

EEC Anti-Dumping Enforcement: An Overview of Current Problems

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Introduction

Anti-Dumping enforcement has always been, and it still is, by far the most important instrument Community authorities may use to secure protection against imports. Anti-Dumping actions tend to be favoured over other trade remedies because, unlike safeguard measures, they offer the possibility for a selective approach and it does not entitle the exporting country to any compensation. Furthermore, the methodology used in anti-dumping law can give rise to high dumping margins and duties unrelated to the actual market situation.

The first EEC Anti-Dumping Regulation dates back to 1968.¹ After more than two decades of EEC anti-dumping enforcement, it may be appropriate to review the situation in order to see what problems remain to be resolved. This is all the more so in view of the fact that the revision of the GATT Anti-Dumping Code is on the agenda of the Uruguay Round negotiations.

During the first ten years of EEC anti-dumping enforcement, relatively few cases were brought and virtually all were settled in the form of price revision undertakings offered by the exporters and accepted by the Community authorities.² In those days, the Commission perceived its role more as that of an "amiable composer" than of a

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¹ Regulation No. 459/68, OJ (1968) L 93/1. Currently, Regulation No. 2423/88 applies, published in OJ (1988) L 209/1. For a comprehensive review of the current Regulation see Van Bael & Bellis, *EEC Anti-Dumping and Other Trade Protection Laws* (2nd. ed. 1989); see also Mr. Bellis' contribution in J. Jackson & E. Vermulst (eds.) *Comparative Anti-Dumping Law: Dumping and Anti-Dumping in Australia, Canada, the European Communities and the United States* (1989).

² See Van Bael, 'Ten Years of EEC Anti-Dumping Enforcement', *Journal of World Trade Law* (1979) 395.

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prosecutor. The Commission aimed at striking a fair balance between the interests of exporters and consumers on the one hand and local industry on the other. This proved to be a convenient solution for all the parties concerned: (1) the complainants obtained relief more quickly; (2) the exporters avoided the payment of duties; and (3) the Commission managed to handle the case load with a very limited staff.

Later, as a result of the economic recession, the number of cases increased substantially. The Commission's anti-dumping division was given more staff and they embarked on a more vigorous enforcement of the Anti-Dumping Regulation, leading more frequently to the imposition of duties than to the acceptance of undertakings. This shift in policy came about at the same time that the Community institutions came to realize that the Anti-Dumping Regulation could be used as a convenient tool of trade and industrial policy, instead of purely as an instrument of commercial defence.³

In view of the fact that the EEC Member States traditionally have been wary of transferring effective powers of commercial and industrial policy to the Community authorities, it is rather normal that the EEC Commission has started to assert its powers in these areas, by the back doors so to speak, by relying on the direct powers it holds in the anti-dumping field.

Anti-Dumping proceedings, instead of aiming solely at restoring prices in the market to fair levels, are now being used to give European industry a second chance to get its act together in the face of global competition. By the same token, anti-dumping actions are meant to pressure governments of third countries to adopt measures to reduce their trade surplus and to open their markets to EEC exports. In addition, third country exporters are being induced to set up manufacturing operations inside the EEC, with a rather high "minimum" local content.

Needless to say, in order to maximize the impact of anti-dumping actions as an offensive weapon in the context of the Community's trade and industrial policy, its deterrent effect has to be exploited in full. This may help to explain some of the interpretations made by the Community authorities of certain provisions in the Anti-Dumping Regulation which do not seem to make much sense from an economic

³ For example, when the steel crisis broke out in the EEC a number of "fast track" anti-dumping proceedings were launched in order to force exporting countries to sit at the table with the Community authorities and agree on quotas. Similarly, the opening of an anti-dumping investigation against video-cassette recorders from Japan appeared to be nothing but a prelude to the negotiation of a voluntary restraint agreement, OJ (1983) L 86/23. Perhaps the current investigation into semiconductors from Japan could lead to a result similar to the US-Japan Agreement aimed at stabilizing prices and increasing sales of US chips in Japan. More generally, the current flurry of anti-dumping proceedings involving Japanese and Korean products fits into the Community's "get tough" policy aimed at forcing these successful exporting countries to reduce their trade surplus with the EEC.

point of view.⁴ It may also be the reason why Japanese exporters have tended to be the first victims of such novel interpretations.⁵

Unfortunately, the Court of Justice has thus far refused to interfere with the considerable discretion enjoyed by the Community authorities when interpreting the Anti-Dumping Regulation. Furthermore, the Court of First Instance, which has been installed as of September of last year, has been clipped in its wings from the outset. Trade cases are excluded from its scope of jurisdiction, although the matter may be reconsidered by the Council of Ministers after the first two years of its operation.

In the absence of adequate judicial review in the Community, exporters start voicing their concern in the press.⁶ In addition, exporting countries have started resorting to the GATT dispute settlement process in an attempt to contain what they perceive as an abuse of the anti-dumping laws.⁷ In the meantime, however, some of the more questionable interpretations and practices of the Community authorities under the Anti-Dumping Regulation have been codified in a series of amendments adopted by the Council in July 1988.

The Community's so-called 1992 programme, aiming at the completion of the internal market, has given rise to fears in third countries, notably Japan and the U.S., that outsiders will pay the price for this market integration. However, "Fortress Europe" is not a new phenomenon. It already exists.⁸ The Community's enforcement of its anti-dumping rules is a form of hidden protectionism which deserves to be exposed.

I. Creative Interpretation of the Anti-Dumping Regulation

In addition to the many options in terms of methodology expressly provided for under the Regulation,⁹ the Community authorities have further amplified their discretionary powers by way of a "creative" interpretation of the Regulations. In their quest for even greater discretion, the Community authorities have, at times, not hesitated to change their methodology with respect to the same exporters in two differ-

⁴ See Hindley, 'Dumping and the Far East Trade of the European Community', *The World Economy* (1988).

⁵ *Id.*; see also Bell, 'Anti-Dumping Practice of the EEC: The Japanese Dimension', *Legal Issues of European Integration* (1987).

⁶ See, e.g., the campaign by EPSON in *Financial Times* (12 April 1988).

⁷ For example, Japan has requested the formation of a GATT panel to resolve its dispute with the EEC over the so-called parts amendment, introduced in the EEC Anti-Dumping Regulation to combat circumvention.

⁸ See, e.g., Hindley, 'The Design of Fortress Europe', *Financial Times* (6 January 1989).

⁹ See, e.g., I. Van Bael, 'Discretionary Powers of the Commission and Their Legal Control in Trade and Antitrust Matters', in Schwarze (ed.), *Discretionary Powers of the Member States in the Field of Economic Policies and Their Limits Under the EEC Treaty* (1988).

ent proceedings.¹⁰ The only consistency in the Community's "teleological" "ad hoc" interpretation of the Regulation would appear to be that higher dumping margins are thus being arrived at.

The creative interpretation practiced by the Community authorities affects both its dumping and injury findings. The Community's practice with respect to the acceptance of price revision undertakings and with respect to review and refund procedures likewise reflects a restrictive approach.

These various forms of creative interpretation described hereafter concern the "old" anti-dumping regulation of 1984.¹¹ In the meantime, however, a number of the Community's questionable interpretations have been endorsed by the Court of Justice and "codified" in the "new" anti-dumping regulation of 1988. Thus, for example, the systematic inflation of normal value and deflation of export price have become a matter of law rather than administrative practice. It remains to be seen, however, to what extent Community law, as amended, is consistent with the obligations assumed under the GATT Anti-Dumping Code.

1. Use of a Double Standard in Comparison Between Normal Value and Export Price

The so-called "dumping margin" means the amount by which the normal value exceeds the export price.

When comparing a normal value, calculated on a weighted average basis for the entire investigation period, with an export price determined on a transaction-by-transaction basis, one generally ends up with an inflated dumping margin because the transaction-by-transaction method allows no compensation for "negative" dumping margins. The comparison between normal value and export price is further distorted in a situation where a foreign exporter sells both in the EEC and on its home market through sales subsidiaries. In such a case, the Community authorities, when netting back the export price and normal value to an ex-factory level, subtract all costs (including overheads) and profits from the export price, whilst only deducting so-called directly related selling expenses, excluding overheads and profits, from normal value. In other words, a normal value, including all distribution overheads and profits, is compared to an export price from which such overheads and profits have been subtracted.

¹⁰ See, e.g., the Court's judgment of 7 May 1987 in the *Miniature Bearings, Nippon Seiko v. Council*, not yet reported, at paras. 13-15.

¹¹ Regulation No. 2176/84, OJ (1984) L 201/1.

(a) A Weighted Average Normal Value is compared with Export Prices on a Transaction-by-Transaction Basis

The EEC has adopted a practice of using weighted average normal values but comparing these to export prices on a transaction-by-transaction basis.¹² Even where the export price is substantially higher than the normal value, the EEC will treat such sales as having a zero dumping margin. By failing to take adequate account of sales above normal value in reaching average dumping margin determinations, the EEC skews its calculation in favour of higher dumping margins, as shown in the following sample computation:

Example 1

Number of transactions	Comparison with normal	Dumping value margin
20	- 3	- 60
30	+ 5	0
10	- 1	- 10
<hr/> 60		<hr/> - 70 or 1.166% (i.e. 70 divided by 60)

In other words, in the example above, no compensation is granted for the 30 export transactions that were made at prices considerably above normal value.

In addition to the fact that each export transaction, rather than a weighted average export price (comparing dumped and non-dumped sales), is compared to normal value, the exporter may suffer yet another disadvantage from the method of comparison used by the EEC in that, generally, the normal value figure used for the comparison with each export price is itself a weighted average price. In the following example, the weighted average domestic price is US \$ 5 (US \$ 15 divided by 3 units):

¹² In earlier cases the Community authorities sometimes calculated the export price on a weighted average basis. However, in *Miniature Bearings*, *supra* note 10, the Court not only approved the calculation of the export price on a transaction-by-transaction basis, but also confirmed the right of the authorities to change their methodology. Indeed, in a previous case involving the same industry, the export price was calculated on a weighted average basis.

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Example 2

Date of sale	Domestic price	Normal value	Export price	Dumping margin
1 February	US \$ 6	US \$ 5	US \$ 6	0
10 February	5	5	5	0
15 February	4	5	4	1
Total	US \$ 15	US \$ 15	US \$ 15	1

The 15 February sale, though not below the 15 February domestic price, is nevertheless a dumped sale because it happens to be one dollar below the weighted average domestic price used as normal value (i.e. US \$ 1 divided by US \$ 15, or 6.6%)

The EEC suggests that its policy is designed to prevent companies from selling at very low prices in some markets and very high prices in other markets and offsetting the one with the other. Thus, in *Housed Bearing Units*, the Council stated:

As the Commission has already stressed in other Regulations implementing the basic anti-dumping Regulation, it uses the transaction-by-transaction comparison method in certain cases because it is the only method which eliminates the compensating effects of reconstructed export prices which are higher than the normal value and consequently makes it possible to determine with greater precision, in view of the very concept of dumping as set out in Article 2(2) of the basic anti-dumping Regulation, the real extent of the dumping and to prevent selective dumping for certain destinations chosen by the exporter.¹³

However, the Community authorities merely assume that such selective dumping takes place, without verifying the actual extent to which it occurs, if at all.

In 1988, the Community's practice was codified in Article 2(13) of the Regulation, as amended.¹⁴

¹³ OJ (1987) L 35/32, at point 20.

¹⁴ Article 2(13), as amended, reads as follows: "Where prices vary:
 - normal value shall normally be established on a weighted average basis;
 - export prices shall normally 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;
 - sampling techniques, e.g. the use of the most frequently occurring or representative prices may be applied to establish normal value and export prices in cases in which a significant volume of transactions is involved."

(b) Systematic Inflation of Normal Value and Deflation of Export Price when Exporter Sells through a Related Company

Before calculating the dumping margin, it is essential that normal value and export price be put on an equal footing in order to compare apples with apples.

The basic principle concerning comparisons between normal value and export price is set out in Article 2(9) of the "old" Anti-Dumping Regulation of 1984:

For the purpose of a fair comparison, the export price and the normal value shall be on a comparable basis as regards physical characteristics of the product, quantities and conditions and terms of sale. They shall normally be compared at the same level of trade, preferably at the ex-factory level, and as nearly as possible at the same time.

Notwithstanding this "fair comparison" requirement, the Community's practice in the determination of normal value and export price has given rise to a strong imbalance in a situation where the exporter sells on the domestic and on the export market through a related sales company.¹⁵ The Community authorities are, indeed, using a double standard when adjusting normal value and export price backwards to an ex-factory level.

(1) Normal Value

It has become the Community's standard practice, when an exporter sells on its home market to related companies, to determine normal value on the basis of the prices charged by the related companies to their independent customers.¹⁶

¹⁵ EEC Anti-Dumping questionnaires routinely contain the following statement: "A purchaser should be considered to be related if it holds directly or indirectly more than one percent of your capital or otherwise controls your company or if your company holds more than five percent of its share capital or you otherwise control it." Obviously, the suggestion that a one percent, or even a five percent, shareholding would be equivalent to control of a company is totally divorced from commercial reality. In contrast, international accounting principles normally use twenty percent of stock ownership as a bench-mark of whether one company controls another.

¹⁶ In previous cases the Community authorities, pursuant to Article 2(7) of the Anti-Dumping Regulation, tended to regard transfer prices between related companies as not being "in the ordinary course of trade" and tended to establish normal value on the basis of constructed value. In the *Electronic Typewriters* case, the Council stated: "Article 2(7) allows the Commission to disregard the prices charged in transactions between associated companies, unless the prices and costs involved are comparable to those involved in transactions between parties which have no such link. In this case, since there were no sales by the manufacturing companies to non-associated third parties, the Commission could not satisfy itself that the prices and costs involved in the sales to the sales companies corresponded to transactions between non-associated companies." OJ (1985) L 163/1, at point 8. It is interesting to note that while Article 2(7) was specifically quoted in the *Electronic Typewriters* case as being relevant to the price of sales made to sales companies, in the *Photocopier* case, the Commission said that Article 2(7) was inapplicable: "Despite certain exporters claim to the contrary, the Commission considered that it would be inappropriate to take account of any transfer price between related companies or branches of any exporter when establishing normal value by means of domestic prices, these prices not being those paid or payable in the ordinary course of trade for the like product.

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The Community authorities justify their practice by stating in all cases, as a question of fact, that sales companies perform functions which are comparable to those of the sales departments of a manufacturing company. Thus, in the *Housed Bearing Units* case, the Commission stated:

For those producers/exporters whose domestic sales to independent buyers were made either exclusively or partially through the intermediary of sales companies of which they hold all or most of the capital, or which they control in some other way, the prices charged by those companies for domestic sales to independent buyers were used to establish the weighted average referred to above. It is considered normal to treat sales companies and the producer/exporter with which they are associated as a single economic unit, insofar as the sales companies concerned in this case are entirely dependent on the producer/exporter concerned and carry out functions on the domestic market which are essentially identical to those performed by a subsidiary or sales department.¹⁷

Incidentally, although it is always stated, as a question of fact, that sales companies perform functions equivalent to those of sales departments, the EEC does not investigate the facts in such cases. They merely assume the facts and do not accept evidence that the sales company is performing a role comparable to that of a distributor.

Establishing normal value at the level of sales by a sales company rather than the manufacturing company has the effect of inflating normal value. This results from the strict limitations on adjustments applied by the Community.

An illustrative list of the differences in conditions and terms of sale qualifying for an adjustment was included in Article 2(10) (c) of the 1984 Regulation: "credit terms, guarantees, warranties, technical assistance, servicing, commissions or salaries paid to salesmen, packing, transport, insurance, handling, loading and ancillary costs and, insofar as no account has been taken of them otherwise, differences in the level of trade."

Accordingly, only prices to independent purchasers were used for the determination of normal value. Some exporters objected to this, indicating that certain transfer prices were at approximately the same level as those to certain independent purchasers and could accordingly be included as provided for by Article 2(7) of Regulation (EEC) No. 2176/84. The Commission considers, however, that where a sales organization, such as many of those of the exporters concerned, merely forms part of a corporate entity created for the manufacture and sale of specific products Article 2(7) does not apply to the transfer of these products from one part of the corporate entity to another, e.g. from manufacturing to sales. In any event, even if Article 2(7) were to apply to such transfers, the Commission considers that such sales were not made in the ordinary course of trade and that the prices and costs involved were not necessarily comparable to transactions between unrelated companies. In addition, in every instance, sales to independent purchasers amounted to at least 70% of all transactions and were accordingly considered representative of all sales on the domestic market." OJ (1986) L 239/5, at point 7.

¹⁷ *supra* note 13, at point 18.

Article 2(10)(c) further provides that “allowances generally will not be made for differences in overheads and general expenses, including research and development or advertising costs.” In other words, Article 2(10)(c) recognizes only adjustments for differences in direct costs excluding any overheads or general expenses.

(2) Export Price

The Anti-Dumping Regulation defines the export price as the price of the product when it leaves the exporting country: “the price actually paid or payable for the product sold for export to the Community.”¹⁸ In practice, the Commission always nets back the export price to the ex-factory level in the exporting country.

In accordance with the Anti-Dumping Regulation, the Community authorities may construct the export price whenever they find an association or a compensatory arrangement between the exporter and the importer.¹⁹ Even though the Community is not required to construct the export price in such a case, it almost invariably does so.

The export price is normally constructed on the basis of the price at which the imported product is first resold to an independent buyer. From this price the Community will deduct all costs incurred between importation and resale, including all duties and taxes. Article 2(8)(b) of the Regulation makes it clear that the costs to be deducted for purposes of constructing the export price are not restricted to direct costs: one of the allowances expressly referred to in Article 2(8)(b) is “a reasonable margin for overheads.” In other words, whereas only direct costs may be the subject of an allowance in connection with normal value, the allowances for purposes of the determination of the export price include both direct and indirect costs.

In addition, as explained further below, the EEC Anti-Dumping Regulation requires that allowance be made for a “reasonable margin for ... profit” in the construction of the export price. The imputation of a national profit margin to the importer is another factor which may lead to an artificial dumping finding.

(3) (Un)fair Comparison

Article 2(6) of the GATT Anti-Dumping Code specifically states that the purpose of making adjustments to the prices is to “effect a fair comparison between the export price and the domestic price in the exporting country.” In practice, the EEC has used its policy on making adjustments to make comparisons which cannot be described as fair. By systematically adopting a policy of deducting all costs incurred in Europe from the export price but limiting the number of costs that can be deducted from the

¹⁸ Art. 2(8)(a).

¹⁹ *Id.*

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price of the products distributed on the home market, the EEC has adopted rules which create artificial dumping margins even where there is no price discrimination between markets. Indeed, a producer which sells its product at exactly the same price in both domestic and export markets will systematically be credited with a dumping margin corresponding to the indirect selling expenses of its domestic sales organization for which no allowances can be made.²⁰

The use of this approach has been justified by the Community authorities by referring to the text of the Regulation which provides for different rules of adjustment of normal value and export price. In other words, the Community authorities have downgraded the fundamental "fair comparison" principle in favour of a strict interpretation of the technical provisions on adjustments. Accordingly, in the *Electronic Typewriters* case the Council stated:

Some parties also raised the point that since in the case of associated importers all costs of the importer are taken into account for the purpose of constructing the export price, an identical approach should be followed where sales on the domestic market are being made indirectly through an associated sales company. This argument confuses two different issues, namely the construction of the export price on the basis of a resale price of a related importer, and the comparison between normal value and export price. Regulation (EEC) No 2176/84 prescribes the deduction of all costs incurred between importation and resale. This is designed to arrive at an export price which is not influenced by the relationship between the exporting company and its associated importers. As to the comparison between normal value and export price other rules apply which have led to price adjustments for all allowable factors, as explained under recital 24 above.²¹

In the *Miniature Ball Bearing* cases, the Court of Justice upheld the use of "asymmetrical" methods to determine normal value and export price on the following grounds:

In that regard it should be noted that the allowances made under Article 2(10)(c) of Regulation No 3017/79 are different, as regards both their purpose and the conditions

²⁰ Hindley, *supra* note 4, at 450, gave the following example:
"A simple example illustrates the effects of the Commission's methodology. Suppose that a Japanese manufacturer sells an identical good at 100 to its associated sales companies in both Japan and the European Community. Each of the sales companies has costs per unit of 40, made up of salespeople's salaries and expenses (20), advertising (10) and overheads (10). Each sales company sells at 150 to independent retailers and therefore has a profit of 10.
The example is set up so that everything is identical in Japan and the European Community. Nevertheless, the Commission will discover dumping. It will deduct all expenses of the export subsidiary in order to arrive – assuming, for the sake of simplicity, accurate and honest calculation – at a reasonable approximation of the actual ex-factory price of 100. But when it turns to the price on the Japanese market, it will deduct from the 150 price to independent retailers only "directly-related selling expenses": 20 for salespeople's salaries and expenses. Thus it will arrive at an ex-factory reference price of 130. And, comparing that reference price with the ex-factory export price of 100, it will discover a dumping margin of 30 percent."

²¹ *Electronic Typewriters*, OJ (1985) L 163/1, at points 25 and 26.

in which they are applied, from the allowances made in the construction of the export price.

Whereas the latter allowances are intended to determine the export price which corresponds to normal trading conditions, the allowances made under Article 2(10) are intended to rectify the export price or the normal value already calculated pursuant to the rules laid down in Article 2(3) to (7) and (8). The allowances provided for by Article 2(10) are made by reference to objective factors enumerated in particular in subparagraph (c) thereof; these factors correspond to the particular features of each market (domestic and export) and have a varying impact on conditions and terms of sale, thus affecting price comparability.²²

In other words, according to the Court, the calculation of normal value and the calculation of export price constitute separate steps, governed by different rules. The Court refuses to recognize the overriding role of the "fair comparison" principles. It is the view of the Court that this principle only comes into play *after* export price and normal value have been determined according to their respective rules. Yet, one would have thought that the rules on adjustments should have been interpreted in accordance with the overriding fair comparison requirement. Indeed, the idea that a literal reading of the rules on adjustments needs to prevail even if it makes the basic comparison between normal value and export price unfair, does not make sense.

The new text of Article 2(9), as amended in 1988, makes it clear that the fair comparison requirement may not play any role in the determination of the method or basis of calculation of normal value or export price, but is only considered after they have been set.

It is submitted that the Community's administrative practice, as codified in Article 2(9), is inconsistent with the purpose expressed in the first sentence of Article 2(6) of the GATT Anti-Dumping Code which is to effect a fair comparison. In addition, the practice of the EEC authorities is inconsistent with the Article 2(6) principle that comparisons shall be made "at the same level of trade, normally at the ex-factory level."²³

Furthermore, the EEC could be accused of violating Article 2(1) of the Anti-Dumping Code. Article 2(1) of the GATT Anti-Dumping Code states:

For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export

²² *Minebea Company Limited v. Council*, case 260/84, Judgment of 7 May 1987 (not yet published). The Court came to the same conclusion in the *Electronic Typewriters* cases, *Canon In. v. Council*, joined cases 277 and 300/85, Judgment of 5 October 1988 (not yet published), at para. 37.

²³ The EEC anti-dumping practice has practically written the concept of comparison "at the same level of trade" out of existence. The Commission has implicitly acknowledged this, since its 1988 amendment of the Regulation provides for the elimination of all references to the notion of level of trade in Article 2(10) of the Regulation. Article 2(6) of the GATT Anti-Dumping Code makes it clear that due allowance shall be made in each case for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. The EEC practice falls short of this rule.

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price of the product exported from one country to another, is less than the *comparable* price in the ordinary course of trade, for a like product when destined for consumption in the exporting country. (Emphasis supplied)

The Code therefore clearly requires that prices used for determining normal value be comparable to the export price. Thus, the EEC practice of going further down the chain of distribution, using prices which are not comparable and then making insufficient allowances for differences,²⁴ may be deemed to be a violation of Article 2(1) of the Code.

It is not surprising that the Community first used this approach in cases involving Japanese exports.²⁵ Indeed, the new methodology especially discriminates against the type of products which constitute the bulk of Japanese exports to the EEC, i.e. consumer electronics, by requiring the setting up of an elaborate and expensive distribution and servicing network. In contrast, the restrictive rules applied by the Commission have only a limited impact on simple commodity-type products for which selling expenses are low.

2. Use of Artificial Selling, Administration and General Expenses (SGA) and of an Artificial Profit Margin in Constructed Value Determination

According to the Regulation,²⁶ the "constructed value" is determined by adding cost of production (computed on the basis of all costs in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses) and a

²⁴ The current EEC legislation provides an exhaustive list of selling expenses which may be deducted from the normal value. From export price, however, all costs incurred by importers may be deducted. The use of an exhaustive list is inconsistent with the Code. The purpose of Article 2(6) is to effect a fair comparison and the Regulation specifically refers to "other differences affecting price comparability." This suggests a need for flexibility in addressing situations which may arise. This flexibility is absent from the new EEC Regulation.

²⁵ See, e.g., Bell, *supra* note 5, at 15:
"Thus it becomes interesting to consider how a typical sale is made on the Japanese domestic market. Perhaps the most striking feature about Japan's internal set-up is the exceptional level of concentration in Japanese industry. Huge industrial groups dominate the market and generally they exercise tight control over the internal distribution network. This is particularly the case in the consumer electronics industry (the products which form the subject matter of most dumping investigations). In practice it is very common to find that consumer durables are sold through an elaborate sales structure where the producer/manufacturer has a controlling interest in the sales company (and may indeed also have a stake in the wholesaler and retailer as well). Thus on the domestic market there may exist several tiers of selling expenses which correspond to the marketing costs incurred in each successive stage of the distribution process. ... Of course, further down the chain of distribution more expenses will have been incurred and thus normal value will be commensurately higher."

²⁶ Art. 2(3)(b)(ii).

reasonable margin of profit. But despite the Article 2(4) GATT Anti-Dumping Code reference to “a reasonable amount for administrative, selling and any other costs and for profits”, in practice the EEC is not very “reasonable” when selecting such amounts.

It is now common practice for the EEC to add selling, administrative and general expenses, as well as profits, related to levels of trade lower in the chain than the level of trade at which the export prices are determined. Furthermore, the EEC adds selling, general and administrative expenses related to the distribution of the product on the domestic market, even though such expenses are not incurred in connection with the exported products.

After using constructed value to create a normal value which is not comparable to the export price, the EEC then applies extremely narrow interpretations of the allowance provisions in order to deny allowances for many of the differences that exist between the constructed normal value and the export price.

(a) SGA

Departing from previous case law,²⁷ the Commission stated for the first time in *Electronic Typewriters* that the selling, administrative and general expenses (SGA) to be included in the cost of production are those incurred in the domestic market of the exporting country, *not* those incurred in exporting to the Community. The Commission explained that, in its view, constructed value is a surrogate for domestic market price. Since, under the “new methodology” used in *Electronic Typewriters*, the normal value covers all SGA expenses incurred by domestic sales organizations where normal value is based on domestic prices, the Commission considered that the same should apply where normal value is based on constructed value.²⁸

The only adjustments which the Commission will accept are direct selling expenses. In other words, regardless of whether normal value is based on domestic

²⁷ See, e.g., *Cotton Yarns*, OJ (1981) L 347/19.

²⁸ *Electronic Typewriters*, OJ (1984) L 325/43, at points 19 and 20.

“Several exporters claimed that selling, general and administrative expenses (S, G & A) incurred by their sales organizations in Japan should not be included in the calculation of constructed value because *inter alia* export transactions were not made by these organizations, and such expenses were directly attributable to domestic sales and because the sales organizations in Japan should be assimilated to the related importers in the EEC whose costs are deducted in order to construct export price. The Commission considers that such expenses should be included in the determination of normal value for the following reasons:

– where normal value is based on domestic selling prices these prices, if they are in the ordinary course of trade, cover all S, G & A, incurred by the sales organizations;

– where normal value is based on constructed value, under the structure of Regulation (EEC) No. 2176/84 this surrogate method should yield the same result as above. Article 2(3)(b)(ii) therefore expressly provides that S, G & A expenses be included. However, this does not preclude the possibility in both cases of subsequently reducing the normal value, as determined, by those S, G & A expenses for which deductions are permissible under the terms, of Article 2(10)(c), which is not generally the case for overheads and general expenses.”

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market prices or constructed value, there is a tilt in favour of dumping. The Community compares a true ex-factory export price with a normal value, constructed at least one step beyond the ex-factory level, from which only a fraction of the selling expenses has been subtracted.

The Commission's current practice of using the SGA expenses incurred by the domestic sales organizations of the exporters has even been applied to a situation where the exporter had no sales on its domestic market. Perhaps more surprising, the Court of Justice upheld the Commission's methodology, stating:

It should be observed that, as is clear from the documents before the Court, TEC markets its products in Japan through a distribution company which it controls financially and to which it entrusts tasks that are normally the responsibility of an internal sales department of the manufacturing organization.

Even if TEC does not sell electronic typewriters in Japan and its subsidiary exclusive distributor in Japan sells only other products, the normal value of its electronic typewriters must be constructed for the purposes of the anti-dumping investigation as if they had been sold on the domestic market.

The division of production and sales activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity which carries out by what is in legal terms as well a single entity.

There would be discrimination if expenses necessarily included in the selling price of a product when it was sold by a sales department forming part of the manufacturer's organization were not included when that product was sold by a company which, although financially controlled by the manufacturer, was a legally distinct entity.²⁹

It has been suggested that the Community's approach of calculating SGA expenses "as if sales on the domestic market had taken place" may be necessary to avoid having "would be" dumpers use cheaper materials or more efficient production plants for their output sold for export than for their output sold on the domestic market.³⁰ However, in the Community's case law one does not find a single instance where the authorities claimed that an exporter had actually organized its production for export in a different way. Thus, the explanation offered as justification for the Community's approach does not hold up: a change from the methodology followed in previous cases can hardly be based on mere conjecture.

Moreover, it is questionable whether the change in methodology is compatible with Article 2(4) of the GATT Anti-Dumping Code, which defines constructed value as "the cost of production in the country of origin plus a *reasonable* amount for administrative, selling and any other costs and for profits." In this connection, the question arises how "reasonable" it is for the Community authorities to load domestic SGA expenses on to exported products, thereby denying exporters the opportu-

²⁹ *Tokyo Electric Company v. Council*, joined cases 260/85 and 106/86, judgment of 5 October 1988, not yet published, paras. 26-29.

³⁰ *Beseler & Williams, Anti-Dumping and Anti-Subsidy Law: the European Communities* (1986) at 59.

nity to establish that it is less costly to market a product for export than to sell it through a more complicated sales structure on the domestic market.

More fundamentally, the GATT Anti-Dumping Code requires that states, in determining normal value on the basis of either prices in the domestic market or export price to a third country, choose prices *comparable* to the export price. When constructing a normal value on the basis of the cost of production, plus a reasonable amount for selling, general and administrative expenses and profit, administering authorities are in a position to create a normal value truly comparable with the export price. This can be done by including those types of selling, general and administrative expenses which are comparable to the ones included or reflected in the export price. The EEC, however, has chosen to add in expenses such as overheads associated with distribution which are excluded from the export price and for which they later refuse to make any allowances. Therefore, the EEC's practice results in the construction of a normal value which is not comparable to the export price. Given the fact that all other tests set out in the Anti-Dumping Code clearly refer to comparable prices, the EEC's practice of adding in an amount for administrative, selling and other costs and for profit associated with, for example, the distribution function on the domestic market where such expenses have been excluded from the export price, cannot be classified as "reasonable."

(b) Profit

In the past, when calculating the "reasonable margin of profit" to be added to production costs in order to arrive at constructed value, the Community authorities retained a single profit margin for all constructed value determinations made in a given case. This single margin was based on average profitability figures for the *industry* concerned. The Community authorities have, however, departed from this practice since the *Electronic Typewriters* case. They now try to determine the profit margin on the basis of each *individual exporter's* average profitability on sales of the product under investigation.³¹

Unfortunately, however, when using the profit of the individual company in calculating constructed value, the EEC's methods for determining profit do not reflect commercial reality. The EEC does not look at the profitability of the company as a whole. Instead, it looks at the profitability of each individual model. If a model is sold at a profit, the profits are included in the EEC's averages, but if the model is not sold at a profit, then those prices are not taken into account in determining the

³¹ If the exporter concerned does not have sufficient profitable sales on the domestic market the Community will use the profits realized by other domestic producers. In *Photocopiers*, OJ (1987) L 54/12, reference was made to the weighted average profit realized by other domestic producers, whereas in *Electronic Typewriters* reference was made to the lowest weighted average profit of producers with sufficient profitable domestic sales (i.e. 47% on cost!).

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average profit.³² This leads to profit margins which are considerably higher than any company actually realizes.

Prior to *Electronic Typewriters*, the profit margins used by the Community typically ranged between 1 and 10%. In contrast, the new approach has given rise to much higher profit margins:

– Electronic Typewriters:	47% to 75% on cost
– Photocopiers:	14.6%
– Printers:	37% ³³

The theoretical justification of the new approach is that constructed value is a surrogate for domestic price and should therefore lead to a result similar to the one obtained if sufficient profitable sales had been made.

With respect to profit, Article 2(4) of the GATT Anti-Dumping Code states:

As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

Although the GATT Anti-Dumping Code clearly uses language broader than “like product” (“general category”), the EEC’s insistence that the profit must be that of a “like product” means that it often reaches profit determinations which are both artificial and unfair, instead of being “normally realized.”

In addition, the EEC’s use of an irrefutable presumption that sales at a loss are not in the ordinary course of trade goes beyond the language of the GATT Code. EEC practice fails to recognize that Article 2(4) of the GATT Code, which permits the rejection of sales when they are not “in the ordinary course of trade”, in certain circumstances, such as when a model is being phased out, permits sales at a loss to be considered as in the ordinary course of trade.

3. Use of an Artificial Profit Margin in a Constructed Export Price

The Anti-Dumping Regulation provides that the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer, *inter alia*, where it appears that there is an association between the exporter and the importer. In such event, allowance may be made for all costs incurred be-

³² For example, in the *Photocopier* case, the EEC kept “end of model” sales in the export price, thus keeping very low price sales in export price. The EEC, however, refused to treat such sales at below cost of the same models in the domestic market as being in the ordinary course of trade. They then proceeded to use constructed value for such models and added very high rates of profit. In other words, they added profits which a company could never hope to obtain on end of model sales. Yet, in the past, the EEC, when faced with end of model sales, excluded them from the calculations both in determining normal value and export price.

³³ *Typewriters*, *supra* note 16; *Photocopiers*, *supra* note 31; *Printers*, OJ (1988) L 317/33.

tween importation and resale and for a reasonable profit margin.³⁴ On the basis of this provision the EEC almost invariably constructs the export price when an exporter uses a related importer to sell to the EEC.

Not surprisingly, companies exporting to the EEC through subsidiaries located in the EEC Member States have found that the EEC's practice of constructing the export price almost always results in a higher dumping margin than that which would be found if the company had used an independent importer. This is especially true when the related importer has an elaborate distribution and serving network since the resulting high overhead costs are subtracted from the export price. Moreover, the EEC's practice of deducting a "reasonable" profit margin from the export price for the related importers which is in excess of the actual profit puts the exporter doing business through a related importer at a further disadvantage:³⁵ the higher the profit deducted, the higher the dumping margin.

In this connection it is important to note that the language of Article 2(6) of the GATT Anti-Dumping Code, does not contain the notion of a "reasonable profit"; instead Article 2(6) refers to "profits accruing" with the French text merely referring to the profit ("bénéfices"). These terms suggest that the profit deducted should be the actual profit; they clearly do not support the EEC's practice of deducting a "reasonable" profit higher than the actual profit made by the importer.

Moreover, while the EEC often refers to the use of the average profit margins of independent importers, exporters are never given access to the information used by the EEC to determine this average profit margin. And even if the profit margins used are the actual average levels of profit incurred by unrelated importers, the practice of using average profit margins to inflate the actual profit margin obtained by the related importer does not appear to be justified. Some companies acting as independent importers are making lower profits than the overage. If it is reasonable for an importer which has no relation with its exporter to make such levels of profits, there would seem to be no reason to assume that it is unreasonable for related importers to make profits lower than average.

4. More Frequent Findings of Sales Below Cost

The Anti-Dumping Regulation provides that, whenever there are reasonable grounds for suspecting that the price at which a product is actually sold in the country of origin is less than the cost of production during the investigation period, such prices may be considered as not having been made in the ordinary course of trade.³⁶

When deciding whether a sale has been made in the ordinary course of trade, Community authorities usually compare the weighted average domestic price during

³⁴ Art. 2(8)(b).

³⁵ Typically, "reasonable" profit margins used by the EEC ranged from 3 to 10 percent.

³⁶ Art. 2(4).

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the investigation period with the average costs of production during the same period. In fact, this method has even been used in the context of a production start-up or expansion phase, where one could not reasonably expect full cost recovery within a relatively short investigation period.³⁷ Moreover, Community authorities may consider certain sales as outside the ordinary course of trade even in situations where the average domestic price during the investigation period is above production cost. For example, in *Photocopiers*, the EEC regarded individual below cost domestic prices as being outside the ordinary course of trade where such prices were not concentrated in a limited period and amounted to at least 20% of domestic sales. As a result, the normal value was inflated artificially.

5. Prospective Exporters are Afforded the Worst Treatment

As a result of a practice adopted by the Commission a few years ago, prospective exporters are in the worst possible position with regard to EEC anti-dumping activities. The Community's new policy is to impose residual anti-dumping duties set at the level of the highest duty imposed in the case on all exporters not explicitly named in the regulation imposing anti-dumping duties. Furthermore, since the 1984 *Sodium Carbonate* case, the prospective exporters are no longer allowed either to offer a price revision undertaking or to apply for a review unless they have exported a substantial volume (and paid the highest duty).

The Commission has justified this policy on the following grounds:

- a) it is difficult to determine an appropriate export price for a company that has not exported to the Community, since any data which may be available are likely to relate to another period or to another destination and would therefore be of questionable relevance;
- b) it is also likely to be difficult or impossible in the case of the potential exporter to determine the volume of any possible future exports and, therefore, what impact they would have on the Community. This is important in cases where, for those parties already exporting, a price level is set, by an undertaking or the imposition of a duty, to eliminate injury to the Community industry and where the volume of sales of the imported product is likely to be a decisive element in the computation of this price level. Any exports by companies which have not previously exported but which have given undertakings would be likely to lead to changed circumstances as compared to those prevailing during the period under investigation and could necessitate a revision of the price level required;
- c) an anti-dumping investigation should, in the interest of all parties concerned be conducted expeditiously. If potential exporters were to be investigated, this would result in an unreasonable administrative burden on the investigative authorities, would lead to a prolongation of the investigation and would thus impede their effectiveness in view of the statutory time requirements.

³⁷ *Ballbearings*, OJ (1984) L 193/1.

Although the non-acceptance of undertakings offered by non-exporters could be disadvantageous for them, it is considered in the light of the foregoing, that in general this course of action is not unreasonable. Moreover, if they begin to export to the Community, it may be appropriate to apply Articles 14 and 16 of Regulation (EEC) No 2176/84 relating respectively to reviews and refunds of anti-dumping duties.³⁸

Whatever the merit of the practical grounds invoked by the Commission, the fact remains that the fate of the prospective exporter is particularly unfair and inconsistent with the GATT Anti-Dumping Code, Article 8(2) of which states:

When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amount in each case, on a non-discriminatory basis on imports of such products from *all sources found to be dumping* and causing injury...

By definition, a source of imports which has never exported the product to the EEC cannot be considered to have been found to be dumped and causing injury.

Moreover, EC practice may be construed as violative of Article 8(3) of the Code, which states:

the amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

For companies which have never exported to the EEC and hence for which no margin of dumping has been established, it is arguable that any amount of duty would be in excess of the dumping margin.

In this regard, one must note that the only section of the GATT Anti-Dumping Code which explicitly refers to the imposition of anti-dumping duties on companies which have not been found to be dumped is Article 8(4), which deals with basic price systems. In such systems, the Code requires very specific safeguards. For example, the maximum level of the basic price may not exceed "the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing."

It should be noted that the Community authorities now seem to be reconsidering the issues of treatment of newcomers. In *Video Cassette Tapes*,³⁹ the Commission expressed its willingness "to initiate without delay a review proceeding" for newcomers. It remains to be seen how this apparent change in policy will be implemented in practice and in particular, whether during the course of the review proceeding exports of newcomers will remain subject to the residual duty or not. If so, the residual duty will remain, in most cases, an insurmountable market entry barrier preventing the newcomer to actually start exports to the EC. In the absence of any

³⁸ *Sodium Carbonate*, OJ (1984) L 311/26.

³⁹ *Video Cassette Tapes (Korea, Hong Kong)*, OJ (1989) L 174/6.

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export sales to the EC, it is hard to see how a review can take place, in particular, how the existence or absence of dumping will be established.

In addition, Article 8(4) contains provisions governing review and refunds which require that the facts be investigated, and any excess anti-dumping duties be reimbursed, as quickly as possible. Outside of basic price systems, however, any practice of imposing a residual duty applicable to companies which have never exported the product is of questionable legality.

In the EEC prospective exporters' problems are compounded by the fact, explained under 8(b) below, that the EEC refund system is so inadequate that potential exporters forced to pay the highest duty sometimes find it totally impossible to find customers. And even if they do find customers, and sell to those customers at non-dumped prices, the EEC is very slow in responding to refund requests.

6. Injury Findings are Stretched Beyond Reason

The Community's interpretation of the Anti-Dumping Regulation is not only biased with respect to dumping findings. Rather, a similar bias can also be found in connection with injury findings.

(a) All Imports are Deemed to be Made at Dumped Prices

Although the EEC practice in assessing injury is extremely non-transparent, it appears that in assessing injury the EEC treats all sales by companies found to be dumping as if they were dumped sales. Indeed, one will never see a distinction made in any EEC Anti-Dumping Regulation between dumped and non-dumped sales by companies which have been found to be dumping on average. This practice is clearly inconsistent with the GATT Anti-Dumping Code, specifically, with Code Article 3(4) which requires states to demonstrate "that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code" and stresses that "injuries caused by other factors must not be attributed to the dumped imports."

(b) Price Undercutting is Increasingly Measured by Reference to Hypothetical Instead of Actual Prices

According to the Anti-Dumping Regulation, significant price undercutting by the dumped imports, as compared with prices of like products in the Community, is a prime indicator of injury.⁴⁰ Another indicator is the injurious impact on local industry, which, *inter alia*, can be measured by reference to prices, that is, by the

⁴⁰ An. 4(2)(b).

“depression of prices or prevention of price increases which otherwise would have occurred.”⁴¹

The Community interprets these two separate provisions in a peculiar way. From the moment price depression exists, the Community no longer measures price undercutting by reference to actual prices but by reference to a hypothetical target price based on cost of production and a reasonable profit margin. In the *Allied (II)* case, the Advocate General came out against such an interpretation.⁴² But in the *Electronic Typewriters* case the European Court of Justice affirmed the Community’s approach, stating:

TEC then asserts that the determination of the injury is vitiated by the fact that the level of price undercutting was not established pursuant to Article 4(2)(b) of Regulation No 2176/84 on the basis of a comparison between the import prices and the prices of like products in the Community on the one hand, but on the “target price”, namely amounts calculated on an artificial and hypothetical basis, on the other.

In order to establish to what extent that submission is well founded, it must be borne in mind that the institutions were unable to determine the injury until after the complaint was lodged by the Community manufacturers on 15 February 1984, whereas it is apparent from the documents before the Court that the Community industry had already some time before begun to feel the effects of the Japanese imports which were subsequently the subject of the anti-dumping proceeding. The prices of the Community products during 1984 could therefore no longer be used for determination of the injury within the meaning of Article 4 of Regulation No 2176/84, in so far as they had already been reduced for some time with a view to resisting the ever-growing pressure from Japanese imports.

In the light of the foregoing considerations, constructing the price which would have been obtained within the Community if it had not been subject over a long period to downward pressure because of Japanese imports is the only way of ensuring that the comparison provided for in Article 4(2) (b) of Regulation No 2176/84 is not rendered meaningless.⁴³

In other words, the Community does not accept a “meeting competition” defence in anti-dumping cases.

(c) Even a Small Increase in Volume may Point to the Existence of Injury

When considering the ratio of imports from a given country to Community consumption, even market shares as low as 2.47% have been found to cause injury.⁴⁴

⁴¹ Art. 4(2)(c).

⁴² *Allied Corporation v. Council*, case 58/83 not yet reported. “I do not consider it compatible with the working of Article 4 or with the market-economic aspect of its background if, for the purposes of their price comparison, the Commission ... determines a model market price for Community producers on the basis of production costs plus a normal profit margin.”

⁴³ *Tokyo Electric Company v. Council*, joined cases 260/85 and 106/86, judgment of 5 October 1988, not yet reported, paras. 48-50.

⁴⁴ See, e.g., *Mounted Piezo-Electric Quartz Crystals*, OJ (1980) L 162/62.

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(d) The Cumulation of Imports of Different Origin Facilitates a Finding of Injury

It is standard practice for the Community to cumulate all imports of whatever origin, even if they are very small in volume. The Community looks at the continued impact of all imports.

(e) The Causal Link Between Dumped Imports and Potential Injury is Readily Assumed to Exist

Article 3(1) of the GATT Anti-Dumping Code states:

A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

But although the Code requires positive evidence that injury is caused by dumped imports, the EEC does not apply a strong standard of proof with respect to causation. Moreover, it refuses to consider evidence that the market was created by the companies importing the product or that price decreases were started by European producers rather than those importing the product. If both dumping and injury are found, the dumping is assumed to be the cause of the injury.

7. Absolute Discretion in Accepting or Rejecting Price Revision Undertakings

The acceptance by the Community authorities of an undertaking whereby either prices are increased or exports cease results in the termination of the proceedings without the imposition of anti-dumping duties.⁴⁵

However, since the Community discovered the use of anti-dumping actions as an instrument of commercial policy, it has become reluctant to accept undertakings offered by exporters from countries *vis-à-vis* which the EEC wants to exploit the deterrent effect of its anti-dumping measures in full. Thus, for example, in the case involving *Hydraulic Excavators* from Japan, the Council refused to accept price revision undertakings which had already received the blessing of the Commission. The Council justified its rejection simply by referring to "the current state of relations with Japan."⁴⁶

⁴⁵ Art. 10(2). It is interesting to note that, at times, the EEC has also accepted quantity undertakings, i.e. commitments not to exceed a certain quota. See, e.g., *Paint Distemper, Varnish and Silimar Brushes*, OJ (1987) L 46/45; *Sheets and Plates*, OJ (1988) L 23/13.

⁴⁶ OJ (1985) L 176/1.

This "political" justification is obviously unfair to the exporters concerned; their fate is sealed by considerations over which they have no control. Moreover, the unfairness is compounded by the inadequacy of the Community's refund procedure.

8. Review and Refund Procedures are Inadequate

(a) Administrative Review

Article 14 of the Anti-Dumping Regulation provides that regulations imposing anti-dumping duties are subject to review. A review may be held at the initiative of the Commission or at the request of a Member State. Any "interested party" may also request a review. But in such cases, the interested party must submit evidence of "changed circumstances sufficient to justify the need for such review." In addition, at least one year must have elapsed since the conclusion of the investigation. If warranted, the anti-dumping measures will be amended, repealed or annulled on review.

It is important to note, however, that review is not automatically granted. The Commission enjoys a margin of discretion in deciding whether or not to accept an application for review. In the past the Commission has accepted the absence of dumping or injury as grounds for the opening of a review procedure. It must be stressed, however, that review is discretionary and there is no certainty that requests for review made by exporters will be granted.

Moreover, even if a review is granted, the actual procedure often ends up being an unsatisfactory vehicle to remedy changed circumstances. First, review tends to take almost as long as the initial proceeding. Second, the Community authorities enjoy considerable discretion regarding the determination of the relevant investigation period and the updating of certain information.

Every year the Commission publishes a report for the benefit of the European Parliament on its anti-dumping activities. If one looks at the number of review proceedings, it is *prima facie* clear that they are much too infrequent to adjust the findings made in the initial proceeding to the ever-evolving economic situation. Since, in the EEC, duties are imposed prospectively, i.e. without any finding that the imports subject to the duty have been dumped, it is obvious that the absence of systematic reviews in practice implies that, in the EEC, anti-dumping duties are in effect a customs tariff hitting dumped and un-dumped exports alike. Paradoxically, it also means that exporters who raised their prices will have higher ad valorem duties imposed on their exports to the EEC, whereas those who reduced their prices and increased their dumping margin will attract lower duties.

(b) Refund Procedure

Article 15 of the Anti-Dumping Regulation allows importers to claim the reimbursement of anti-dumping duties where they can show that "the duty collected ex-

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ceeds the actual dumping margin ... consideration being given to any application of weighted averages." The Commission has published a notice on the reimbursement of anti-dumping duties laying down a number of guidelines on various procedural and substantive issues raised in refund proceedings.⁴⁷

From the Commission's notice, it is clear that the filing of a refund application will in effect trigger an investigation into the normal value and the export price of the exporter concerned during a new reference period (i.e. normally the six months preceding the relevant imports). The refund application will be granted only insofar as the weighted average dumping margin of all importers during the reference period is lower than the duty.

The following problems arise in connection with the EEC refund procedure:

- Refund claims must be filed by all importers. If the importers are unrelated, they may not have all the necessary information about normal value and about prices charged to other importers.
- The processing of refund claims takes several years and the procedure is lacking in transparency.
- The Commission's practice with respect to refund applications filed by related importers makes it difficult for such importers to qualify for a refund. Unless the product is resold to the first independent buyer on a duty unpaid basis, the Commission will treat the anti-dumping duties paid by the related importer as a cost incurred between importation and resale for purposes of determining the export price. A reimbursement will be granted only if the resale price is increased, in total or in part, by an amount equivalent to the dumping margin and the anti-dumping duty.
- Refund applications can be filed only to the extent the duty exceeds the dumping margin. In other words, no refund applications can be based on the ground that the duty exceeds the injury margin.
- The question of whether or not interest should be paid on the amount of refunded anti-dumping duties is left to Member State law. In most Member States no interest is paid.

For all these reasons it is obvious that the Community's refund system is not operating satisfactorily. To put it mildly, it is truly amazing that the EEC, with its highly protectionist methods leading to "unjust enrichment", has managed to get away virtually uncriticized for so long. It is submitted that the "double counting" of the duty in the event of exports through a related importer seems particularly unjustifiable. Indeed, it is improper to treat duties which are refundable as a cost. The Community in so doing is actually prejudging the whole idea of refundability. As long as a duty may qualify for a refund, it should be treated as a neutral element, not as a cost. Hence, the Community's practice violates Article 8(3) of the GATT Anti-Dumping Code.⁴⁸

⁴⁷ OJ (1986) C 266/2.

⁴⁸ Article 8(3) of the GATT Anti-Dumping Code states:

In contrast, the U.S. authorities treat anti-dumping duties as being deposits of estimated duties. After a period of time these duties either become collectable or are reviewed. Needless to say, the practice of treating a duty as being an estimate of the amount actually owed is considerably more equitable. It does not prejudice the issue of whether the duty is refundable.

II. Codification of the Administrative Practice

On 11 July 1988, the Council of Ministers adopted a series of amendments to the Anti-Dumping Regulation.⁴⁹ The Commission's Explanatory Memorandum introducing the amendments stated that it was necessary to codify the Community's existing practice in order to avoid increased litigation at the new Court of First Instance concerning the "relatively vague principles" contained in the Community's anti-dumping legislation. The amendments were described as being "essentially technical in nature."⁵⁰

1. Quick Fix Legislation

This explanation is truly remarkable in that the clear implication is that the amendments were rushed through the Council as a "quick fix" to prevent the new court from questioning the Commission's administrative practice. Its codification would, indeed, make it impossible for the Court of First Instance to call into question some of the Commission's interpretations of vague and broad concepts.

The fact that the Community's institutions felt it necessary, in the face of the imminent creation of a Court of First Instance, to use their secret legislative process⁵¹ to present the new court with a "fait accompli"⁵² shows that the Commission must have felt that its practice might not have withstood in-depth judicial scrutiny. The Commission's apparent fear of judicial scrutiny is corroborated by the

"The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin the amount in excess of the margin shall be reimbursed as quickly as possible."

⁴⁹ See *supra* note 1.

⁵⁰ Proposal for a Council Regulation (EEC) amending Regulation (EEC) No. 2176/84 on protection against dumped or subsidized imports from countries not members of the European Economic Community, presented by the Commission, COM (88) 112 final, Brussels, 22 March 1988, at 3.

⁵¹ No draft of the proposed amendment has been published in the Official Journal or communicated to the European Parliament.

⁵² It is also interesting to note that the amendments were adopted several months before the judgment of the Court of Justice in the *Electronic Typewriters* case, *supra* note 22. In other words, the Commission and Council did not bother to wait for the Court's judgment on a number of issues which they wanted to "codify."

Council of Ministers' decision to exclude anti-dumping cases from the jurisdiction of the new Court of First Instance, at least for the first two years of its existence. Waking up to the spectre of increased judicial control over its anti-dumping policy, the Commission caused the Council first to plug the holes in the anti-dumping legislation and then, even better, to bar the Court of First Instance from anti-dumping cases altogether for at least two years.

This last minute legislative surgery occurred in total disregard of the recommendations of the European Parliament and the Court of Justice. According to a press report, the European Parliament's recommendation brought an immediate warning from President Delors: "If we move to enlarge world trade, then there will be more anti-dumping cases. Lengthy cases in the court will only weaken our position."⁵³

Delors' statement is difficult to understand; when foreign exporters file an appeal in court duties are already in place, hence, European industry is protected. Furthermore, Delors' statement, which could be interpreted as saying that all time spent in court is wasted, fails to acknowledge that the credibility of the Community's trade policy should be based on serious judicial review. The world has the right to know how the Commission's staff has marshalled the facts. Sunlight is the best disinfectant.

2. The Codification Includes New Methodology

Although the Commission's Explanatory Memorandum made it look as if the proposed new amendments were nothing but a codification of existing administrative practice, in fact, new approaches have been introduced.

(a) Insignificant Adjustments

The new Article 2(10)(e) provides that no adjustments will be made for insignificant amounts with insignificant adjustments defined as individual adjustments having an impact of less than 0.5 percent on the value or price.

Although this provision seems innocuous – the preamble indicates that it is motivated by "reasons of administrative convenience" – it can have a major impact on dumping determinations. Several individual adjustments with less than 0.5 percent impact can add up to a significant amount. Accordingly, Article 2(10)(e) appears to violate the GATT Anti-Dumping Code, which requires that adjustments be made for the "differences affecting price comparability"; the Code does not provide for the possibility of ignoring differences below a certain threshold for reasons of administrative convenience. Furthermore, since the 0.5 percent limitation does not apply to calculations pursuant to Article 2(8)(b) which deals with deductions from the export

⁵³ *Financial Times* (16 June 1988).

price when the export price is constructed, the amendment will have the effect of increasing dumping margins.

(b) Additional Anti-Dumping Duty

An even more important innovation introduced at the time of the 1988 codification concerns the new rule, contained in Article 13(11), requiring exporters to pass the anti-dumping duties on to customers. The new rule provides that additional anti-dumping duties may be imposed where it is found that the anti-dumping duty has been borne by the exporter in whole or in part. In other words, the additional duty is an anti-absorption duty. It is meant to compensate for the amount of the duty borne by the exporter.⁵⁴

If an interested party wants there to be an investigation into possible absorption of the anti-dumping duty, the party may file a complaint to initiate the proceeding. During the investigation, the exporters and importers concerned will have the opportunity to defend themselves, *inter alia*, by showing that the absence of a price increase corresponding to the anti-dumping duty is due to a reduction in the distribution costs and/or profits of the related importer.

In the absence of any case law so far under this new provision, it is premature to discuss its possible implementation in any detail. Suffice it to say, however, that a number of practical problems are bound to arise. For example, how will the Commission establish whether there has been a price increase or not in the event new models are being sold for which no known resale price exists prior to the imposition of duties?

In any event, the new rule is questionable under the GATT Anti-Dumping Code. First, the Code prohibits anti-dumping duties from being imposed without an accompanying statement explaining that there is dumping which causes injury. Hence, the imposition of "additional" duties without an examination of dumping and injury violates the GATT Code.⁵⁵ Second, the possible "retroactive" application of the additional duty is also questionable under GATT. Article 11 of the GATT Anti-Dumping Code prohibits the retroactive application of anti-dumping duties except for retroactive collection of provisional duties or in cases of "sporadic" dumping. A retroactive application of additional anti-dumping duties does not fit into these exceptions.

⁵⁴ The preamble to the newly codified Anti-Dumping Regulation states: "[e]xperience has shown that it is necessary to prevent the effectiveness of anti-dumping duties being eroded by the duty being borne by exporters. It is appropriate to confirm that, in such circumstances, additional anti-dumping duties may be imposed, where necessary retroactively."

⁵⁵ In the context of its defence of the so-called "parts amendment", i.e. Article 13(10) of the Anti-Dumping Regulation, in GATT, the EEC has taken the position that the parts amendment is not a measure under Article VI of GATT or the GATT Anti-Dumping Code but rather is based on Article XX(d) of GATT. Perhaps the EEC might take the same position with respect to Article 13(11).

III. Limited Judicial Review

The Community authorities enjoy a wide discretion in applying the trade defence rules. Arguably, such a wide discretion may be necessary to adjust the Community's policy swiftly to the changing needs of the economy. However, it presupposes the existence of a system of checks and balances to make sure that the discretion is not abused.

In the absence of a meaningful control by the European Parliament over the discretionary powers of the Commission and Council, it remains for the European Court of Justice to provide the necessary checks and balances. Unfortunately, the Court has generally been reluctant to scrutinize the use the Community authorities have made of their powers. Although the Court's powers are very broad, encompassing both the facts and the law, it has, from the outset, perceived its role more as that of a constitutional or Supreme Court dealing with legal issues than as a true Court of Appeals with plenary jurisdiction.⁵⁶ For example, in *Grundig*, an early competition case, the Court emphasized that:

[t]he exercise of the Commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based.⁵⁷

The rules of evidence followed by the Court in appeal proceedings are thus clearly less geared to actual fact finding than to review of the legality of the decision adopted by the Community authorities.

Although the paragraph of the Court's *Grundig* ruling quoted above refers to the Commission's power to grant exemptions under Article 85(3), it accurately reflects the European Court of Justice's overall attitude concerning whatever economic evaluations the Commission makes in its decisions. As a matter of fact, 19 years later, in its *Remia* judgement, in a case which the Commission had decided under Article 85(1), the Court came to the same conclusion. It noted that the Commission's decision was based on an appraisal of complex economic situations and stated that re-

⁵⁶ See, for example, the memorandum presented by the President of the Court to the Presidents of the Council of Ministers and of the Commission in the summer of 1978. In this memorandum a proposal was made for the creation of a court of first instance. According to the Court's proposal: "[s]uch a reform would have the advantage not only of bringing the Community judicial system more into line with those of all Member States, but also – and above all – of making the Court to a large extent the judge of questions of law rather than of fact, so concentrating its activities on what is its true and main role within the framework of the Community." *European Documents*, No. 1034 of 20 December 1978, at 4.

⁵⁷ 299 ECR (1966) at 347.

view of such an appraisal therefore had to be limited to verifying whether the relevant procedural rules had been complied with, whether the facts on which the choice was based had been accurately stated and whether there had been a manifest error of appraisal or a misuse of powers.⁵⁸

The Court has adopted the same approach in anti-dumping proceedings. In the *Miniature Bearings* case, decided in May 1987, the Court cited its *Remia* judgement, given in the competition field, to explain why it would only engage in a limited review of the facts. This means that in anti-dumping cases also it is the Court's intent not to interfere with the appraisal of the facts made by the Commission and Council unless there has been a "manifest error of appraisal" or "a misuse of powers"⁵⁹: the Court assumes that the Community authorities have properly discharged their burden of adducing sufficient evidence of breach of the competition, anti-dumping, or any other rules, if they have not committed any "manifest error" when addressing the facts. But discretion cannot and should not mask the standards of evidence on which such a breach can properly be based – *in dubio pro reo*. The reluctance of the Court of Justice to review the facts established by the Community authorities, in effect, forces the defendant to prove his innocence.

Admittedly, the Court of Justice has a heavy workload in a number of fields, several of which could be deemed more important than anti-dumping cases.⁶⁰ This may, in part, explain why the Court has not felt a great desire to engage in any substantial fact-finding on its own in order to double-check or improve upon the EEC Commission's findings. The fact remains, however, that the proceedings before the Commission are administrative in nature. It is not an adversarial type of judicial procedure because the Commission combines the functions of prosecutor, judge and jury. Furthermore, the Commission (and, *a fortiori*, the Council) is not a tribunal but a political agency. As a result, its decisions are not made on purely legal grounds but emerge in a political context.

Clearly, when so much power is vested when the EEC Commission as the prime enforcer of anti-dumping laws, a better system of checks and balances is absolutely essential. The current "one shot" appeal before the Court of Justice is manifestly insufficient to guarantee an exhaustive analysis of the facts. It is, therefore, submitted that the need for extending the scope of jurisdiction of the Court of First Instance, to include the review of trade cases, remains paramount. Indeed, the enforcement of commercial and industrial policy decisions under the Community's anti-dumping laws can only be successful in the underlying facts have been properly

⁵⁸ *Remia v. Commission* case 42/84, not yet reported.

⁵⁹ See *supra* note 10.

⁶⁰ Notably, some of the Court's truly "constitutional" functions, e.g., actions against Member States for failure to comply with Treaty obligations, actions brought by Member States regarding the legality of acts of Community institutions, referrals by national courts on matters involving the interpretation of the Treaties.

established. This in turn requires open and exhaustive procedures allowing the defendants to put all their cards on the table in the context of a fair trial.

Conclusion

Over twenty years of anti-dumping enforcement have produced very little debate in the EEC on the purpose and the merits of anti-dumping measures. The technicalities inherent in the application of the anti-dumping laws have proven to be a convenient smokescreen against public scrutiny.

This low visibility is unfortunate because it implies that a whole segment of the trade and industrial policy of the EEC remains virtually unchecked.

In addition to the defendant exporters and importers, the obvious victims of this state of affairs in the EEC are the users and consumers. Their interests tend to suffer from benign neglect. Furthermore, one may rightly wonder whether in the end even European industry's interests are being served by the kind of protection resulting from anti-dumping activities. As noted by one observer, "Anti-Dumping procedures amount to a hopeless attempt to remedy faults *ex post* that can only be tackled by greater alertness among European producers *ex ante*..."⁶¹ Instead of the governments picking the winners, the losers pick the governments."⁶²

It has often been stated that anti-dumping proceedings act as a safety valve in a liberal trade order: they provide an outlet for protectionist pressures which otherwise might shatter the foundations of the liberal trade order itself. However, this premise is only valid if all interested parties can have full faith and confidence in the ultimate fairness of the system. The system's credibility presupposes transparent procedures, objective findings and a comprehensive judicial review instead of today's obscure results of backroom computations which tend to remain unchecked by the Court.

Ultimately, the issue is whether Europeans want to raise their tariffs to protect the industries concerned. To leave this crucial question to a purely bureaucratic mechanism rather than give it higher level consideration is a step backwards for the EC – not an advance to "fairer" trade. It is one for which each citizen of the EC is paying a high price.⁶³

⁶¹ See 'An EC Tax on Efficiency', *Financial Times* (31 May 1988).

⁶² See 'The Abuse of Anti-Dumping', *Financial Times* (5 September 1988).

⁶³ See Messerlin, 'EC Anti-Dumping Policy: "Un chat est un chat"', *Financial Times* (15 December 1988).