁷ See Regulation 2423/88, *supra* note 173, Art. 15(1).

²⁴⁸ *Id.* Art. 15(2).

The sunset clause is a significant improvement over prior legislation because it prevents the perpetual application of antidumping duties or undertakings beyond the needs of Community industries. Indeed, relatively few objections have been raised against impending expiry.

J. Refunds

In the EC, antidumping duties are imposed prospectively and last for five years. If the collection of antidumping duties exceeds the actual dumping margin, taking into account any application of weighted averages, the excess amount must be reimbursed.²⁴⁹ The vehicle for this reimbursement is the refund procedure.

A request for a refund must be made by the Community importer (who paid the antidumping duties in the first place). The application must be submitted to the Commission via the Member State in the territory of which the products were released for free circulation. It must be made within three months of the date on which the amount of the definitive duties to be levied was determined by the Member States customs officials or of the date on which a decision was taken by the Council to definitively collect the amounts secured by way of provisional duty.

The Member State must forward the application to the Commission as soon as possible and may comment on its merits.²⁵⁰ The Commission must inform the other Member States forthwith and give its opinion. If the Member States agree, or do not object within one month of being informed, the Commission may decide in accordance with its opinion. If objections are raised, the Commission must decide, after consultation, if and to what extent the application should be granted.

The refund procedure in the EC does not work optimally for the following reasons. In the first place, the fact that the request has to be made by the importer is an obvious handicap. Secondly, requests must be made in all the

²⁴⁹ This amount must be calculated in relation to the changes which have occurred in the dumping margin which was established in the original investigation for the shipments to the Community of the importer's supplier. Refund calculations must be based - as far as possible - on the same method applied in the original investigation, in particular, with regard to any application of averaging or sampling techniques. This 1988 amendment confirms the guidelines published by the Commission in 1986 concerning the reimbursement of antidumping duties. See 1986 O.J. (C 266) 2. Indeed, the European Court of Justice has 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. It gives an importer the opportunity to establish, on the assumption that those findings were generally accurate, that they do not apply in his individual case and that consequently the actual dumping margin is lower than the margin on the basis of which the antidumping duties were instituted.

Case 312/84, *Continente Produkten Gesellschaft Ehrhardt-Renken v. Commission*, E.C.R. 841, 867 (1987).

²⁵⁰ See Regulation 2176/84, *supra* note 119, Art. 16(2).

Member States and on a per shipment basis, a time-consuming and costly business. In the third place, refunds are only possible if the dumping margins have gone down. However, in approximately half of the investigations, antidumping duties are imposed on the basis of, often substantially lower, injury margins. In these cases, the importer can only obtain a refund if he can prove that the dumping margin dropped below the level of the injury margin as decreases in the injury margin do not qualify for a refund. Fourthly, it is left to Member States' law whether interest should be paid on the amount of refunded antidumping duties, and only German law would seem to require such payment.

Commission implementation can furthermore be assailed on the grounds that the procedure takes much too long and that it deducts antidumping duties from the resale price to the independent buyer in constructed export price situations because, like normal customs duties, they are considered as a cost to the related importer. The Commission has justified its practice on this point as follows:

[The Commission] is of the opinion that the wording of Article 2 (8) (b) is clear: all duties, including anti-dumping duties, have to be deducted from the resale price. The Commission would, therefore, by granting the applicant's request, infringe the express requirement of Article 2 (8) (b) and of Part II (2) (b) and (c) of the Notice. [The basic] Regulation . . . establishes different rules for the determination of the export price in different situations depending on whether the importer is related to the exporter or not. This cannot be considered discriminatory The second essential argument by the applicant, who sold on a duty-paid basis, is that a simple increase of its resale price in the Community by an amount equivalent to the amount of the duty, would not allow it to qualify for a refund. The Commission stresses that, had the applicant sold on a duty-unpaid basis, a single increase would have been sufficient to allow it to qualify for a refund Even where, as in the applicant's situation, the imported product was resold in the Community on a duty-paid basis, only one increase of the resale price by an amount equivalent to the amount of the duty is necessary, provided that the Commission is satisfied that in the particular circumstances of the case under consideration this increase in the price paid by the independent buyer eliminates or reduces the dumping margin and does not represent merely the anti-dumping duty which the importer could pass back to its customer if it obtained a refund. This could be the case, for example, if either the costs incurred between importation and resale by NMB or Minebea's normal value had been reduced since the original investigation period. In addition, other changes in circumstances could require the application of different adjustment or calculation methods which could lead to the same result, *i.e.* the

elimination or reduction of the dumping margin by a single price increase. In the present case there is no evidence that these conditions are met.²⁵¹

This means that in order to qualify for a refund on the basis of increased export prices, a related importer must in fact raise his prices by twice the amount of the antidumping duties paid, unless he sells to his customers on a duty-unpaid basis. The latter is virtually impossible in cases involving consumer electronics, where the problem tends to arise most frequently, because independent dealers or end-users will not want to be bothered with the administrative inconvenience of having to clear the merchandise through customs. The efficacy of the refund procedure becomes all the more important because the Community institutions often refer to it as a remedy for otherwise unfair results of the application of the basic Regulation.²⁵²

K. Prevention of Circumvention of Antidumping Duties

In the EC, different tests are applied for determining the occurrence of circumvention through production within the EC and production in third countries. Only with respect to the former does a specific anti-circumvention provision exist. Other forms of circumvention, including third country circumvention, have thus far been dealt with under the existing rules (rules of origin and customs classification).²⁵³

In June 1987, the EC adopted a specific circumvention provision in the framework of its antidumping law by incorporating an extra procedure for investigation of assembly operations in the EC.²⁵⁴ At the time of writing, seven proceedings concerning assembly operations in the EC have been

²⁵¹ Certain Ball Bearings from Singapore, 1988 O.J. (L 148) 30, 31.

²⁵² See, e.g., Sodium Carbonate from the USA, 1984 O.J. (L 311) 26 (imposing definitive antidumping duty on certain sodium carbonate imports from the U.S.A. and refusing to accept undertakings from non-exporters); Ball Bearings from Japan and Singapore, 1984 O. J. (L 193) 1 (imposing definitive antidumping duty on ball bearing imports from Japan and Singapore and refusing to consider price increases during the proceeding or before investigation period).

²⁵³ For a more detailed analysis see Vermulst & Waer, *European Community Rules of Origin as Commercial Policy Instruments?*, 24 J. WORLD TRADE 55 (1990); Vermulst & Waer, *Anti-Diversion Rules in Anti-Dumping Procedures: Interface or Short-Circuit for the Management of Interdependence?*, 11 MICH. J. INT'L L. 1119 (1990).

²⁵⁴ See Regulation 2176/84, *supra* note 119. The amendment was incorporated in the new Antidumping Regulation, Regulation 2423/88, *supra* note 173. See also Bellis, Vermulst & Waer, *Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies*, 23 J. WORLD TRADE 21 (1989).

initiated,²⁵⁵ all of them aimed at Japanese manufacturing operations in the Common Market.

Article 13 (10) of the basic Regulation provides that antidumping duties may also be levied on products assembled within the EC, provided that three cumulative conditions have been fulfilled:

- (1) The producer in the EC must have a relationship²⁵⁶ or association²⁵⁷ with an exporter of the like product subject to duties;²⁵⁸
- (2) the producer in the EC must have commenced or substantially increased its production after the commencement of an antidumping proceeding;²⁵⁹ and

²⁵⁵ For example, (1) Electronic typewriters (assembly operations of Brother, Canon, Matsushita, TEC, Sharp and Silver Seiko), 1987 O.J. (C 235) 2; (2) Electronic Scales (assembly operations of TEC Keylard and TEC U.K.), 1987 O.J. (C 235) 3; (3) Hydraulic Excavators (assembly operation of Komatsu), 1987 O.J. (C 285) 4; (4) Photocopiers (assembly operations of Canon, Konishiroku, Matsushita, Minolta, Ricoh, Sharp and Toshiba), 1988 O.J. (C 44) 3; (5) Ball Bearings (assembly operations of Nippon Seiko and NTN Toyo Bearing), 1988 O.J. (C 150) 4; (6) Serial Impact Dot Matrix Printers (assembly operations of Brother, Citizen, Fujitsu, Juki, Matsushita, NEC, OKI, Seiko Epson, Seikosha, Star Micronics and TEC) 1988 O.J. (C 327) 8; (7) Video Cassette Recorders (assembly operation of Orion), 1989 O.J. (C 172) 2.

²⁵⁶ In *Electronic Scales*, 1988 O.J. (L 101) 1, TEC-Keylard was deemed to be related to TEC because it had substantial capital links and close economic and commercial relations with TEC Japan. In *Photocopiers*, 1988 O.J. (L 284) 36, 60, a 50 percent shareholding was considered sufficient.

²⁵⁷ Although in *Electronic Typewriters*, 1988 O.J. (L 101) 4, 5, assembly operations were in one case carried out by an independent company, the Council determined that this did not preclude application of the parts amendment:

[o]ne company, namely Silver Reed International (Europe) Ltd, claimed that it should not be included in this investigation because the assembly operation was not carried out by Silver Reed but by Astec Europe Ltd. However, the investigation revealed that Astec's activities in this context were limited to the mere assembly of all parts of electronic typewriters which were imported and delivered to it at its premises by Silver Reed. These assembled electronic typewriters were then exclusively sold on the Community market by the Silver Reed Group. This group bore all costs between importation of the parts and the sale of the finished products. An assembly fee was paid to Astec by the Silver Reed Group but this fee constituted only a small percentage of Silver Reed's total costs of sale. In these circumstances, this assembly operation should be considered as having been carried out by Silver Reed.

²⁵⁸ The mechanics of EC antidumping law under which antidumping duties are imposed on a country-wide basis, imply that EC production facilities of companies which never exported the product concerned to the EC from the foreign country, can nevertheless be covered by a parts proceeding. In *Electronic Typewriters*, for example, typewriters produced by Matsushita in the United Kingdom were subjected to antidumping duties under the parts amendment even though Matsushita had never exported typewriters from Japan.

²⁵⁹ In *Ball Bearings*, 1989 O.J. (L 25) 90, it was held that increases of respectively 24 percent in one year and 40 percent in two years were substantial, in particular because they had followed a period of stability.

- (3) more than 60 percent of the value²⁶⁰ of parts or materials used in the EC manufacturing operation must originate in the exporting country subject to antidumping duties.²⁶¹

It should be noted, however, that following a 1988 complaint in GATT by Japan, a subsequently established GATT panel found in 1990 that the measures taken pursuant to the parts amendment were in violation of GATT. The EC has accepted the Panel report and since then has not initiated any new parts proceedings, although it continues to require producers from which undertakings were accepted to file reports.

L. Judicial Review

In contrast to the U.S. Trade Agreements Act of 1979, there is no special provision in the basic Regulation for judicial review. Consequently, the general provisions of the EEC Treaty apply.²⁶² In recent years, an increasing number of cases in the antidumping field have been brought before the European Court of Justice (hereinafter ECJ) in Luxembourg.²⁶³ Practically all of these have been based on Article 173 (2) of the EEC Treaty. For the moment, the following conclusions can be drawn:

- (1) As regards foreign producers/exporters who participated in the proceeding:
 - (a) Regulations imposing provisional or definitive duties or ordering definitive collection of provisional duties, are reviewable.

²⁶⁰ Value of parts and materials from the country of export is determined on an into-EC-factory basis. This includes cost items such as freight in the exporting country, ocean freight and insurance, customs duties at the EC border, customs clearance costs, and freight in the EC (from the border to the factory). In addition, where products shipped from the exporting country to the EC production facility involve transactions between related parties, the Commission will want to see evidence that the prices of such products are at arm's length, in other words, that they cover the cost of manufacture, SGA and a reasonable profit.

²⁶¹ See Regulation 2324/88, *supra* note 173, Art. 13(10)(a). Besides these three operative conditions, other circumstances such as the variable costs incurred in the assembly or production operation, the research and development carried out and the technology applied within the Community should be considered. In practice, investigations have focused on the administratively convenient 60/40 percent rule. It should be noted that, if the Community institutions would have attached importance to these criteria, they might have been subjected to local content charges by effectively requiring - or at least promoting - foreign companies to perform certain parts of the production process in the EC.

²⁶² For a more detailed discussion of judicial review in international trade cases see Vermulst, *Judicial Review in Trade Policy Matters in the United States and the European Community*, 33 *SOCIAAL ECONOMISCHE WETGEVING* 347 (1985); Kuyper, *Judicial Protection and Judicial Review in the EEC*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY*, *supra* note 175.

²⁶³ For a more detailed discussion see VERMULST, *ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES: A COMPARATIVE ANALYSIS* 254 (1987).

- (b) Decisions to accept undertakings or not to review undertakings or measures of protective action are probably reviewable too.
 - (c) The decision to open a proceeding is not reviewable.
- (2) As regards complainants:
- (a) Regulations imposing provisional or definitive duties or ordering definitive collection of provisional duties are reviewable.
 - (b) A decision not to open a proceeding is reviewable. By analogy, the decision to terminate a proceeding without protective action or to terminate an investigation because of acceptance of undertakings and the decision not to review an undertaking or an antidumping duty also appears to be reviewable.
- (3) As regards Community importers:
- (a) If the measures taken by the Community authorities require actions by national authorities, those actions can be challenged before the national courts. These courts may, or must,²⁶⁴ refer the case to the ECJ for a preliminary ruling.
 - (b) Where importers are related to the foreign producers/exporters or where they import on an OEM-basis,²⁶⁵ they can bring a direct action before the ECJ.

There are two major groups of interested parties for whom recourse to the judiciary leaves much to be desired: exporters/producers who did not participate in the investigation do not seem to have any recourse at all, despite the fact that the antidumping duties apply to them as well. More important, however, is the predicament of Community importers who, in most cases, will not be able to appeal directly to the European Court of Justice, but must go through the Member States' judiciary.

As far as the scope of review is concerned, the ECJ has shown a very deferential attitude to the expertise of the Commission and the Council in antidumping proceedings, especially with regard to substantive issues.

²⁶⁴ If they are the highest courts in the Member States against whose judgments no national appeals are possible.

²⁶⁵ Original equipment manufacturers. This was decided in Case ___/___, *Gestetner v. Council*, Judgment of the Court of ___ (1990), not yet reported; and Case ___/___, *Nashua v. Council*, Judgment of the Court of ___ (1990), not yet reported.

IV. CONCLUSION

Important differences between the U.S. and EC systems include the following:

Treatment of Confidential Information. One of the most striking contrasts between the U.S. and EC antidumping systems is the much more litigious nature of the U.S. process, which perhaps reflects the more pervasive influence of lawyers in U.S. society. This difference is manifested in the much greater openness of the U.S. system and, in particular, the administrative protective order procedure under which counsel has access to almost all of the confidential information submitted by the other side. Prior to the passage of the Trade Agreements Act of 1979, the petitioner's counsel in an antidumping investigation did not have access to any of the confidential information submitted by the respondents to the Treasury Department.²⁶⁶ The public summaries of the information were often extremely cursory, and gave the petitioners little ammunition with which to fight the LTFV phase of the investigation. Conversely, the respondents had no access to the confidential information supplied by the petitioners to the International Trade Commission in connection with the injury investigation. It was extremely difficult for the respondents' counsel to challenge the petitioners' assertions of reduced profits, lost sales, and the like, when none of the facts underlying these assertions were available to them.

By instituting the procedure whereby counsel for each party receives under administrative protective order virtually all the information filed by the other side, the 1979 Act significantly changed the nature of U.S. antidumping proceedings. Arguments can be presented to the tribunals with full knowledge of the facts.²⁶⁷ Naturally, this has greatly increased the cost of antidumping proceedings. Fees for representing petitioners or respondents routinely run in the hundreds of thousands of dollars, and sometimes reach the millions.

As a result of the absence of a system of disclosure of confidential information under a protective order,²⁶⁸ the EC system has not reached this "advanced" stage, and legal fees are usually a great deal lower than in the United States. While interested parties are required to file non-confidential summaries of confidential information submitted to the EC authorities, these summaries tend to give only very generalized data that do not enable the

²⁶⁶ Treasury had responsibility for the LTFV phase of investigations until 1980, when authority was transferred to the Commerce Department.

²⁶⁷ However, U.S. antidumping proceedings still fall far short of full-fledged litigation. There are no discovery rights, and although cross-examination is permitted in final ITC hearings, the severe time constraints mean that as a practical matter it rarely occurs. In the Canadian system, by contrast, antidumping hearings can last for days, and full cross-examination takes place.

²⁶⁸ For more detail see Taylor & Vermulst, *supra* note 123.

opposing parties to gain any real insight into the allegations of the party concerned. This means that the debate about dumping margins in the EC takes place only between the Commission officials in charge of the proceeding and the foreign producers/exporters, with little or no input from the domestic industry. Conversely, the discussion about injury and injury margins is usually the province of the Commission case handlers and the EC industry.

A protective order system is unlikely to be adopted in the EC in the near future, not least because the legal system in continental Europe has no experience with protective orders. The most that could be achieved in this respect might be the appointment of a "hearing officer," *i.e.*, a Commission official not directly involved in the proceeding who could be called upon by interested parties to check the confidential data and the conclusions drawn therefrom by the case handlers.

Political Influence. The U.S. antidumping process is designed to be free of political influence. The statute requires the entry of an antidumping order whenever the necessary findings of sales at less than fair value and injury are made, and gives no discretion to the authorities to waive the imposition of duties for reasons of public interest.²⁶⁹ Antidumping cases involving large volumes of trade or sensitive products often do attract a considerable degree of political attention. Politics can play an important role in the areas where the authorities do have some discretion, for example, in deciding whether or not to suspend an investigation or to participate in settlement discussions designed to lead to withdrawal of the petition.²⁷⁰ However, the Department and the ITC pride themselves on making their basic decisions on purely objective grounds, unaffected by broader political considerations. There have been very few cases in which it has even been alleged that the Department's or the ITC's decision was in any way affected by extraneous factors.²⁷¹

²⁶⁹ Contrast the antidumping statute with the Trade Act of 1974 § 201, Pub. L. No. 93-618, 88 Stat. 1978 (1975), the so-called *Escape Clause*, which gives the President discretion not to impose import relief after an affirmative finding by the ITC, and requires him, in exercising that discretion, to consider such factors as the international economic relations of the United States and the effect of import relief on consumers. The relatively "automatic" nature of antidumping investigations, compared with the highly discretionary nature of Section 201 proceedings, does a good deal to explain the much greater popularity of the former among U.S. industries seeking import relief.

²⁷⁰ The most obvious examples of these are the series of steel cases in the early 1980s, which were settled with a voluntary restraint agreement, and the cases involving semiconductors from Japan, which were settled in part on the basis of an agreement by the Japanese companies not to sell below cost to the United States. Because of their size and the importance of the products involved to the industrial well-being of the country, these cases received a great deal of political and diplomatic attention.

²⁷¹ In *Southwest Florida Winter Vegetable Growers Association v. United States*, *supra* note 59, the domestic industry charged that the Department's finding of no sales at less than fair value, which was based on a highly unorthodox method of analysis, was motivated by the Administration's desire not to offend the Mexican government. The court rejected the charge, holding that there was insufficient evidence to show that the Department's decision had been affected by political considerations.

Unlike the U.S. system, the EC antidumping system, in theory, offers a good deal of room for political maneuvering. This is first because of the decision-making process in which the Member States (both in the Advisory Committee and in the council) play an important role. While the Member States in the past tended to take a fairly passive role and deferred to the expertise of the EC Commission in antidumping matters, in recent cases, the Member States are increasingly scrutinizing the Commission's proposals. This change in attitude seems caused by both direct representations and the present public debate about certain aspects of the EC's antidumping practice.

Second, under EC antidumping law, imposition of antidumping duties is discretionary even if dumping and resulting injury are found, because Community law requires a finding that imposition of duties is, in fact, in the *interests of the Community*. The Community institutions, however, normally take the position that if there is dumping and resulting injury, it is in the interests of the Community to protect its domestic industry. The Community interests condition has not played an important role in practice.

The Commission itself conducts investigations in an impartial manner and does not usually let itself be influenced by political activities of interested parties. On the other hand, it can hardly be denied that the EC basic Regulation, as applied in practice by the Commission, contains certain structural biases²⁷² against exporting interests that facilitate findings of dumping margins. This, however, is an issue not unique to EC antidumping law,²⁷³ and should be addressed by exporting countries in the Uruguay Round.

Structural Differences. An important structural difference between the two systems is that in the U.S. system, the injury and fair value investigations are conducted by different agencies; the inquiry in the EC is handled by the same body. The bifurcated U.S. approach seems to offer no obvious advantage,

One decision that has sometimes been viewed as politically motivated was the second countervailing duty decision involving *Softwood Lumber From Canada*. In the first decision, the Department had held that the Canadian provinces, which owned most of the standing timber in Canada, had not conferred subsidies on private parties by granting them "stumpage" rights, *i.e.*, the right to cut and take the timber, at what the U.S. industry alleged were artificially low prices. 48 Fed. Reg. 24,159 (1983). Soon after the decision, when Congress was giving serious consideration to an amendment to the countervailing duty law, which would have treated a wide range of natural resource practices of foreign countries — including the granting of stumpage — as subsidies, the Department allegedly hinted to the U.S. softwood industry, which was strongly supporting the amendment, that if it filed a new countervailing duty petition, the result might be different. The industry did refile and the result was different — based on virtually identical facts, the Department issued a preliminary finding that the grant of stumpage rights *did* amount to a subsidy. 51 Fed. Reg. 24,173 (1986). The case was settled before the final determination, based upon an undertaking by the Canadian government to impose an export tax to offset the "subsidy."

²⁷² For example, the treatment of negative dumping, the asymmetry in the calculation of normal value and export prices where domestic and export sales are made through related sales subsidiaries, and the surrogate country methodology used in calculating normal values for non-market economy countries.

²⁷³ See ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY, *supra* note 175.

and has several disadvantages. For example, respondents are required to answer separate questionnaires from the two agencies, creating some duplication of effort. Perhaps more importantly, the U.S. system places serious obstacles to challenges to the standing of petitioners. Each domestic producer which receives a questionnaire from the ITC is required to indicate whether or not it supports the petition. Thus, the ITC possesses information that demonstrates whether or not the petitioners command the necessary degree of support for the industry. Yet, the ITC refuses to rule on standing issues,²⁷⁴ but defers to the Department of Commerce, which does not have access to the information before the ITC.²⁷⁵

Administrative Discretion. The EC system gives a great deal more discretion to the officials administering the law than does the U.S. system. This has advantages and disadvantages. On the one hand, the "black box" aspect of the EC system, in which it is virtually impossible to predict the size of the dumping margins, contrasts with the U.S. system, in which it is often possible for petitioners and respondents to conduct their own margin analysis once the relevant data has been assembled. On the other hand, however, the greater flexibility of the EC approach makes more sense in some respects. For example, the "lesser duty" rule, under which the duty assessed will be limited to the amount necessary to remedy the injury, has no counterpart in the United States, where the duty is always equal to the full amount of the margin.²⁷⁶ At least in theory, the EC system would permit the foreign producer to remain in the EC market, albeit at less competitive prices. In the United States, by contrast, a high duty is likely to exclude the foreign product altogether, even though this result is not always necessary to restore the U.S. industry to a healthy condition.²⁷⁷ The significance of the lesser duty rule in EC antidumping proceedings is demonstrated by the fact that the level of antidumping duties (or undertakings) is lower than the dumping margin in approximately half of the cases. Another inflexible provision in the U.S. law which has been widely criticized as unfair is the statutory minimum of eight

²⁷⁴ See, e.g., *Gray Portland Cement and Cement Clinker From Japan*, Inv. No. 731-TA-461 (Final), USITC Pub. 2376 (April 1991).

²⁷⁵ See *Suramericana de Aleaciones Laminadas, C.A. v. United States*, *supra* note 6, in which the Court sharply criticised the "run-around" given to the standing issue as "the type of circular argument to be expected in a journey 'Through the Looking Glass,' not in the administration by agencies of statutes placed within their jurisdiction by Congress." 746 F. Supp. at 152.

²⁷⁶ However, until the early 1980's the ITC would sometimes reach negative injury determinations where it concluded that the dumping margins had not contributed to the injury, for example, where they were much lower than the amount of underselling.

²⁷⁷ However, the lesser duty rule may act as a disincentive to foreign producers to cooperate in antidumping investigations, since they might reason that, even if they receive a high "best information available" margin, the impact will be ameliorated by the rule.

percent for the profit element of constructed value.²⁷⁸ The EC has no specified minimum so that the officials are free to use a lower figure where appropriate.

In other respects, however, the EC system is less favorable to respondents. For example, unlike the United States, the EC does not permit any deduction of indirect selling expenses in the home market, even where the importer is related to the exporter and the importer's selling expenses are deducted from normal value.²⁷⁹ The EC *always* treats advertising costs as indirect costs (and, therefore, not qualifying for an adjustment), while the United States makes adjustments for directly related, (*i.e.*, product-specific) advertising costs. Finally, the EC practice of applying the highest margin to uninvestigated companies is a great deal harsher than the United States, which uses a weighted average of the investigated companies.²⁸⁰

Procedural Flexibility. The EC system is procedurally more flexible than the U.S. system. Price undertakings are routinely accepted as a way of settling antidumping cases. In the United States, by contrast, suspension agreements based on price undertakings are unavailable as a practical matter, even though they are authorized by the statute. Unlike the EC, the United States has no automatic sunset provision, and revocations are not easy to obtain, particularly if the domestic industry maintains an interest in the case. U.S. investigations operate under strict (and short) time limits. By contrast, in the EC, the only real deadline is that definitive duties must be imposed within four months²⁸¹ of the imposition of provisional duties.²⁸²

Administrative Review. A final difference is the system of annual administrative reviews in the United States, which does not exist in the EC. The U.S. annual reviews are a logical consequence of the U.S. system of retroactive assessment of antidumping duties. Because an antidumping duty order provides only an estimate of the duties, it is only in the course of the annual reviews that the Commerce Department determines the dumping margins on the transactions made in the previous year and, consequently, the actual amount of antidumping duties owed.

²⁷⁸ The minimum amount for general expenses of 10 percent of the cost of labor and materials has not been attacked so often, perhaps because it is quite unusual for actual general expenses to fall below this amount, so that the minimum rarely comes into play.

²⁷⁹ The EC does, however, treat salesmen's salaries as direct expenses, whereas the United States treats them as indirect expenses and therefore subject to the ESP cap.

²⁸⁰ However, the recent institution of so-called "newcomer reviews" in the EC enables uninvestigated parties which did not export during the original investigation period to request an expedited review and alleviates, to some extent, this aspect of EC antidumping law.

²⁸¹ With the possibility of a two months' extension.

²⁸² Article 7(9)(a) of the basic Regulation providing that investigations should "normally" be concluded within one year is hardly a deadline as it is seldom adhered to.

In the EC, on the other hand, antidumping duties are imposed on a prospective basis. This means that the antidumping duties imposed in the original investigation, in principle, will be payable for five years. If a foreign producer/exporter then decreases his dumping margin, he can qualify for a refund and/or request a review.²⁸³

* * * * *

In summary, each system could stand significant improvement. While the U.S. approach to adjustments contains a number of biases that favor the domestic parties, it is less distorted than the EC system. Procedurally, however, the greater flexibility of the EC system encouraging settlement has a good deal to commend it, as does the sunset provision and the lesser duty rule. Adoption by the EC of an administrative protective order system like the U.S. system would undoubtedly improve the prosperity of European trade lawyers, although it would not necessarily lead to fairer results.

²⁸³ This procedure does not apply to the injury margin.