

JUDICIAL REVIEW OF
SAFEGUARD MEASURES
IN THE
EUROPEAN COMMUNITY

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ABSTRACT OF THESIS (Regulation 7.9)

This thesis is an attempt to analyse the jurisprudence of the European Court of Justice in the review of safeguard measures in the European Community. The safeguard measures considered are the Community's anti-dumping and anti-subsidy rules under Regulation 2423/88, safeguard measures under Regulation 288/82 and rules to combat illicit commercial practices under Regulation 2641/84. These instruments are part of the European Community's arsenal designed to counteract unfair trade practices of Third Countries. Emphasis is placed on the anti-dumping rules given that the measures imposing anti-dumping duties are most frequently challenged before the Court.

The thesis begins with a synopsis of the Community's competence to deal exclusively with these matters. The respective roles of the Community authorities and the Member States in the adoption of protective measures is also considered.

In order to understand the rationale of the Court's rulings in cases involving safeguard measures each of the instruments are viewed from an international and European perspective. The latter involves an analysis of the Community's legislation with respect to the substantive and procedural rules governing the imposition of protective measures to combat unfair trade practices of Third Countries.

Having placed the safeguard measures in their proper perspective, judicial review by the Court is viewed first from the standpoint of an applicant's locus standi or standing to challenge a Community act imposing protective measures. If an applicant has locus standi he may apply to the Court for an award of interim measures pending the outcome of the main application. The rules relating to such awards are considered and the Court's rulings in cases involving safeguard measures are analysed. Judicial review 'proper' in the sense of the Court's review of the merits of the cases that have come before it to date are considered in the light of the grounds of review in Article 173 of the EEC Treaty. This final chapter attempts to determine the extent to which the Court is prepared to review the findings of the authorities upon which the measures were adopted.

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INTRODUCTION

In a recent article in the Financial Times¹ Mr. Tien, the Vice Chairman of the Japanese Committee on anti-dumping proceedings, in criticising the European Community's anti-dumping policy was of the opinion, like so many others outside the Community, that the creation of the Single Market in 1993 would bring with it a "fortress Europe" mentality hurting export led economies such as Japan.

Safeguard measures dating back to the beginning of the Twentieth Century have been used by the major trading nations of the Western world to combat unfair competition in the market place. This unfair competition normally, but not always, takes the form of price discrimination, i.e. subsidising low cost exports with profits from selling at high prices in the domestic market.

By far the greatest weapon in the European Community's arsenal of safeguard measures are the anti-dumping rules. Anti-dumping duties may be imposed if it can be established that dumping has caused injury to Community industry. Dumping occurs when a product is sold for export at a price lower than it is sold on the domestic market. Anti-dumping duties can be applied on a selective basis to those producers whose products cause injury to Community industry. It is one of the exceptions to the GATT (General Agreement on Tariffs and Trade) principle that safeguard measures must be applied on a non-discriminatory basis.

The Community's trading partners, in particular Japan, are now of the opinion that the Community is increasingly applying its anti-dumping

1 1st September 1989.

legislation in a protectionist manner. Up to a few years ago Hong Kong was subject to only one anti-dumping proceeding which was subsequently discontinued. More recently, it has been the subject of an increasing number of investigations. To its surprise, in December 1987, its imports of video cassette tapes were subject to anti-dumping duties in the region of 22 per cent. The Hong Kong producers argued that the Community rules were applied in an arbitrary and unfair manner. Given the small size of its market, Hong Kong, they contended, was not an example of dumping in the classical sense of subsidising low cost exports with high profits obtained on the domestic market.

Another trend to emerge with the new anti-dumping policy is the greater number of "high tech" consumer products which inevitably are subjected to higher duties. Because such products involve greater amounts of money, investment and employment there is greater pressure on the Community authorities to take action where injury is established. It is due to the importance of the anti-dumping legislation that the Chapters to follow hereon concentrate on the application and review of these rules. Reference will be made to the European Coal and Steel Community (ECSC) and European Atomic Energy Community (EURATOM) Treaties only in passing. Therefore reference to the Treaty is intended to refer to the Treaty of Rome or the EEC Treaty and reference to the Community is intended to refer to the European Economic Community.

Apart from the anti-dumping legislation, the Community also has at its disposal anti-subsidy legislation to counteract the use by foreign governments of export and domestic subsidies. It can also impose quotas, designed to reduce the influx of low cost imports which have not been dumped but which nevertheless cause injury to Community industry. New legislation has been brought into force designed to combat 'illicit commercial practices' which cause injury to both Community imports and exports:

The review of safeguard measures by the Court involves an analysis of the procedural and substantive rules relating primarily to an action for annulment of a Community act under Article 173 since this is by far the most important right of action at the disposal of an affected party. Because the application of safeguard measures involves an evaluation of highly complex and technical findings, the writer also considers the extent to which the Court will review the exercise of powers which confer on the Community authorities a margin of discretion.

Chapter 1 deals with the competence of the Community authorities to bind both the Community and the Member States in the field of external trade relations. The role and functions of the Community authorities and the Member States in the application of safeguard measures are also examined.

Chapter 2 concerns safeguard measures from an international perspective. The chapter begins with an overview of the General Agreement on Tariffs and Trade ("the GATT") with respect to its aims and principles. The remainder of the chapter is a synopsis of the main safeguard provisions in the GATT. In the second section the anti-dumping rules are considered from an historical, an economic and a legal perspective. The third section concerns the rules in the GATT relating to subsidies and countervailing duties, and in particular Articles XVI and VI. The fourth section deals with the general safeguard provision, namely Article XIX, and the final section deals with those GATT rules which are within the ambit of the Community's new commercial policy instrument and in particular the rules relating to dispute settlement.

In Chapter 3 the safeguard measures are considered from a European perspective. Those measures considered are Regulation 2423/88 - anti-dumping and anti-subsidy rules; Regulation 288/82 - common

rules for imports; and Regulation 2641/84 - new commercial policy instrument. Each is analysed in relation to its procedural and substantive rules.

Chapters 4 to 6 deal specifically with the matter of judicial review. The analysis concentrates primarily on the Community's anti-dumping rules as these have been almost exclusively the subject of Court proceedings to date.

Chapter 4 concentrates on the admissibility of actions, i.e. has the applicant sufficient locus standi or standing to challenge the disputed Community act before the Court? It is divided into two parts. Part one deals generally with the matter of locus standi in relation to the various rights of action at the disposal of an affected party. The second part of the chapter deals specifically with the various categories of persons who would seek to challenge a Community act imposing protective measures under the various safeguard measures.

Chapter 5 involves an examination of the jurisprudence of the Court with respect to the granting of interim measures in proceedings involving safeguard measures.

Chapter 6 deals with the review by the Court of the substantive issues in proceedings involving safeguard measures. Part one of the chapter involves a synopsis of the main grounds of review under Article 173. The second part of the chapter analyses the jurisprudence of the Court to date in relation to each of these grounds of review. The analysis concentrates on the application by the Court of the general principles common to the laws of the Member States and also the extent to which the Court will review the exercise of the powers of the Community authorities which confer on them a margin of discretion.

The law is stated, as much as is possible, as at 31st March 1990.

CHAPTER 1

THE EXTERNAL COMPETENCE OF THE EUROPEAN COMMUNITY ON THE INTERNATIONAL PLANE AND THE POWERS OF THE COMMUNITY AUTHORITIES IN THE ADOPTION OF SAFEGUARD MEASURES

INTRODUCTION

In dealing with unfair trade practices by third countries in the European Community it is principally the Community authorities and not the Member States who regulate and adopt safeguard measures. This power flows from the fact that the Community has for the most part exclusive competence in dealing with matters affecting trade with third countries.

The aims of this chapter are to analyse the external competence of the European Community on the international plane, and to consider the basic powers of the Community authorities and the Member States in the context of the main safeguard measures examined in the chapters which follow.

1 . THE EXTERNAL COMPETENCE OF THE EUROPEAN COMMUNITY

The scope and extent of the Community's capacity to act on the international plane is determined in accordance with the rules of international law, by the legal nature of the Community and by the powers assigned to it under the Treaties¹.

1 Elhermann, "Scope and extent of the capacity of the Community to act on the international plane", House of Lords Select Committee on European Affairs, Report 1985.

The further the Common Market comes to repricate a "domestic" market for goods originating within the Community the greater is the need for uniformity in the rules applying to the goods originating in third countries and imported into the Community. This is all the more crucial when one takes into account the increased economic interdependence of the major industrialised nations over the last two decades. Furthermore, the Community is increasingly dependent on the world economy both for the supply of raw materials and as an international market for its goods.

In the field of external relations, the EEC Treaty vests power in the Community in a limited number of areas, for example those Articles² which deal with the Common Commercial Policy (hereinafter referred to as "the CCP").

Apart from these express provisions, the European Court of Justice (hereinafter referred to as "the Court"), has developed a doctrine of implied powers³. In relation to the Community's Commercial Policy the Court stated in Opinion 1/75⁴ that within the sphere of the CCP the Community is competent to conclude agreements with regard to a particular facet of that policy even if it has not yet established any Community rules which occupy the field internally.

2 Articles 110-116.

3 Case 22/70 Commission v. Council [1971] ECR 263.

4 [1975] ECR 1355.

1.1. The Scope of the Community's Powers within the CCP

The main Treaty provision with regard to the CCP is Article 113. This confers on the Community the power to create and conduct a Common Commercial Policy based on uniform principles. It refers specifically to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those taken in the case of dumping or subsidies. Apart from these express powers the scope of Community powers in the area of the CCP depends on the definition of the term "Commercial Policy".

This was defined by the Court in Opinion 1/75 when it held that its meaning may not be interpreted more narrowly for the sake of the Community than it is practised generally by the Member States⁵. It further stated that Commercial Policy is made up by the combination and interaction of internal and external measures without priority being taken by one over the other⁶. This echoed the dictum of the Court in the Massey-Ferguson case⁷ where it had already emphasised the necessity of giving a broad construction to the Articles of the Treaty relating to customs union and trade policy.

In Opinion 1/78 the Court stated that the enumeration of Article 113 was not exclusive⁸. It held that an interpretation restricting the CCP to the use of instruments intended to have effect only on the traditional aspects of external trade to the exclusion of more highly

5 ibid. at 1362.

6 ibid. at 1363.

7 [1973] ECR 897.

8 [1978] ECR 2871 at 2913.

developed mechanisms would create a Commercial Policy destined to become nugatory in the course of time⁹.

The Council was of the view that a measure, in order to be a measure of Commercial Policy, must have the object of altering the volume or the flow of trade¹⁰. Bourgeois¹¹ has argued that this definition, although it sounds convincing, had two main drawbacks. First, for the purposes of autonomous Community commercial measures it produces results that were unsatisfactory when applied to measures that were inherent to the conduct of any Commercial Policy, e.g. customs formalities or marks of origin. Under the Council's interpretation these measures would be unlikely to fall within the ambit of Article 113 as it would be difficult to show that they affected the volume or flow of trade. Second, the interpretation imported a subjective element which would allow reluctant Member States to argue that the measure was beyond the Community's powers or that it required unanimity. The Commission, on the other hand, argued that a measure of Commercial Policy must be assessed by reference to its specific characteristics as an instrument regulating international trade¹². This definition is also unsatisfactory in that the term instrument is a very broad concept.

A better interpretation of the scope of the Community's Commercial Policy is a combination of both views¹³:

9 ibid.

10 ibid. at 2910.

11 "The Common Commercial Policy - Scope and Nature of the Powers" in (ed.) Volker, 'Protectionism in the EEC', p. 4.

12 Opinion 1/78 supra at 2910-1.

13 See Ehlermann, Director-General for Commission Legal Service exposé at 10th Congress of International Federation for European Law held in Dublin, 24-26 June 1982.

All measures which regulate openly and specifically trade with third countries should always be considered as part of the Common Commercial Policy; they are per se measures of commercial policy unless the Treaty provides for an exception. Other measures should be considered as part of such policy by a sort of 'rule of reason' viz. when their dominant purpose is to influence the volume or flow of trade.

The measures enumerated in Articles 112 and 113 and measures ancillary to these such as customs regulations and procedures for import and export licensing would come within this formulation as would measures such as taxes and measures having an effect equivalent to quantitative restrictions.

Bourgeois¹⁴ provides some helpful guidelines in determining what constitutes "dominant purpose". They are as follows:-

- (a) the form of the agreement - the purpose, structure, instruments and effects;
- (b) the framework within which it was concluded, for example if it takes place within an institutional organisation whose aim is to promote trade.

The construction does, however, require further elucidation, but it goes some way in attempting to reconcile the differences in the views held by the Council and Commission. There is no doubt that the Community's safeguard measures used to counteract unfair trade practices are per se Commercial Policy measures and as such are within the scope of the Community's powers.

1.2. The Nature of the Powers within the CCP

The Court, since its judgment in the ERTA case¹⁵, has consistently declared that the Community's external relations power

14 op. cit.

15 Case 22/70 Commission v. Council supra.

is exclusive in nature. When such a power is exclusive the Member States may no longer unilaterally enter into international agreements or adopt autonomous measures in the field of external relations.

The principle in ERTA¹⁶ was based on two grounds. First, the Community power excludes the possibility of concurrent or parallel powers on the part of the Member States since any steps taken outside the framework of the Community would be incompatible with the unity of the Common Market and the uniform application of Community law. Second, upon entry into force of a common internal rule it is the Community alone that is in a position to carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.

More specifically, in Opinion 1/75¹⁷, which concerned an area of Commercial Policy, namely export credits, the Court concluded that the CCP was conceived in the context of the operation of a Common Market for the defence of the common interests of the Community. The Court stated that:-

Unilateral action on the part of the Member States would lead to disparities in conditions for the grant of export credits calculated to distort competition between undertakings of various Member States in external markets ... It cannot be accepted that in the field such as that governed by the understanding in question which is covered by export policy and more generally by the Common Commercial Policy, the Member States should exercise a power concurrent to that of the Community in a Community sphere and in an international sphere¹⁸.

At a later stage in its judgment the Court again unequivocally indicated that the Member States and the Community could not exercise

16 ibid.

17 supra at 1363-4.

18 ibid. at 1364.

powers concurrently in the sphere of Commercial Policy¹⁹. The Court reiterated the principle in Donckerwolcke²⁰ in which it indicated that at the end of the transitional period, responsibility in the field of Commercial Policy was transferred en bloc to the Community and unilateral action by the Member States was excluded across the whole field.

**2. THE BASIC POWERS OF THE
COMMUNITY AUTHORITIES AND THE
MEMBER STATES IN THE ADOPTION
OF SAFEGUARD MEASURES**

The EEC Treaty which established the European Economic Community (EEC), like the Treaty of Paris (hereinafter referred to as the ECSC Treaty) which established the European Coal and Steel Community (ECSC), created a Community with legal personality and four autonomous institutions. The European Atomic Energy Community (EURATOM) was established by a separate Treaty at the same time as the EEC. It too had a separate legal personality and four autonomous institutions. The institutions included an Assembly (now known as the European Parliament²¹), a Council of Ministers, a Commission (equivalent to the High Authority under the ECSC Treaty but which had more limited autonomous powers) and a Court of Justice.

A single Court and Assembly were established for all three Communities by a Convention signed at the same time as the EEC and Euratom Treaties. On 1st July 1967, as a result of a Merger Treaty (Treaty establishing a Single Council and Single Commission of the European Communities of 8th April 1965) a Single Council of Ministers

19 ibid.

20 Case 41/76 [1976] ECR 1921.

21 Article 2, Single European Act.

was established. At the same time the ECSC High Authority and the EEC and Euratom Commissions were merged to form a single body known as the Commission.

Even though the three Communities have common institutions they are legally distinct with the powers and functions of the institutions based on the terms of the Treaty under which they were established. This is of importance in relation to the Commission since it enjoys the more wide-reaching powers which are conferred on the High Authority under the ECSC Treaty.

The aim of this part of the chapter is to examine the respective roles of the Community institutions and Member States in combating unfair trade practices. For the most part the emphasis will be on the EEC rules since the ECSC rules are limited solely to Coal and Steel products.

2.1. The Commission

Under the safeguard measures discussed in the chapters to follow the Commission has as its major role the task of investigating the facts and determining whether there is sufficient evidence to initiate a proceeding. This is quite a large undertaking for the Commission now that there are many more complex cases being brought to its attention. As the number of complaints increase rapidly the Commission is faced with an acute shortage of staff necessary to investigate unfair trading practices. This is particularly so in relation to anti-dumping cases. In 1986 only 26 officials were employed by the Commission to investigate complaints of dumping compared with 110 in the US for the same purpose²². To overcome this problem it was suggested that the Commission should consider

22 Financial Times, 8th October 1986.

employing private investigators to supplement its own staff²³. In 1987 the number of case workers was increased to 33 and they were aided by 15 officials lent to the Commission by the Member States. There are currently 40 case workers assisted by 30 officials seconded from the Member States.

Under Regulation 2423/88²⁴, the Commission has the power, if certain conditions are fulfilled, to impose provisional anti-dumping and countervailing duties²⁵. Such duties are valid only for six months, however, whereupon it is the responsibility of the Council to adopt definitive duties. Under Regulation 288/82²⁶ the Commission has the power to limit the period of validity of import documents or alter the rules for the product in question by providing that it may only be put into free circulation on production of an import authorisation²⁷. This can be done either on the request of a Member State or on its own initiative. By virtue of Article 1(b) of the New Commercial Policy Instrument - Regulation 2641/84²⁸ the Commission has the power to initiate, conduct and terminate formal international consultations or dispute settlement procedures.

Under Regulation 2423/88 the Commission also has the power to terminate proceedings where there is no injury or where it is not in the interests of the Community to impose protective measures. This is the case, however, only where no objection is raised within the Advisory Committee, otherwise the matter must be submitted to the

23 ibid.

24 For an analysis of the Regulation see Chapter 3 infra.

25 Article 11.

26 For an analysis of the Regulation see Chapter 3 infra.

27 Article 15.

28 For an analysis of the Regulation see Chapter 3 infra.

Council²⁹. It can accept undertakings if it considers them appropriate instead of adopting anti-dumping duties or countervailing duties. Until very recently the Commission favoured settling most cases in this way. However, with the emergence of anti-dumping cases involving "high tech" consumer products from Japan and other Far East countries it has become less inclined to accept them owing mainly to the fact that large price increases are required in order to eliminate the injury caused by dumping. Although it does not specifically provide for it in Regulation 288/82 the Commission may accept a Voluntary Export Restraint agreement³⁰. This is unlikely to occur very often since these agreements are for the most part offered on an industry to industry basis. To accept such an undertaking would mean that the appraisal of the injurious effects of imports on Community industry, as well as the choice of any protective measures, would be decided by someone other than the Commission.

2.2. The Powers of the Commission under the ECSC Treaty

Under the ECSC Treaty, the High Authority was vested with the supreme powers of decision making. By virtue of the Merger Treaty, the High Authority and the Commissions which were established by the Treaties of Rome were merged into one single Commission. This does not mean that the Commission's powers are always the same. When acting under the ECSC Treaty it has all the decision-making powers which were vested in the High Authority.

This explains why the Commission, when acting under the ECSC anti-dumping rules for example, has the power not only to order the definitive collection of provisional duties but also the power to

29 Article 9(1).

30 See Chapter 3, Part 3: Safeguard Measures section 1.7.

impose definitive duties³¹. It is also competent to terminate proceedings when protective measures are thought to be unnecessary without seeking the permission of the Advisory Committee³². Even though it must consult the Advisory Committee throughout all the important stages of the procedure, it can adopt decisions quickly without having them vetoed as may be the case under the EEC Treaty.

2.3. The Council

Under the EEC Treaty the Council of Ministers is the institution endowed with supreme decision-making powers.

Under Regulation 2423/88 it is only the Council which is competent to impose definitive duties and to order the definitive collection of the provisional duties. Likewise it can adopt protective measures on a proposal from the Commission under Regulation 288/82 and Regulation 2641/84.

The fact that the Council adopts definitive duties has caused difficulties in the handling of cases before the Court mainly because it is the Commission which carries out the investigation. These difficulties have been made all the more acute by the number of highly complex cases that are coming before the Court³³. In each of these cases it is the Council and not the Commission which is the defendant because the Council and not the Commission adopts the definitive duties. In most cases the Commission is only an intervener. Members of the Council Legal Service have intimated that they often find it difficult and unsatisfactory to represent the Council as defendant in anti-dumping cases with which the Commission

31 Article 12, Decision 2424/88, O.J. L209/18.

32 Article 9(1), Decision 2424/88. cf.: Article 9(1) of Regulation 2423/88.

33 See Chapters 4, 5 and 6 infra.

officials are more familiar. At the moment the Commission Legal Service helps the Council draft its mémoire.

There are two possible means of avoiding duplication and also preventing the Council from being held responsible for errors made by the Commission. It is possible to introduce, if only in theory, legislation enabling the definitive duties to be adopted by the Commission. This would have to be made subject to the proviso that the Member States be consulted. This solution has, however, its drawbacks, the major one being the political obstacles to the change. The alternative solution is an administrative one and it could take one of three forms. First the Commission Legal Service could prepare the Council's mémoire. This tends to be the case, to a large extent in the more complex cases now coming before the Court. Second the two institutions could instruct counsel from one of the Member States. The problem with this alternative is that it is difficult to find suitable counsel. In anti-dumping cases especially, the questions which need most work are those on which the Community is in a weak legal position. Inevitably, the institutions will not wish to divulge the points they are most concerned about irrespective of whatever promises counsel makes regarding disclosure to private clients. Furthermore, anti-dumping actions will almost always give rise to issues of policy. It is difficult and often undesirable to make counsel aware of policy considerations. Third in cases where there is no conflict of interest, there is no reason why the Commission's lawyer could not act as the Council's agent.

2.4. The Member States

The Member States have an important role to play in the administering the safeguard measures designed to counteract unfair trading practices. They, in the form of the Advisory Committee, are required to be consulted at each stage of the procedure. The Committee is made up of a representative from each of the Member States with a representative of the Commission as Chairman.

Under Regulation 2423/88 they also have the task of collecting the duties imposed by the Community institutions through their customs authorities.

Finally, under Regulation 288/82, the Member States have the power to adopt interim protective measures where there exists in their territory a situation authorising the adoption of protective measures; or where such measures are justified by a safeguard clause contained in a bilateral agreement between the Member State and a third party³⁴.

34 Article 17(1)(a)&(b).

CHAPTER 2

SAFEGUARD MEASURES : AN INTERNATIONAL PERSPECTIVE

INTRODUCTION

The General Agreement on Tariffs and Trade ("the GATT") came into existence in 1947¹. It provides a framework of rules and standards for international trade. The GATT was based largely on the ill-fated International Trade Organisation Charter². The contracting parties to the GATT aimed at:

raising the standard of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods³.

There were two means of contributing to these objectives. The GATT was concerned not only with the liberalising of trade policies by the reduction of tariffs but also with the elimination of discriminatory treatment and the anti-competitive effects of unfair trade practices such as dumping.

The GATT is based largely on three basic principles. First, there is the principle of non-discrimination. This means that goods of any contracting party are to be given no less favourable treatment than that given to any other contracting party. This principle - or most

1 See generally, Jackson "World Trade and the Law of GATT" (1969); Dam, "The GATT: Law and International Economic Organisation" (1970); GATT 4th Supp. BISD (1956).

2 Jackson, ibid. Chapter 2.

3 Preamble of the GATT.

favoured nation clause as it is known in the GATT - is contained in Article I⁴. The object of the clause is to ensure that all foreign goods are treated equally. As a corollary, Article III attempts to impose the principle of non-discrimination between goods domestically produced and those which are imported with respect to internal taxation and other forms of governmental regulation. Such a provision is necessary, otherwise such measures would be substituted for tariff reductions.

The second principle is the prohibition on the use of quotas or other commercial measures as a means of protecting domestic industry⁵. Unlike tariffs, the impact of which an exporter can gauge, non-tariff restrictions such as quotas are arbitrary with the result that an exporter will be unable to assess how his product will be treated.

The third principle is that the GATT proceeds on the basis of consultation in resolving its trade disputes. The GATT outlines those situations when a contracting party can deviate from its obligations⁶ and also the circumstances in which retaliatory action can be taken against unfair trading⁷. Furthermore, if a party considers that a benefit accruing to it under the GATT has been

4 There are a number of other mfn or non-discrimination clauses in GATT - for example Article III(7) Internal mixing requirements, Article IVb Cinema films, Article V(2), (5) & (6) Transit of goods, Article IX(1) Marks of origin, Article XIII(1) Quantitative restrictions, Article XVII(1) State trading, Article XVIII(20) Measures to assist economic development, Article XX(j) Measures for goods in short supply.

5 Article XI GATT. See Jackson op. cit.

6 Article XIX (Safeguard Clause); Articles XX and XXI (General Exceptions); Article XXV (Waivers); Article XXIV (Regionalism).

7 Articles XI and XIII (Quantitative Restrictions); Article XVI (Subsidies); Article VI (Anti-dumping and Countervailing Duties).

nullified or impaired as a result of another party's breach or adoption of other measures the GATT dispute settlement procedure can be initiated under Article XXIII⁸.

In order to achieve reduction of tariffs and the elimination of discriminatory treatment there have been a number of major rounds of multilateral trade negotiations⁹. Originally the objective of the negotiations was to bring about a substantial reduction in tariffs and the elimination of tariff preferences. From the outset it was agreed that the negotiations should be held on a "reciprocal and mutually advantageous basis"¹⁰. This idea of reciprocity, i.e. that one concession should be matched by another of similar value, was at the core of the international trade order. It worked well in relation to the reduction of tariffs. Great progress was made at the Kennedy Round on the reduction of tariffs with regard to industrial goods where the contracting parties applied a 'linear' approach to cut tariffs¹¹. This was in sharp contrast to the previous round of negotiations - the Dillon Round - where negotiations were conducted on a product by product basis¹². The GATT is concerned not only with the reduction of tariffs but also with the elimination of other barriers to trade. As tariffs are reduced the role of non-tariff barriers becomes more important. Kelly has defined a non-tariff barrier as:

8 See generally Jackson, op. cit. Chapter 8.

9 Geneva 1947; Dillon Round 1960-1; Kennedy Round 1965-7; Tokyo Round concluded in 1979; Uruguay Round 1982-

10 Article XXVIIIbis para. 1. cf. Part IV GATT (added in 1964/5) provides that reciprocity will not be expected from less developed countries.

11 GATT 13th Supp. BISD 109 (1965).

12 GATT 8th Supp. BISD 119 (1960).

any law, regulation, policy or practice of a government, other than an import duty that has a restrictive effect on trade¹³.

Most of the general clauses in the GATT deal with specific non-tariff barriers. As these barriers are reduced, those not controlled by the GATT become increasingly significant. Owing to their opacity, however, non-tariff barriers are much more difficult to value in terms of trade concessions and, as a result, it is much more difficult to achieve reciprocity.

The Tokyo Round of Multilateral Trade Negotiations concluded in 1979 was concerned with formulating new, fairer and more transparent rules on international trade relations in order to bring about the advantages in tariff reductions. Unlike the Kennedy Round, which was negotiated during an era of world economic expansion, unfavourable conditions - rising oil prices, world trade recession and rampant inflation - dominated the Tokyo Round Negotiations. In periods of expansion it is relatively easy to reduce barriers to trade since, generally speaking, imports do not give rise to a threat of loss of employment or closure of local industry. On the other hand, in times of recession protectionist policies prevail and national frontiers are closed.

The result of the Tokyo Round was a number of Codes which improve and update the rules and procedures governing world trade in that they facilitate the abolition or reduction of a number of non-tariff barriers and improve surveillance. These Codes were seen as a way of reducing, if not eliminating protectionism so as to facilitate more freedom in international trade¹⁴.

13 "Non Tariff Barriers" in (ed.) Balassa 'Studies in Trade Liberalisation: Problems and prospects for industrial countries' (1967).

14 GATT 26th Supp. BISD (1978-9).

In September 1982 the contracting parties agreed to launch a new Round of trade negotiations to be called the Uruguay Round. One of the objectives of the negotiations is to continue with the work of reducing tariffs and non-tariff barriers. These negotiations are special, however, in that they cover not only trade in goods but also trade in services. Trade in services has increased in importance owing to the development of communications and data processing technologies and the general trend towards deregulation in many service sectors and their trade. This has resulted in an increase in the proportion of services that can be traded across borders in recent years¹⁵. It was, therefore, considered important to negotiate a multilateral framework of principles and rules in order to increase transparency and to liberalise trade in services.

The aim of this chapter is to analyse the rules relating to the safeguard measures, as applied by the European Community against unfair trade practices from an international perspective, in order to show how they have developed and the extent to which they meet the demands of an ever changing world economy.

1 . DUMPING

1.1. Historical Background

Prior to the GATT there was little international regulation of dumping¹⁶. The question first arose at an international level in

¹⁵ See Focus: GATT Newsletter 57 (1988); GATT economists estimated that in 1988 trade in services amounted to some 600 US\$ billion. (See Focus: GATT Newsletter 71 (1990)).

¹⁶ At national level a number of countries had already in existence legislation which enabled them to impose anti-dumping duties. The first country to have such legislation was Canada in 1904 - an act to amend the Customs Tariff, 1897 S.C. 1904, c11, s 19.

1920 at the World Economic Conference in The League of Nations. The general reaction to laws which would permit a country to impose anti-dumping duties was a fear that they would be used as a protectionist device by distorting competition and protecting domestic industry. Against this background, the power to impose anti-dumping duties where it could be shown that the dumping caused injury to the domestic producers of the like product was included in the new General Agreement on Tariffs and Trade¹⁷. However, the major drawback of the original anti-dumping provision was that it was subject to the grandfather clause contained in the Protocol of Provisional Application¹⁸. This meant that in relation to those provisions in Part II of the GATT (Article VI was such a provision) the pre-existing legislation of the contracting parties was not superseded by the GATT. The result of this was that the requirements of Article VI were disregarded, in particular by the United States whose legislation¹⁹, which existed prior to the GATT, did not require injury to be proved.

Owing mainly to the insistence of the European Community, the question of dumping was considered at the Kennedy Round of Multilateral Trade Negotiations. The European Community was in favour of more specific and binding rules with regard to anti-dumping. The result was an Anti-Dumping Code²⁰. This Code, however, was only an extensive interpretation of Article VI and binding only on those contracting parties which signed it.

At the Tokyo Round of Multilateral Trade Negotiations the Anti-Dumping Code concluded at the Kennedy Round was replaced by a

17 Article VI GATT.

18 GATT, 1st Supp. BISD 81 (1952).

19 Tariff Act 1897 Chapter 11 30 Stat 205 as amended by the Tariff Acts 1922 and 1930.

20 GATT 15th Supp. BISD 24 (1968).

new Code²¹ which for the most part was incorporated into the legislation of those signatories to the Code, including the United States.

1.2. Economic Rationale

In his authoritative work Dumping a Problem in International Trade²² Jacob Viner defined dumping as price discrimination between national markets. This essentially means that the producers in one country sell their goods for whatever reason in the market of another producer at unusually low prices²³.

It is generally agreed that three preconditions are necessary for price discrimination between national markets to occur²⁴:

- (a) There have to be separate markets. This will usually be accompanied by the situation whereby the dumper's market will be insulated from the re-importation of the dumped goods. In order for this to occur certain barriers to trade will exist in order to distort the free flow of trade. They may take the form of high tariffs or transport costs but more often they will be

21 GATT 26th Supp. BISD 171 (1978-9).

22 Reproduced in M. Kellay, New York 1966; first published in 1923.

23 See Fisher "The Anti-Dumping Law of the US: A Legal and Economic Analysis" 5 Law & Policy in International Bus. (1973) 85 at 85-93; Bryan "Taxing Unfair International Trade Practices" pp. 31-43; De Jong "The Significance of Dumping in International Trade" 2 JWTL 162 at 168.

24 Viner op. cit. pp. 94-101; Bryan ibid. p. 33; Ehrenhaft, "Protection against international price discrimination: US countervailing and anti-dumping duties" 58 Columbia Law Rev. (1958) pp. 48-49.

non-tariff barriers such as different technical standards²⁵.

- (b) The dumper must exercise some form of control over the price in his domestic market. This in essence means that conditions of imperfect competition must exist. In other words, the producer of the dumped goods must have a relatively large share of the domestic market and must produce a product which can be differentiated from that which is sold by the other producers²⁶. The dumper does not have to be a monopolist unless he is involved in predatory dumping, i.e. a foreign monopolist who sells his product in the importing country at a loss in order to eliminate his competitors in that market. Thereafter he will be able to sell at higher prices²⁷.
- (c) There must exist in the importing country a greater elasticity of demand in order for the dumping to be profitable. This is more likely to be the case where demand in the domestic market for the product is inelastic²⁸. In such a case the price will be higher since a reduction in the price will have little effect on the level of sales.

In his analysis of dumping²⁹ Professor Viner broadly outlined three categories of dumping: sporadic dumping, short term or intermittent dumping and continuous or long term dumping.

25 Bryan op. cit. pp. 31-2. This situation can be contrasted with one in which perfect competition prevails. Each firm sells a small amount of the total sold in any given market and each sells identical or homogenous products.

26 Barcelo "The Anti-Dumping Law: Repeal or revise it" (1979) NYB of International Legal Studies p. 65.

27 De Jong op. cit. p. 168.

28 An example of highly inelastic demand for a product was the case of Electronic Typewriters (Japan) O.J. 1984 L335/43. In the domestic market the demand for alphanumeric typewriters was small and inelastic. This enabled the Japanese manufacturers to maintain high prices.

29 op. cit.

Sporadic dumping ususally takes the form of unloading excess stock on to foreign markets in order to protect the dumper's position in the domestic market. It may be that demand in the dumper's market is inelastic, in which case a reduction in the price will have little effect on sales. Viner saw this as not causing serious injury and at worst it deprived the consumer in the country of origin of the benefit of a bargain sale³⁰.

Short term or intermittent dumping is aimed at gaining a foothold in the foreign market, or preventing the development of competition or eliminating competitors altogether³¹. This last situation is known as predatory dumping, and it occurs when a foreign producer sells abroad at a loss while maintaining monopoly profits in the domestic market. His temporary losses will in time be recouped by higher prices. Professor Viner saw this type of dumping as objectionable irrespective of whether or not predation was involved. He contended that, owing to its impermanence, it was liable to cause injury to the domestic producer in that its sudden cessation could render valueless investment or cut off a source of supply for materials. He argued that on the whole the injury to the domestic producers outweighed the short term gain for the consumer³².

Long term or continuous dumping may occur as a result of the producer's determination to maintain the price structure in the domestic market or for reasons of maximising economies of scale. In both cases he will sell his product abroad at reduced prices in order to maintain high prices in his own home market³³. Professor Viner

30 ibid. p. 101.

31 ibid. pp. 26-27.

32 ibid. pp. 132-140.

33 ibid. pp. 28-30.

noted that this was the only occasion in which dumping would benefit the foreign country in terms of efficiency and welfare³⁴.

1.3. The Regulation of Dumping in the GATT

Dumping is regulated primarily by Article VI. However, as will be shown below, Article VI suffered from a number of serious drawbacks.

First, it was subject to the grandfather clause which meant that it did not supersede the pre-existing legislation of the contracting parties³⁵. Second, there were no multilateral procedural regulations to govern its application³⁶. This meant in effect that by carrying out lengthy and time-consuming investigations the anti-dumping procedure could be used as a protectionist device. This was one of the main reasons why it was added to the list of non-tariff barriers to be discussed at the Kennedy Round. Finally, Article VI suffered from a serious lack of definition of key concepts. Although the Expert Group on Anti-Dumping and Countervailing Duties³⁷ went some way in clarifying the position it was not really until the Anti-Dumping Codes of the Kennedy Round³⁸ and the Tokyo Round³⁹ that a more specific set of standards were adopted with respect to the determination and investigation of dumping and injury.

34 ibid. at p. 133; De Jong op. cit. p. 177.

35 See footnote 18 supra.

36 See generally Curzon & Curzon "GATT" in (ed.) Shonfield 'International Economic Relations of the Western World [1959-71]'.

37 GATT 8th Supp. BISD 146 (1960).

38 Reproduced in GATT 15th Supp. BISD 24 (1966-7).

39 Reproduced in GATT 26th Supp. BISD 171 (1978-9).

In the following analysis of the GATT regulation of dumping reference to the Anti-Dumping Code is to the Code concluded at the Tokyo Round as it replaced that adopted at the Kennedy Round⁴⁰.

Dumping is defined in Article VI(1) as the situation where the price of the product from one country to another is less than the comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country⁴¹. The term "like product" was not defined in Article VI⁴². Because this is central to the question of dumping and injury it was defined in Article 2(2) of the Anti-Dumping Code⁴³.

1.3.1. The Determination of Dumping

In order for dumping to exist the export price of the product must be less than its normal value. Article VI(1) provided that the export price was simply the price of the product exported from one

40 Article 16(5) Anti-Dumping Code (1979).

41 This definition was maintained in Article 2(1) of Anti-Dumping Code.

42 The Expert Group defined "Like product" thus:
'a product which is identical in physical characteristics subject however to such variations in presentation which are due to the need to adapt the product to special conditions in the market of the importing country'
GATT 8th Supp. BISD 146 at 149 (1960).

43 In the Anti-dumping Code "Like product" was defined as a product which is identical, i.e. alike in all respects to the product under consideration or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

country to another⁴⁴. However, it did not deal with the situation where no export price existed or where the export price proved to be unreliable owing to association or compensatory arrangements. This was rectified by Article 2(5) of the Anti-Dumping Code. It provided that the export price may be constructed on the basis of the price:

- (i) at which the imported products are first resold to an independent buyer; or
- (ii) if the products are not sold to an independent buyer or not resold in the condition imported, on such a reasonable basis as the authorities may determine.

In both these cases allowances are permitted for costs incurred between importation and resale⁴⁵.

With regard to the normal value the preferred price was to be the domestic price, i.e. the comparable price in the ordinary course of trade for the like product when destined for consumption in the exporting country⁴⁶. In the absence of the domestic price, Article VI provided for two alternative methods of establishing normal value. It could be established by taking the highest comparable price for the like product for export to any third country in the ordinary course of trade⁴⁷. Although it could be the highest price it had to be representative⁴⁸. Alternatively it could be established by taking the cost of production of the product

⁴⁴ According to the Expert Group on Anti-Dumping and Countervailing Duties this was to be the price at which the product left the exporting country and not that at which it entered the importing country, GATT 8th Supp. BISD 146 (1960).

⁴⁵ Article 2(6) Anti-Dumping Code.

⁴⁶ Article VI(1)(a).

⁴⁷ Article VI(1)(b)(i).

⁴⁸ Article 2(4) Anti-Dumping Code.

in the country of origin and adding to it a reasonable amount for selling expenses and for profit⁴⁹.

In order to ensure a fair comparison between the normal value and the export price, Article VI(1) provided that allowances should be made for differences in taxation, in conditions and terms of sale and for other differences affecting price comparability. Article 2(6) of the Anti-Dumping Code added to this the requirement that the normal value and the export price should be compared at the same level of trade, i.e. the ex-factory level and in respect of sales made as near as possible in time. Once these allowances have been made the dumping margin could be determined.

1.3.2. Determination of Injury

Dumping on its own, however, was not to be condemned unless its effect was such that material injury was caused to domestic industry in the importing country⁵⁰. Unfortunately, Article VI did not define injury⁵¹ and it was not until the Anti-Dumping Codes of the Kennedy Round and Tokyo Round that guidelines for the determination of injury were laid down.

Under Article 3 of the Anti-Dumping Code a determination of dumping can only be made where the dumped imports are the cause of material injury to a domestic industry. This was a much less stringent test than that provided for in the Anti-Dumping Code of the Kennedy Round,

49 Article VI(1)(b)(ii).

50 Article VI(1); no precise definition or set of rules could be given in respect of the injury concept. With regard to a definition of industry the Group of Experts agreed that a single firm within a large industry could generally not constitute an industry, GATT 8th Supp. BISD 150 (1960).

51 See Article VI(1) and (6)(a).

by which the authorities of the importing country had to show that dumping was demonstrably the principal cause of material injury⁵².

According to Article 3, the determination of injury must be based on positive evidence, involving an examination of the volume and prices of the dumped imports and the consequent impact on the domestic producers of the like product⁵³. In other words, the dumped imports have to be the cause of injury and other factors such as the volume and prices of non-dumped imports which are causing injury are not to be attributed to the dumped imports⁵⁴. As injury has to be caused to the producers of the like product in the importing country it is important to know what constitutes domestic industry.

Article 4 of Anti-Dumping Code defines it as:

the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".

This general rule is subject to two exceptions. First, where the producer is related to the exporter or is himself the importer, then domestic industry may be interpreted as referring to the rest of the producers and second, the territory of a party may be divided into two or more competitive markets and the producers within each may be regarded as domestic industry⁵⁵.

1.3.3. Anti-Dumping Duties and Undertakings

When it has been determined that the producers of the like product have been injured as a result of the effects of dumping a contracting

52 Article 3(a); Barcelo op. cit. contends that Article 3 of the Anti-Dumping Code adopted at the Tokyo Round was a soft injury test.

53 Article 3(2)-(3) Anti-Dumping Code.

54 Article 3(4) Anti-Dumping Code.

55 Article 4(2) Anti-Dumping Code.

party can impose anti-dumping duties⁵⁶. The amount of duty levied cannot exceed the margin of dumping in respect of such product⁵⁷ and the framers of the Code considered it desirable to impose a lesser duty if this would be adequate to remove injury⁵⁸. Furthermore the imposition of duties is not subject to the principle of non-discrimination. In other words, duties can be imposed selectively on the dumped goods while the same goods from other sources which were not dumped would be free of such duties⁵⁹. Apart from the imposition of duties, the authorities in the importing country may accept price undertakings which revise the price or cease exports at dumped prices so as to eliminate the injurious effects of dumping⁶⁰. The advantages of such undertakings are their flexibility and the fact that they bring about a more amicable solution.

1.3.4. Procedure

A major drawback of Article VI was that it did not require the contracting parties to comply with any procedural requirements. This resulted in it being used as a protectionist device with investigations dragging on for many months. This situation was rectified by the Anti-Dumping Code. It provided that anti-dumping investigations had to be concluded within one year after initiation⁶¹ and furthermore that the investigation on dumping and

56 Article VI(6)(a).

57 Article VI(2); Article 8(3) Anti-Dumping Code.

58 Article 8(1) Anti-Dumping Code.

59 This can be contrasted with Article XIX GATT which permits the adoption of safeguard measures in cases of emergency. Such measures have to be applied on a non-discriminatory basis.

60 Article 7(1) Anti-Dumping Code.

61 Article 5(5) Anti-Dumping code.

injury had to be considered simultaneously⁶². The gathering of evidence and its verification is regulated by Article 6 of the Anti-Dumping Code. It provides that in cases where the offending exporter does not co-operate, the authorities in the importing country may proceed on the basis of facts available⁶³.

1.4. Evaluation

The Anti-Dumping Code concluded at the Tokyo Round, like its predecessor, is binding only on those parties which signed it. Whereas most of the industrialised nations of the Western World signed it, the less developed countries did not. More importantly, the United States bound itself by the injury criteria and it incorporated the Code into its domestic legal order⁶⁴.

The Code has also resulted in greater transparency with respect to the determination of dumping and injury. This process has continued through the work of the Anti-Dumping Committee and in particular with regard to its recommendations on greater transparency in anti-dumping proceedings and on-the-spot investigations, to name but two⁶⁵.

As a result of the recent GATT Panel's report in the dispute between the European Community and Japan concerning the importation of anti-dumping duties by the Community on "screwdriver assembly" products⁶⁶, the delegates at the Uruguay Round are at present

62 Article 5(2) Anti-Dumping Code.

63 Article 6(8) Anti-Dumping Code.

64 Trade Agreements Act 1979 s. 2(b)(3), 19 USC s. 2503 (b)(3).

65 GATT 30th Supp. BISD (1982-83).

66 See Chapter 3, infra.

debating the question of introducing provisions into the Anti-Dumping Code to counteract the circumvention of duties by such methods⁶⁷.

2. SUBSIDIES AND COUNTERVAILING DUTIES

2.1. Historical Background

The GATT rules on subsidies are much stricter than those regulating dumping. Whereas dumping is prohibited by the GATT only when it causes injury, some subsidies are prohibited altogether, notably export subsidies on non-primary goods, while others are to be restricted in their application.

The main GATT provision on subsidies is Article XVI. It distinguishes between export subsidies and subsidies in general, the former being subdivided into export subsidies on primary goods and those on non-primary goods⁶⁸.

The term subsidy is not defined in the GATT nor in the Code on Subsidies and Countervailing Duties though it is generally accepted that it involves a net loss to government⁶⁹. In 1961 the GATT Panel of Experts agreed that a definition was neither feasible nor necessary. Further they pointed out that to formulate a definition might give rise to a situation where measures are included which were never intended to come within the meaning of Article XVI⁷⁰.

67 See Focus: GATT Newsletter 70 (1990).

68 Article XVI(3) and (4).

69 Pestieau "Revising GATT approach to Subsidies: A Canadian View" p. 95 in (ed.) Warnecke 'International Trade and Industrial Policies' (1978).

70 GATT 10th Supp. BISD at 208 (1962).

Originally, the country granting the subsidy had to notify GATT of the nature, extent and effects of the subsidy⁷¹. Not surprisingly, this provision was ignored, largely because it meant confessing to a practice that was trade distorting. The reason for such a weak provision was twofold. First, subsidies were regarded as a less serious obstacle to trade than, for instance, tariffs or quotas. Second, as we live in a buyers' market rather than a sellers' market, most countries tend to use subsidies as a means of increasing their exports⁷². This is due largely to the fact that the economies of the various contracting parties are at different stages of development and many have industries which are not internationally competitive⁷³.

In 1955 new rules on subsidies were added in order to strengthen Article XVI. These new rules banned export subsidies on non-primary goods altogether and limited the application and effect of export subsidies on primary goods⁷⁴.

The new Code on Subsidies and Countervailing Duties recognises that subsidies are used by governments to promote important objectives of social and economic policy⁷⁵. However, at the same time it provides that the signatories should seek to avoid the use of any subsidy which causes:

- (a) injury to domestic industry of another signatory;

71 Article XVI(1).

72 See generally Kock "International Trade Policy and the GATT 1947-67".

73 Warnecke "Government Intervention and Open Global Trading System" p. 15 in (ed.) Warnecke op. cit.

74 Article XVI(3) and (4).

75 Article 8(1) Subsidies Code.

- (b) nullification or impairment of the benefits accruing directly or indirectly to another signatory;
- (c) serious prejudice to another signatory⁷⁶.

2.2. Export Subsidies and Domestic Subsidies

Article XVI deals almost entirely with export subsidies. This is due to the fact that domestic subsidies were seen as less harmful than export subsidies since they were used primarily to further social and economic goals.

2.2.1. Export Subsidies

Barcelo defines an export subsidy as a subsidy conditioned on the export of a product or on export performance⁷⁷. The primary aim of the exporting country in granting a subsidy is not to further socio-economic goals but is rather an attempt to increase their share of the market in the importing country⁷⁸. The GATT further distinguishes between export subsidies on non-primary goods and those on primary goods⁷⁹.

Article XVI(4) prohibits contracting parties from granting subsidies on non-primary goods which result in the sale of such products for export at a lower price than the comparable price charged for the like product in the domestic market. The 1960 Working Group had the task of giving effect to Article XVI(4). The

76 Article 8(3) Subsidies Code.

77 Barcelo "Subsidies, Countervailing Duties and Anti-dumping Duties after Tokyo Round" 13 Cornell L.J. 257 at 261.

78 ibid. at 261-2.

79 At the Uruguay Round of Multilateral Trade Negotiations the United States has proposed that this distinction should be ended.

result was an illustrative list of those subsidies they considered were not compatible with Article XVI(4)⁸⁰. This prohibition and illustrative list is reproduced in Article 9 of the Subsidies Code. It is, however, subject to one qualification in that the developing countries can grant such subsidies provided they do not cause serious prejudice to the trade or production of another signatory⁸¹.

Article XVI(3) provides that the contracting parties should seek to avoid the use of subsidies on the export of primary products.

Primary products are defined as:

"a product of farm, forest, or fishery or any mineral in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade"⁸².

Article XVI(1) then provides an exception to Article XVI(3) in that a contracting party can grant an export subsidy on a primary product but only if this is applied in a manner which does not result in that party having more than an equitable share of world trade in that product. What is meant by the term "more than an equitable share of world trade" is uncertain. Phegan argues that since the term "equitable" connotes fairness what may seem fair to one producer may not be fair to another⁸³. Unfortunately, the Subsidies Code has failed to resolve the difficulties posed by the term. Article 10(1) reproduces Article XVI(3) and Article 10(2) attempts to define what is meant by the term "more than an equitable share of world trade". It states that the term shall include:

- 80 GATT 9th Supp. BISD 187 (1961).
- 81 Article 14(3)-(6) Subsidies Code.
- 82 Notes to Article XVI Section B para. (2).
- 83 "GATT Article XVI.3: Export subsidies and equitable shares" 16 JWTL 251.

any case in which the effect of an export subsidy granted by a signatory is to displace exports of another signatory bearing in mind development in world markets.

2.2.2. Domestic Subsidies

Barcelo regards these as being primarily production subsidies which are granted irrespective of output destination⁸⁴. Such subsidies are granted largely for social and economic reasons though they may have the effect of indirectly increasing a country's exports. They are often used as a tool in a country's industrial policy in order to prevent or promote structural change. Such subsidisation can be justified from an economic point of view in that it eliminates distortions that are not self-correcting such as those brought about by the problems associated with infant industries and foreign government interference⁸⁵. As a tool of industrial policy, subsidies have become more apparent today. This is due largely to the worldwide recession which has resulted in high inflation coupled with stagnation. There is therefore a need for temporary measures to protect jobs and prevent the collapse of industry. However, as the number of firms in trouble continually grows, these temporary measures inevitably become more permanent.

We, today, are also witnessing an industrial revolution in the Far East countries. These newly industrialised countries such as Taiwan, Korea, etc., along with Japan, produce large quantities of high-tech goods, the majority of which are exported at very low prices. In such cases subsidies are used to counteract fierce competition and protect infant industries.

84 op. cit.

85 See generally Curzon Price "Industrial Policies in the EEC" (1981).

Domestic subsidies can, however, have adverse effects. They can, and often do, amount to protectionism which runs contrary to the liberal trade order as laid down by the GATT. Second, they may have the effect of increasing the number of imports into the country complaining of low priced imports. Third, as a corollary of the above, such subsidies may bring about a reduction in the number of exports of other countries to third country markets⁸⁶.

The Subsidies Code refers to domestic subsidies as subsidies other than export subsidies. On the whole the GATT takes a more tolerant view of these subsidies. Prior to the Tokyo Round no separate provision dealing with such subsidies existed. Now, Article 11 of that Code recognises that domestic subsidies could be used as important instruments for the promotion of social and economic policy objectives⁸⁷ and therefore as such are not prohibited. However, it was also noted that such subsidies may have adverse effects on trade⁸⁸. In such a case they may be subject to countervailing duties if they cause injury to the domestic industry of the like

86 Barcelo op. cit.

87 The objectives noted in Article 11 are as follows:
(a) the elimination of industrial, economic and social disadvantages of specific regions;
(b) to facilitate the restructuring, under socially acceptable conditions, of certain sectors especially where this has become necessary by reason of changes in trade and economic policies including international agreements resulting in lower barriers to trade;
(c) generally to sustain employment and to encourage retraining and change in employment;
(d) to encourage research and development programmes, especially in the field of high technology industries;
(e) the implementation of economic programmes and policies to promote the economic and social development of developing countries;
(f) redeployment of industry in order to avoid congestion and environmental problems.

88 Article 11 Subsidies Code.

product in the importing country⁸⁹. On the otherhand where such subsidies are being maintained in such a manner as to cause injury or serious prejudice or nullification or impairment of benefits accruing to other signatories, they may be subject to whatever countermeasures are deemed appropriate by the Committee on Subsidies and Countervailing Measures⁹⁰.

2.3. The Procedures for Counteracting the Adverse Effects of Subsidies

The new Subsidies Code provides two different procedures for counteracting the adverse effects of subsidies whether they be export or domestic subsidies.

2.3.1. Countervailing Duties

The effect of a subsidy is similar to that of dumping. It results in the importation of unfairly low priced products on to the domestic market. The difference between the two lies in the fact that whereas dumping is practiced by the individual firm, subsidies are granted by foreign governments or out of public funds.

Article VI(3) provides that a countervailing duty may be imposed to offset a bounty or subsidy which has been granted directly or indirectly on the manufacture, production or export of a product. Where the subsidy causes or threatens to cause injury to the domestic producers of the like product the GATT permits the countracting parties to impose countervailing duties⁹¹. In such a situation it

89 Article VI GATT; Part I Subsidies Code.

90 Article 13 Subsidies Code.

91 Article VI(6) GATT; Article 6 Subsidies Code.

is of no relevance whether the subsidy in question is prohibited under the GATT⁹² or the Subsidies Code⁹³.

Article VI, however, was not uniformly applied by all the contracting parties. More importantly, the United States did not require that injury be determined before it could impose countervailing duties. It relied on the grandfather clause which provided that pre-existing legislation was not superseded by the GATT, in order to avoid some of the requirements of Article VI⁹⁴.

Now, by virtue of Article 1 of the Subsidies Code, the signatories to the Code must take the necessary steps to ensure that the imposition of countervailing duties is in accordance with Article VI. Part I of the Subsidies Code deals at length with the procedures involved in determining whether or not a subsidy has caused injury to the domestic producer of the like product in the importing country. The procedures relating to anti-subsidy actions are similar to those which apply to anti-dumping actions and therefore they do not need to be considered here.

2.3.2. Dispute Settlement Procedure

Article 13 of the Subsidies Code provides that signatories may, after authorisation has been given, adopt such counter measures as they consider appropriate including withdrawal of concessions or obligations, in order to counteract export subsidies that are inconsistent with the Code or any subsidy which may cause injury or serious prejudice or nullification or impairment of benefits accruing to a signatory.

92 Article XVI(4). See also Report of GATT Experts GATT, 8th Supp. BISD 146 (1960).

93 Article 9(1) Subsidies Code.

94 See supra Footnote 18.

However, such measures cannot be adopted unilaterally. They may only be authorised by all the contracting parties⁹⁵ or by the Committee on Subsidies and Countervailing Measures⁹⁶.

Furthermore, authorisation will be granted only after the necessary consultation, conciliation and dispute settlement procedures have been complied with⁹⁷.

2.3.3. Evaluation

It was hoped that the new Code would strengthen the multilateral regulation of subsidies and go some way in helping to achieve the primary aim of the Tokyo Round Negotiations - a greater expansion and liberalisation of world trade. Some success was achieved with a need to prove injury before countervailing duties could be imposed but at the same time it did not bring about a greater control over subsidisation policies per se. Owing to their variety and ambiguity a large proportion of subsidies tend to remain outside the ambit of GATT multilateral regulation. Instead of it becoming more difficult to distort international trade it has become easier by the device of domestic subsidies⁹⁸. The problems and difficulties raised by the Code on Subsidies and Countervailing Duties are very much on the agenda at the Uruguay Round of Multilateral Trade Negotiations⁹⁹.

The United States in particular has called for greater transparency in countervailing duty proceedings and the establishment of clearer

95 Article XXV(1) GATT.

96 Article 15 Subsidies Code.

97 Articles 12, 13, 17 and 18 Subsidies Code.

98 Curzon Price op. cit.

99 Bulletin of European Communities No. 9 1986 16/19
pp. 13-21.

guidelines for the administration of multilateral rules on subsidies. It has also proposed updating the Code by including provisions designed to prevent circumvention of countervailing duties¹⁰⁰.

3. SAFEGUARD MEASURES

3.1 Historical Background

By virtue of Article XIX of the GATT, a contracting party can take emergency action on imports where:

if as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this agreement including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

The situation envisaged by Article XIX is that in which serious injury is caused by a large influx of imports of a particular product at prices lower than those on the domestic market but which are not at dumped or subsidised prices¹⁰¹.

¹⁰⁰ See Focus: GATT Newsletter 70 (1990).

¹⁰¹ This corresponds to what the Special Working Party in 1960 described as "market disruption". They concluded that this concept had a number of elements:

- (i) sharp and substantial increase (or potential increase) of imports of particular products from particular sources;
- (ii) offered at prices substantially lower than those on the domestic market;
- (iii) serious damage or threat of it to domestic producers;
- (iv) difference in price is not due to either subsidies or dumping.

As a result of a number of serious drawbacks inherent in Article XIX the contracting parties tend to resort to other means of relief permitted by the GATT¹⁰². The main drawbacks are as follows:

- (1) The injury criterion under Article XIX is much more stringent than that under Article VI (Article VI refers to material injury rather than serious injury). This can be explained by the fact that they have not been imported at dumped or subsidised prices.
- (2) Article XIX is subject to the rule of non-discrimination in that safeguard measures must not be applied in a discriminatory or selective manner. This in effect means that protective action must be taken against all contracting parties even though the problem imports come only from a few.
- (3) Resort to Article XIX tends to be expensive in that the country wishing to rely on the escape clause will have to offer equivalent compensation to any contracting party having a substantial interest at stake¹⁰³.

3.2. Voluntary Export Restraint Agreements (VER's)

As a result of these drawbacks in Article XIX, Voluntary Export Restraint agreements (VERs) have become more prolific. As a non-tariff barrier they are much more difficult to control and are not subject to multilateral surveillance.

The concept has been defined by Metzger as follows:

Action of restraint by the exporting country taken because of its concern that unilateral quotas would otherwise be imposed against it by an importing country which might well produce more adverse trade effects than those voluntarily

102 Merciai "Safeguard Measures in GATT", 15 JWTL 41 at 45-6.

103 Article XIX(3).

agreed to by the exporting country through a more flexible medium¹⁰⁴.

VERs are based on either:

- (1) formal bilateral voluntary restraint agreement between exporting and importing country; or
- (2) unilateral action on the part of an exporting country¹⁰⁵.

As a means of counteracting injury from a large influx of imports of a particular product they are more flexible than action taken under Article XIX, which normally takes the form of quotas. As far as VERs are concerned it is the exporting country which for the most part maintains control over them. Their duration and severity are open to periodic review through the negotiation process. Quotas on the other hand are applied by the importing country on the basis of an independent and non-negotiable decision.

The flexibility of VERs is enhanced by the fact that they can be applied on a discriminatory basis and, unlike action under Article XIX, they do not involve payment of compensation.

3.3. The Need for Selective Safeguards

Because of the proliferation of VERs and the fact that the Contracting Parties tend not to resort to Article XIX some countries, and notably the Community, advocated at the Tokyo Round of Multilateral Trade Negotiations a Code on Safeguard Measures. Behind this call for a new Code was the hope that safeguard measures could be adopted on a selective basis.

104 "Injury and market disruption from imports" in Williams Commission Papers 1 at 167, 168-73 (1971).

105 See generally McGovern "International Trade Regulation" (1982).

Certain advantages would be gained from having selective safeguard measures. First, it would limit the action taken to the problem imports, with the result that this would be less disruptive to trade. Second, it would avoid the need to pay compensation which is required in the case of official action under Article XIX. Thus, it has the advantage over VERs in that they would be subject to multilateral surveillance.

On the other hand strong legal, economic and political arguments can be put forward against the introduction of selective safeguards¹⁰⁶. The adoption of safeguard measures on a discriminatory basis is against the spirit and aims of the GATT which is based for the most part on the principle of non-discrimination. To allow such measures would, in the words of Curzon-Price¹⁰⁷, "open the floodgates of discrimination in all kinds of circumstances". There must be a commitment to the non-discriminatory application of such measures in order to expose and control protectionist interventions. In the absence of non-discrimination, small and weaker countries would suffer from the abuse of power by the larger and more powerful ones. A discriminatory system also has the effect of penalising the most disruptive producers, i.e. the most efficient, the result of which is a reduction in world income. Lastly, from the political viewpoint, the GATT would lose. It would find itself virtually unable to handle the disputes and trade wars that would inevitably arise under a discriminatory system.

Since the Tokyo Round, there has been little progress with regard to selective safeguard measures. At the GATT Ministerial Meeting in 1982 there was a call for more predictability and clarity of safeguard measures in order to bring about a greater security for

106 Curzon Price op. cit. pp. 5-10.

107 ibid. at p. 8.

both importing and exporting countries. In doing so the results of trade liberalisation to date would be preserved and it would avoid the proliferation of restrictive measures¹⁰⁸.

At the Uruguay Round of Multilateral Trade Negotiations the question of safeguard measures has arisen. In remaining true to the spirit and aim of the GATT, one of the objectives specified in the Ministerial Declaration was an agreement on safeguards based on the principles of the GATT including the fact that it should apply to everyone.

The European Community has again raised the question of selective safeguards¹⁰⁹. Earlier this year it proposed a selective safeguard regime applicable in special circumstances¹¹⁰. Its proposal would allow interim precautionary action against one or a group of suppliers whose products have been found to be causing serious injury to domestic producers as a result of the large influx in imports.

Following consultations, action to restrict these imports would have to be proportional to the injury suffered and would be removed after a maximum of eight months or at the end of a full injury investigation. Where serious injury is definitively established, the importing country would be able, following consultations, to adopt selective safeguard measures for a period which should be the subject of negotiations at the Uruguay Round. Those countries affected either by the interim or definitive measures would be free to withdraw equivalent concessions to the importing country. During the period during which the measures are in force, imports of the product from other countries can be monitored. If they are found to

108 See full text of GATT Ministerial Declaration reproduced in 17 JWTL 67.

109 See generally FOCUS: GATT Newsletter 69 (1990).

110 ibid.

be causing injury to domestic producers, the countries covered by the measures could request that they be extended to these suppliers.

This proposal has not received broad support. The majority of the less developed countries are of the opinion that such a regime would benefit only the more powerful trading nations. The idea of the affected exporters being able to request the extension of safeguard measures to other exporters is seen as an attempt to shift the political burden from importer to exporter.

It appears, therefore, that the question of selective safeguards will be discussed in greater detail in the months ahead and it seems unlikely that agreement will be reached, at least not in the foreseeable future.

3.4. Evaluation

Because of the shortcomings of Article XIX, an increasing number of cases are determined on the basis of the Anti-Dumping Rules. In essence, the Anti-Dumping Rules are used as a surrogate escape clause because they are less rigid than emergency action under Article XIX.

In order to make safeguard measures more effective they have to be much more predictable and precise. This could be achieved by shortening the duration of the measures and by allowing imports to increase at a reasonable rate while at the same time bringing about the adjustment of the domestic industry in question¹¹¹. Also VERs and similar arrangements have to be monitored in order to prevent the movement away from trade liberalisation to protectionism¹¹².

111 Bulletin of European Communities No. 9 (1986) Vol. 19
pp. 13-21 at 19.

112 Executive Branch GATT Studies No. 8, GATT Provisions on
Relief from Injurious Imports, 124-9.

Apart from the issue of selective safeguards, the Negotiating Group on Safeguards are at present discussing a draft text of a new code¹¹³ .

4. ILLICIT COMMERCIAL PRACTICES

4.1 Historical Background

Inevitably there are other forms of unfair trade practices not caught by the anti-dumping, anti-subsidy or safeguard measure provisions. The majority of these take the form of non-tariff barriers, such as discriminatory treatment of imported goods vis-à-vis domestic goods and infringement of intellectual property rights, to name but two.

In 1964 the European Commission had discussed the idea of "common principles and a Community procedure concerning abnormal trade practices of Third Countries"¹¹⁴ with the Council of Ministers. The idea received little attention and it was temporarily dropped. It was not until 1980 that the matter was again discussed by the Welsh Committee, the Committee for External Economic Relations in the European Parliament. In its report, the Committee recommended that new legislation should be considered by the Community authorities to cover those areas of unfair trading practices not covered by the existing legislation¹¹⁵.

In 1983, the Commission submitted a proposal to the Council for a new Regulation designed to strengthen the Common Commercial Policy. The result was the adoption of Regulation 2641/84. Regulation

113 See generally FOCUS: GATT Newsletter 63 (1989).

114 EEC Bulletin 1964, Supp 1.

115 European Parliament, Doc. 1 422/811.

2641/84¹¹⁶ is aimed primarily at illicit commercial practices not covered by the existing trade policy instruments in the Community¹¹⁷. The Regulation was designed to produce the same effects as Section 301 of the US Trade Act 1974¹¹⁸. Unlike Section 301, however, it does not aim at opening up third markets but seeks to protect European trade interests in such markets against illicit commercial practices. In effect it is a means of permitting the Community to use its existing rights with regard to the commercial practices of third countries.

The Regulation in part allows the Community authorities, if certain conditions are satisfied, to take unilateral action¹¹⁹. Prior to this, unilateral action could be taken only in the case of dumping and subsidisation. In all other cases unfairness had first to be established by the GATT membership before a complainant could retaliate¹²⁰.

116 See Chapter 3 Part 4 infra.

117 Article 13 Regulation 2641/84.

118 19 USC 241. The Regulation was not modelled on Section 301 as the Community Institutions saw it as a substantial derogation from the spirit of the GATT.

119 By virtue of Article 10(2) Regulation 2641/84 countermeasures can only be taken if they are compatible with the Community's international obligations and procedures. This means that where there is provision for consultation and dispute settlement, this must be exhausted before retaliatory action can be taken. However, where an applicant cites a breach of a rule outwith the GATT then the Community may take unilateral action if injury has been caused to Community industry as a result of the illicit commercial practices see: Unauthorised reproduction of sound recordings (Indonesia) O.J. 1987 C136/3.

120 M.C.E. Bronckers "Private response to foreign unfair trade practices" N.W.J.Int.Law & Bus. (No.3 Winter 1985) 651 at 718.

Regulation 2641/84 provides the Community authorities with procedures allowing them to:

1. respond to illicit commercial practices causing injury;
2. ensure full exercise of the Community's rights with regard to the commercial practices of third countries¹²¹.

The Regulation is aimed at strengthening the Community's hand in the GATT dispute settlement procedure under Article XXIII. This section of the chapter will therefore be concerned for the most part with an analysis of Article XXIII. However, it is important to first consider the type of practices which are to be regarded as illicit.

4.2. Illicit Commercial Practices

The term illicit commercial practice is defined in Regulation 2641/84 as:

any international trade practices attributable to third countries which are incompatible with international law or generally accepted rules¹²².

The Regulation further provides that the Community authorities can respond to such practices where they affect either Community imports or exports. The definition focuses on trade practices "attributable to third countries". This would therefore seem to

121 Article 1.

122 Article 2(1).



suggest that it covers trade practices only of governments and not of private companies¹²³.

It is not yet clear what activities of third countries are caught by Regulation 2641/84. A number of complaints have however been brought to the attention of the Community authorities¹²⁴. Two of these have concerned practices in third countries which have affected Community exports and have been held to constitute illicit commercial practices¹²⁵.

Aramid Fibres concerned the exclusion from the United States market of the unlicensed importation of certain aramid fibres manufactured by Akzo NV or its affiliated companies outside the United States under Section 337 of the US Tariff Act 1930¹²⁶. The complainant, Enka, Akzo's fibre subsidiary, contended that this was a breach of Article III(4) of the GATT and the exclusion of the unlicensed importation of aramid fibres was not necessary under Article XX(d) of the GATT. Article III(4) sets out the obligation to treat imported products no less favourably than like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, purchase, transportation, distribution or use. Enka

123 See Steenbergen "The New Commercial Policy Instrument" (1985) CMLRev. 421 at 425 where he contends that one cannot rule out the possibility that the new instrument can be used where unfair trade practices of private companies are directly or to a substantial degree caused or promoted by government intervention in third countries, for example in the fields of government contracts, price regulations, rules on advertisements, technical standards, etc.

124 Aramid Fibres (US) O.J. 1986 C25/2; Sound Recordings (Indonesia) O.J. 1987 C136/3; Soya Meal (Argentina) unpublished decision 22nd December 1986; Commission Decision rejecting complaint lodged by Smith Kline & French Laboratories Ltd. against Jordan O.J. 1989 L30/67.

125 See Aramid Fibres and Sound Recordings ibid.

126 O.J. 1986 C25/2.

claimed that, by not being able to challenge the standing of DuPont in the United States aramid fibre industry, it was deprived of establishing that DuPont's position was achieved as a result of an infringement of Enka's patent.

The complaint, as the Commission noted, raised important questions of interpretation which had considerable economic implications. It referred the matter to the GATT under Article XXIII¹²⁷. In November 1989, the GATT Council adopted a panel report finding Section 337 of the United States Tariff Act 1930 to be inconsistent with Article III(4)¹²⁸. The importance of this finding lies in the fact that it was not the substantive elements of the law that were contrary to the GATT rules but rather the procedures for enforcing it in the national courts¹²⁹.

In Unauthorised Reproduction of Sound Recordings¹³⁰ the complainant, the association of members of the International Federation of Phonogram and Videogram Producers (IFPI), alleged that Indonesia was in breach of both international law and of generally accepted rules. The breach of international law was Article 10 of the Paris Convention for the Protection of Intellectual Property of which Indonesia was a signatory.

The complaint also referred to a breach of "generally accepted rules". The question to be considered here is "how does a rule become generally accepted?" Professor Sohn provides us with several ways in which a rule can become generally accepted¹³¹.

127 O.J. 1987 L117/18.

128 36th Supp. BISD (1990).

129 ibid.

130 O.J. 1987 C136/3.

131 "Generally Accepted International Rules "61 Washington L.Rev. (1986) 1073 at 1073-4.

This may occur when a rule is supported by the constant practice of States who consider that the practice is obligatory¹³². It is not clear how generally accepted the practice of States must be, but "universality" is not required¹³³. Sohn identified two factors which had to be taken into account: first, there had to be express acceptance of the rule by a reasonable number of States representing different political, economic and ideological views and, second, acquiescence by other States¹³⁴.

In Unauthorised Reproduction of Sound Recordings, the complainant relied on the Berne Convention for the Protection of Literary and Artistic Works and the Paris text of Universal Copyright Convention. Indonesia was not a signatory to either Convention but it was argued that in view of the large number and importance of the countries adhering to those Conventions they constituted generally accepted rules¹³⁵. As a result of an undertaking by the Indonesian authorities, the Commission suspended¹³⁶ and more recently terminated the proceedings without further examination of the complaint¹³⁷.

On the otherhand, the Commission has in two cases rejected complaints on the basis that the alleged act of unfair competition was not incompatible with international law or generally accepted rules. In

132 ibid. at 1073.

133 Brownlie "Principles of Public International Law" 7, (3rd ed.) (1979).

134 Sohn, op. cit. at 1074.

135 O.J. 1987 C136/3.

136 O.J. 1987 L335/22.

137 O.J. 1988 L123/50.

Soya Meal¹³⁸ FEDIOL, the Community association of oil-seed crushers and oil processors, alleged that Argentina's system of differential export taxes for soya goods and export restrictions were incompatible with the GATT and in particular with Articles III and XI thereof. In an unpublished decision the Commission refused to initiate proceedings on the basis that the measures complained of were not contrary to the GATT. FEDIOL appealed to the Court against this decision¹³⁹. They argued that Article III was not designed simply to remove any discrimination whereby imported products were adversely affected by a system of domestic charges but also to prevent the protection of domestic products by a differential export tax system as existed in the present case, from harming production in another country to which those products were imported.

The Court rejected this argument. It held that Article III could not be applied to a case such as the one in issue which related to a system of differential charges on exports levied solely on categories of domestic products.

The applicant also argued that the fixing of artificial reference prices as a basis for calculating the differential charges on soya products intended for exportation constituted a measure having an effect equivalent to a quantitative restriction and was therefore contrary to Article XI. The Court rejected this argument on the ground that Article XI applied only to quantitative restrictions and could not be interpreted as covering measures having an effect equivalent to quantitative restrictions.

It also rejected the applicants' subsidiary arguments based on Articles XX and XXIII.

138 Unpublished Decision dated 22nd December 1986.

139 Case 70/87 EEC Seed Crushers' and Oil Processors' Federation (Fediol) v. Commission [1989] ECR 1781.

The Commission also rejected a complaint lodged by Smith Kline & French Laboratories Limited against Jordan¹⁴⁰. In that case the complainant alleged that an amendment to Jordan's intellectual property law amounted to "an act of unfair competition" in terms of Article 10 bis (1) of the Paris Convention for the Protection of Industrial Property. In refusing to initiate proceedings, the Commission held that the term "act of unfair competition" could not include the legislative acts of a signatory State.

As these complaints were brought by "natural or legal persons", this may be an indication of how the new instrument will develop. Along with the courts in many other contracting States the Court has, however, until recently denied the direct effect of GATT provisions¹⁴¹. The Court has in the Third Fediol¹⁴² case held that for the purpose of the new Commercial Policy instrument natural or legal persons can rely directly on the provisions of the GATT. The Court relied on the fact that the GATT forms part of the Rules of Public International law, and by virtue of Article 2(1) of Regulation 2641/84 the applicants were entitled to apply to the Court to review the legality of the Commission decision applying those provisions.

This decision is to be welcomed and it is hoped that the reasoning of the Court may be extended to cover the other major safeguard measures.

140 O.J. 1989 L30/67.

141 See Petersmann "Application of GATT by the Court of Justice of the European Communities" 20 CMLRev. (1983) 397-437; Chapter 6, infra.

142 Case 70/87, supra; see also Brand "Private Parties and GATT Dispute Resolution: Implications of Panel Report on Section 337 of US Tariff Act of 1930" 24 JWTL (vol. 3) 5.

4.3. Dispute Settlement under Article XXIII GATT

Protective measures under the new Regulation may be adopted only insofar as they are compatible with the Community's international obligations and procedures¹⁴³. This in essence means that the procedures providing for consultation and dispute settlement at international level must be exhausted before the Community authorities can adopt any protective measures. Only where there is no provision for such procedures can retaliatory action be taken unilaterally. It should also be noted that the procedure laid down in Article 1(b) Regulation 2641/84 (i.e. ensuring the full exercise of the Community's rights with regard to the commercial practices of third countries) relates specifically to the implementation of the relevant dispute settlement procedures under international law.

4.3.1. Article XXIII

A party which believes that a benefit accruing to it has been nullified or impaired by another contracting party's breach or other measure may seek consultations with the aid of other interested parties and the GATT secretariat¹⁴⁴.

The first question to be considered is, "what is meant by the term 'nullification or impairment' in Article XXIII ?" As the term has never been defined it is necessary to look at the decided cases to date for guidance. It is arguable that the term implies that some

¹⁴³ Article 10(2) Regulation 2641/84.

¹⁴⁴ Article XXIII(1)

sort of injury must have occurred to the trade expectations of a contracting party before it can invoke Article XXIII¹⁴⁵.

Owing to the lack of definition, however, there has developed the principle of prima facie nullification or impairment¹⁴⁶. This principle presumes nullification or impairment in at least three situations:

- (i) when a quantitative restriction has been imposed on a product;
- (ii) when a domestic production subsidy is introduced on a product which has previously been the subject of a tariff concession resulting from tariff negotiations;
- (iii) when a State has been held by a GATT panel to have violated its GATT obligations.

By presuming nullification or impairment the burden of proof is shifted on to the defendant State which as a result has to prove its innocence¹⁴⁷. If a contracting party fails to reach a satisfactory solution through consultations, it can by virtue of Article XXIII(2) request the setting up of a working party or a panel to investigate the dispute¹⁴⁸. If the recommendations of the panel are not implemented then the contracting party can ask the GATT plenary body

145 This became clear in one of the earliest cases: see Chile v. Australia GATT 2nd Supp. BISD 188 (1952); see also Disc case 23rd Supp. BISD 98 (1977); Jackson "The jurisprudence of international trade : the DISC case in GATT" 72 AJIL (1978) 747 at 755; Klabbers & Vrengdenhil "Dispute Settlement in GATT : DISC and its successor" (1986) 1 LIEI 115 at 118.

146 Klabbers & Vrengdenhil op. cit. at 119.

147 ibid.

148 The main difference between a working party and a panel is that the former consists of national representatives whereas the latter normally consists of GATT experts.

to authorise the suspension of the GATT obligations or application of concessions¹⁴⁹.

Some of the Codes negotiated at the Tokyo Round of Multilateral Trade Negotiations have their own dispute settlement procedures¹⁵⁰. For the most part these correspond to the general system under Article XXIII. The Code on Subsidies and Countervailing Duties, however, contains more stringent time limits and it also allows the Committee administering the Code to authorise the injured parties to take a number of wide-ranging counter measures.

4.3.2. Evaluation

Most of the leading commentators on the GATT have criticised the dispute settlement procedure under Article XXIII¹⁵¹. The major criticism is that the system is subject to many delays. Furthermore, it is often the case that diplomatic or other political pressures ensure compliance with the panel's recommendations. These extra-legal means are inappropriate to an adjudicatory procedure which, if it is to succeed, needs to develop trust and

149 Article XXIII(2); see also Netherlands v. US GATT 1st Supp. BISD 32 (1953); GATT 7th Supp. BISD 23 (1959) - the only case in which the provision was invoked.

150 Code on Technical Barriers to Trade; Code on Government Procurement; Code on Customs Valuation and Code on Subsidies and Countervailing Duties. See generally GATT 26th Supp. BISD (1978-9).

151 See Jackson, "The Jurisprudence of International Trade : the DISC case in GATT" 72 AJIL (1978) at 747; Bronckers "Selective Safeguard Measures in Multilateral Trade Relations" (1985); Hofbauer & Schott, "Trading for growth : the next Round of Trade Negotiations", 11 Inst. Int'l Econ. 79 (1985); Richard Sutherland Whitt "The Politics of Procedure: An examination of the GATT Dispute Settlement Panel and Article XXI, Defense in the context of the US embargo of Nicaragua" (1987) Law, Policy & Int'l Bus. 603.

confidence¹⁵². Inevitably, diplomatic and political pressure works well in the case of the more powerful contracting parties but less so in the case of the less developed countries.

The panel procedure is also criticised. It is argued that it is often difficult to find an impartial panel where members are not allied to one of the parties to the dispute. Owing to the fact that consensus is required at each stage of the process this also results in endless delays.

Whatever the solution to the problems facing the GATT dispute settlement process and the panel procedure, one has to be very aware of the restrictive political environment in which it operates. Reform of the rules is one of the objectives of the Uruguay Round of Multilateral Trade Negotiations. According to the Ministerial Declaration of Punta del Este, the aim of the negotiations in this area was to improve the Rules and procedures of the dispute settlement process, with the object of ensuring compliance with the adopted recommendations¹⁵³. In this respect the special negotiating group have produced a new decision of the contracting parties styled "Improvements to the GATT Dispute Settlement Rules and Procedures". The result is a more adjudicatory approach to dispute settlement in the GATT and a movement away from the institutionalised negotiating forum it was designed to be¹⁵⁴.

152 See Jackson, ibid. at 780.

153 See Focus: GATT Newsletter 47 (June 1987).

154 GATT, 36th Supp. BISD 1990; see also Eric Canal-Forgues and Rudolf Ostrihansky "New Developments in the GATT Dispute Settlement Procedures" 24 JWTL 5 (vol. 2). They noted a shift in emphasis from consultations to panel proceedings, strict determination of time limits, inclusion of arbitration provisions to name but a few.

Because the GATT Dispute Settlement Procedure lacks both the political will to ensure effectiveness and also consensus on the interpretation of certain GATT Rules¹⁵⁵, the new Regulation can be seen as strengthening the Community's hand within the system. As Steenbergen points out, much will depend on the attitude of the Commission, the Council (especially the Member States who insisted on the insertion of Article 10(2)) and, in the last instance, on the Court if not on the contracting parties¹⁵⁶.

155 See Richard Sutherland Whitt, op. cit. at 628.

156 op. cit. at 430.

CHAPTER 3

SAFEGUARD MEASURES IN THE EUROPEAN COMMUNITY

INTRODUCTION

In order to consider the extent to which the findings of the Community authorities are reviewed by the Court, it is important to be familiar with the manner in which safeguard measures are applied in the Community. The aim of this Chapter is to analyse the substantive and procedural rules of the following safeguard measures:-

- Part 1 - Anti-Dumping rules under Regulation 2423/88
- Part 2 - Countervailing measures under Regulation 2423/88
- Part 3 - Common Rules for imports under Regulation 288/82 (as amended)
- Part 4 - Response to illicit commercial practices under Regulation 2641/84 - the new commercial policy instrument.

PART 1 : ANTI-DUMPING MEASURES

INTRODUCTION

Dumping occurs when a supplier sells his product at different prices in different countries¹. Such a practice is regarded as a form of unfair and undesirable competition. As a result, the majority of industrialised nations in the Western World have adopted legislation which permits them to impose anti-dumping measures

¹ Dale, Anti-Dumping in Liberal Trade Order 1980, p.1.

against such practices. A number of commentators have, however, questioned the economic rationale of such measures².

In the European Community it is the institutions of the Community which have the power to take action against dumped products from third countries. This power stems from Article 113 of the EEC Treaty, which provides for a Common Commercial Policy after the end of the transitional period based on uniform principles including measures to protect trade such as those to be taken in the case of dumping or subsidies³. This competence is exclusive with the exception of new Member States who can adopt national measures against dumped goods during the transitional period⁴.

2 See generally Dale, ibid.; Barcelo, "The Anti-Dumping Law: Repeal it or revise it", 2 [1979] 1 Michigan Yearbook of International Legal Studies 53; Davey, "An analysis of European Communities legislation and practice relating to anti-dumping and countervailing duties", in (ed.) B. Hawk, 'Anti Trust and Trade Policy in International Trade' (1983).

3 Prior to the end of the transitional period (1969) the Member States were competent to apply their own anti-dumping legislation. From 1962 onwards there was a obligation to consult at Community level. By virtue of Article 91 of the Treaty, the Member States could adopt measures against intra-Community dumping. This however was no longer applicable at the end of the third stage of the transitional period.

4 e.g. Article 380 Act of Accession of Spain and Portugal. Note: the Commission can also take action against dumping within the Common Market - see Article 91(1) EEC Treaty.

The anti-dumping rules are laid down in Regulation 2423/88⁵. They do not, however, apply to the field of coal and steel. The relevant instrument here is Commission Decision 2424/88⁶. This section will deal primarily with the rules as laid down by Regulation 2423/88⁷.

Dumping must cause injury⁸ to Community industry before anti-dumping duties may be imposed. Regulation 2423/88 also provides that the imposition of such duties must be in the interests of the Community⁹.

1 . DUMPING

Article 2(2) of Regulation 2423/88 states that "a product shall be considered to have been dumped if its export price to the Community

5 O.J. 1988 L209/1. The first Regulation adopted was in 1968 (Regulation 459/68 - O.J. 1968 L93/1); for a Commentary see Beseler, "EEC Protection against dumping and subsidies from 3rd States" [1968] CMLRev. 327. It was substantially revised in 1979 (Regulation 3017/79 - O.J. 1979 L339/1) as a result of the new Anti-Dumping Code which was adopted at the Tokyo Round of Multilateral Trade Negotiations (reproduced in O.J. 1979 L71/90) and the opinion of Advocate-General Warner in Case 113/77 NTN Toyo Bearing Co. Ltd. v. Council [1979] ECR 1185 at 1212; Regulation 2176/84 (O.J. 1984 L201/1 (as corrected - O.J. 1984 L227/35)) was adopted in 1984 and amended by Regulation 1761/87 (O.J. 1987 L167/9) permitting the Community authorities to impose anti-dumping duties on components of products which were already subject to duties.

6 O.J. 1988 L209/18.

7 For the most part the anti-dumping rules involving EEC products and ECSC products are the same. Where they differ, specific reference to the differences will be made.

8 Article 2(1) Regulation 2423/88.

9 Article 11(1), 12(1).

is less than the normal value of the like product". In order to determine whether dumping has taken place the following must be considered:

- the normal value of the product¹⁰
- the export price of the product¹¹
- the comparison of the normal value and the export price properly adjusted¹².

1.1. The Like Product

Dumping can take place only if the product is sold abroad at a price below the normal value of the like product and if it causes injury to the Community producers of the like product.

"Like Product" is defined in the Regulation as:

a product which is identical, i.e. alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration¹³.

The Community authorities have recently held that the requirement that a product be similar to an imported product should not be interpreted narrowly and that only differences in quality or basic use are grounds for considering that a product is not similar to another¹⁴. The position under Regulation 2423/88 can be compared

10 Article 2(3)-(7) Regulation 2423/88.

11 Article 2(8) Regulation 2423/88.

12 Article 2(9)-(10) Regulation 2423/88.

13 Article 2(12). This was taken directly from Article 2(2) GATT, Anti-Dumping Code.

14 See Small Screen Colour Televisions (Korea) O.J. 1989 L314/1. The Commission excluded higher range small screen colour televisions which included features such as flat square screens, teletext modules and digital chassis. It noted that these more innovative and enhanced technical

to the regime under Regulation 288/82 (Safeguard Measures) where the term "like product" applies to both producers of like and also directly competing products¹⁵.

In ascertaining whether the exported product and that sold on the domestic market are like products within the meaning of Article 2(12) the Commission for the most part relies on their physical characteristics and the degree of interchangeability of the products in question. For example, the Commission held that nickel produced in the Community had a purity the same as that originating in the USSR and that each product was almost interchangeable in application with one another¹⁶.

The degree of interchangeability has, however, not been defined. It is essential, therefore, to look at the decisions to date. In one case the Commission noted that the products under consideration all had the same chemical component, magnesium oxide. Although the content varied it lay within a range from 71-90 per cent. While this and other factors may be relevant for certain specific uses all products were used for the same purposes¹⁷. In another case, however, the Commission was satisfied on the basis of available data

characteristics were not found in the Korean export models; Synthetic Fibres of Polyester (USA, Mexico, Taiwan, Romania, Turkey, Yugoslavia) O.J. 1988 L348/49.

15 Article 15(1) Regulation 288/82.

16 Unwrought Nickel (USSR) O.J. 1983 L286/29. See also Bisphenol (USA) O.J. 1983 L23/9 where the Commission noted that the few differences between the specifications for US and Community were minimal; Glass textile fibres (Rovings) (GDR, Czechoslovakia) O.J. 1983 L354/15, the Commission concluded that as regards the physical characteristics the products closely resembled one another and that in a large number of cases they could be used for the same application.

17 Natural Magnesite (caustic burned) (China) O.J. 1982 L371/21.

that sodium carbonate in light and dense forms were not randomly interchangeable by end users. They were therefore held not to be like products¹⁸. Where a large variety of models are concerned the Commission has to decide whether they form one single category of products or whether they fall into different categories separated by clearly defined dividing lines. Such a situation arose in Dot Matrix Printers¹⁹. In order to determine this, the Commission considered the following criteria:

- (i) the physical and technical characteristics of the printers;
- (ii) their application and use;
- (iii) particularities of the printer market and the consumers' perceptions of these products; and
- (iv) other factors inter alia production, equipment, and personnel.

It concluded that the printers formed one single category of products .

In a number of cases, the Commission has held that the products in question were not like products. It held that transparent drawn glass and transparent float glass obtained by the float method were

18 Sodium Carbonate (Bulgaria) O.J. 1982 L283/9.

19 O.J. 1988 L130/12. See also Daisy Wheel Printers (Japan) O.J. 1988 L177/1; Compact Disc Players (Japan, South Korea) O.J. 1989 L205/5.

not like products²⁰. It took into account the fact that the process of manufacturing drawn glass led to optical defects which were evident when regarded at an angle. Also the float process made it possible to obtain larger rectangles which were essential for certain uses. Finally, only float glass could be used for certain purposes. Similarly, in Freezers it concluded that chest freezers and upright freezers were not like products²¹.

On the other hand the Commission has held that even where the products sold in the domestic market and those for export are not in exactly the same form, the product sold on the domestic market is a like product because it has characteristics that closely resemble that exported to the Community²².

20 Glass (Turkey, Yugoslavia, Romania, Bulgaria, Hungary, Czechoslovakia) O.J. 1986 L51/73 (Note: for the purpose of an investigation under Regulation 288/82 the two types of glass were regarded as directly competing products O.J. 1986 L128/7); see also Outboard Motors (Japan) O.J. 1983 L152/18 Commission excluded Outboard Motors above 85 h.p. since Community industry did not produce models in question and because there was no evidence that the establishment in the EEC of such production was being envisaged; Small Screen Colour Televisions (Korea) O.J. 1989 L314/1.

21 O.J. 1986 L259/14.

22 See Sensitized Paper for Colour Photographs (Japan) O.J. 1984 L124/45. Two of the exporters sold the product for export in large width rolls but for the domestic market these were cut into smaller widths. Exporter suggested that normal value should be based on the export prices to non-EEC countries or on their constructed value. The Commission however considered that the product sold on the domestic market was a like product since it had characteristics which closely resembled that exported to the EEC; see also Aluminium Foil (Austria) O.J. 1982 L339/58. The Commission held that the product sold to the Community was not in exactly the same form as that sold on the domestic market. It therefore based normal value on the cost of production of the like product in Austria.

1.2. Normal Value

1.2.1. The Domestic Market Price

The preferred basis for the determination of normal value is the domestic market price, i.e. the price actually paid or payable in the exporting country or the country of origin.

Normal value is defined in the Regulation as:

the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or the country of origin²³.

Article 2(3)(a) of Regulation 2423/88 provides that this price shall be net of all discounts and rebates directly linked to the sales under consideration provided that the exporter claims and supplies sufficient evidence that any such reduction from the gross price has actually been granted. In Compact Disc Players²⁴ one of the exporters claimed that normal value established for sales on the domestic market should take account of the purchase value of compact discs which were given in the form of rebates on the price paid for the product under consideration. They argued that these were directly related to the sales under consideration. The Commission noted that the compact discs were purchased by the exporter several years before the investigation period. They were not provided with any indication of their cost nor an estimate of the effect of these goods on the market value of the compact disc players. In these circumstances the Commission estimated this effect to be the cost of similar compact discs purchased during the

23 Article 2(3)(a).

24 O.J. 1990 L13/21; see also Synthetic Fibres of Polyester (Mexico, Romania, Taiwan, Turkey, USA, Yugoslavia) O.J. 1988 L348/49.

investigation period by the exporter. This cost was deducted from the domestic selling price.

On the other hand, in Small Screen Colour Televisions²⁵ it refused to deduct a rebate which it held was not directly related to the sales under consideration. Two of the Korean producers operated a form of rebate to their customers, i.e. retailers. This was paid when the products under consideration were resold by their customers to final customers on instalment terms. The Commission held that this was an event posterior to and independent of the producer's sale to their customers.

Article 2(3)(a) also permits the Commission to take into account deferred discounts, provided they are directly related to the sales under consideration and evidence is produced to show that these discounts were based on consistent practice in prior periods or an undertaking to comply with the conditions required to qualify for the deferred discount.

In three main situations the domestic market price will not be used namely, when there are no sales of the like product on the domestic market; when there are no sales of the like product in the ordinary course of trade and when such sales do not provide a proper comparison, i.e. insufficient sales²⁶.

1.2.1.1. No Sales of the Like Product on the Domestic Market

The domestic market price will be disregarded when there are no sales of the like product on the domestic market. Such a situation will normally arise if for example the exporter only manufactures the

25 O.J. 1989 L314/1.

26 Article 2(3)(b) Regulation 2423/88.

product in question for export²⁷, or where there are no sales on the domestic market of the models comparable to those exported to the Community²⁸.

A new Article 2(3)(c) was introduced by Regulation 2423/88 to deal with the increase in the number of original equipment manufacturers (hereinafter referred to as OEMs), i.e. importers who sell in the Community under their own brand names, products which they neither sell nor produce in the country of origin but which are purchased from other producers of the product who export the product in question to the Community. This Article provides that in such cases the normal value shall be established on the basis of prices or costs of other sellers or producers in the country of origin either by reference to their domestic market price or the constructed value²⁹.

1.2.1.2. No Sales in the Ordinary Course of Trade

The domestic market price will also be disregarded when there are no sales in the ordinary course of trade. This concept is not defined in the Regulation. It does, however, signify the fact that the Commission will disregard the domestic price when it does not reflect normal trading conditions³⁰. In other words, the domestic

27 See e.g. Ballbearings (Thailand) O.J. 1986 L113/61; Stainless Steel House Cooking Ware (S. Korea) O.J. 1986 L74/83; Chemical Fertilizer O.J. (1983) L15/1.

28 See Electronic Scales (Japan) O.J. 1984 L80/9.

29 See Small Screen Colour Televisions (Korea) O.J. 1989 L314/1; Glutamic Acid and its Salts (Indonesia, Korea, Taiwan, Thailand) O.J. 1990 L56/23.

30 See Van Bael & Bellis "EEC Antidumping and other Trade Protection Laws" (1985) at p. 33.

prices used to determine the normal value must be arms length prices³¹.

The Regulation expressly refers to the fact that sales made at a loss³² and sales between parties who are associated or who have a compensatory arrangement are not made in the ordinary course of trade³³. Sales are made at a loss when they are made at a price less than the cost of production³⁴. Such sales may be considered as not having been made in the ordinary course of trade if they:

- (a) have been made in substantial quantities during the investigation period as defined in Article 7(1)(c) and
- (b) are not at prices which permit recovery, in the normal course of trade and within the period referred to in paragraph (a), of all costs reasonably allocated³⁵.

The changes made to Article 2(4)(a) and (b) confirm that the Commission must confine its examination to the investigation period.

Transactions between parties which appear to be associated or to have a compensatory arrangement with each other may be considered as not being in the ordinary course of trade³⁶. This means that the Commission can disregard prices charged in transactions between

31 Article 2(4) Regulation 2423/88.

32 ibid.

33 Article 2(7).

34 "Cost of production" is defined in Article 2(3)(b)(ii) of Regulation 2423/88 as:
... 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 ...

35 Article 2(4)(a) and (b) Regulation 2423/88. See e.g. Dot Matrix Printers (Japan) O.J. 1988 L317/33; Video Cassette Tapes (South Korea, Hong Kong) O.J. 1989 L174/1; DRAMS (Japan) O.J. 1990 L20/5.

36 Article 2(7) Regulation 2423/88.

associated companies unless the prices and costs involved are comparable to those involved in transactions between parties which have no such link³⁷.

The term associated is not defined in the Regulation. It has, however, been the subject of controversy in relation to sales companies which form part of the corporate structure. In Electronic Typewriters it was held that the sales from the manufacturing company to its sales company were in reality transactions between associated companies. In arriving at such a conclusion the Council took into account that they both formed part of the corporate structure in which the sales company had a function similar to a sales department. It also noted that although they were legally separate entities this did not alter the existence of a single economic entity and what was relevant was not the legal structure but the fact that the principal function of these sales companies was to sell or facilitate the sale of the corporate product³⁸.

This approach has since been followed by the Commission in a number of recent decisions³⁹.

37 Electronic Typewriters (Japan) O.J. 1985 L163/1; Compact Disc Players (South Korea, Japan) O.J. 1989 L205/5.

38 ibid; see also Electronic Typewriters (Japan) O.J. 1984 L335/13. The Commission considered that an exporter had a controlling interest in Japanese sales company because "all other shareholders have individually only minor shareholdings" and because "the main reason for the sales company's existence is to sell the exporters product in Japan".

39 Electronic Scales (Japan) O.J. 1985 L275/5; Photocopiers (Japan) O.J. 1986 L239/5; Synthetic Fibres of Polyester (GDR, Romania, Turkey, Yugoslavia) O.J. 1987 L103/38; UREA (GDR, USSR, Czechoslovakia, Yugoslavia, Kuwait, Saudi Arabia, Libya, Trinidad & Tobago) O.J. 1987 L121/11; Daisy Wheel Printers (Japan) O.J. 1988 L177/1; Compact Disc Players (South Korea, Japan) O.J. 1989 L205/5.

Even if an association does exist Article 2(7) does not rule out the possibility of allowing the Commission to use the sales in question if the prices are comparable to those at which the like product is sold to unrelated parties⁴⁰.

Article 2(7) also allows the Commission to treat as associated, parties who have a compensatory arrangement⁴¹. The term however is not defined in the Regulation. It could for example be an arrangement between an exporter and an importer which involved the sale of a product at an artificially high price (in order to avoid dumping) with the loss compensated by his receiving other goods at artificially low prices⁴².

1.2.1.3. Sales not Permitting a Proper Comparison,
i.e. Insufficient Sales

Finally the domestic market price will be disregarded when the quantity of sales involved is so residual or so negligible that they cannot be considered as reliably reflecting prices in the ordinary

40 Sensitized Paper for Colour Photographs (Japan) O.J. 1984 L124/4.

41 See Polypropylene Film (Japan) O.J. 1982 L172/44. The Commission excluded sales because of existence of a special processing arrangement; Polyester Yarn (USA) O.J. 1983 L50/14 - textural arrangement; Phenol (USA) O.J. 1981 L195/22 - Conversion operation.

42 See Cuanne & Stanbrook "Dumping and Subsidies" (1983) p. 34/5; Briët "Antidumping in de EEG - De Kinderschoenen ontgroeid?" SEW (1982) 145 at 150 note 30 - he suggests that it could include buy back arrangements, swap deals and conversion operations.

course of trade⁴³. The Commission has now set a threshold below which sales on the domestic market should be disregarded. It held that given the commercial importance of the Community as an import market, sales on the domestic market should be used if they exceed 5 per cent of volume of exports to the Community⁴⁴. The Commission has recently held that even if sales on the domestic market are low in absolute terms, so long as they exceed the threshold amount, such sales will be used to determine normal value⁴⁵.

1.2.2. The Alternative Methods of Determining Normal Value

In those cases where the Commission cannot use the domestic market price it has the power to base the normal value of the product in question in one of the following ways:

- 43 The Commission simply stated that domestic sales did not permit a proper comparison because "minimal quantities were involved" Potato Granules (Canada) O.J. 1981 L116/11); "quantities involved are insufficient" Ferrochromium (South Africa, Surinam, Turkey, Zimbabwe) O.J. 1983 L161/15); "small quantities were involved" Unwrought Aluminium (Norway, USSR, Yugoslavia, Surinam) O.J. 1984 L57/19); "virtually no sales" Ballbearings (miniature) (Singapore, Japan) O.J. 1984 L79/8.
- 44 Electronic Typewriters (Japan) O.J. 1984 L335/43; see also Photocopiers (Japan) O.J. 1986 L239/5; Dot Matrix Printers (Japan) O.J. 1988 L130/12; Video Cassette Tapes (Hong Kong, South Korea) O.J. 1989 L174/1; Compact Disc Players (Japan, South Korea) O.J. 1989 L205/5; Ferro Silicon (Iceland, Norway, Sweden, Venezuela, Yugoslavia) O.J. 1990 L38/1. Cf. Under the law of the United States, domestic sales are insufficient if they are less than 5% of exports to countries other than the United States, 19 CFR (1983) 5 353(4)(a).
- 45 Compact Disc Players (Japan, South Korea) O.J. 1989 L205/5. The Council concurred with the Commission, O.J. 1990 L13/21.

1.2.2.1. The comparable price of the like product when exported to any third country, i.e. export price to a third country⁴⁶.

1.2.2.2. The constructed value⁴⁷.

There are two further methods by which normal value can be determined where the sales are made at a loss in the country of origin⁴⁸:

1.2.2.3. The remaining sales on the domestic market made at a price which is not less than the cost of production.

1.2.2.4. Adjusting the sub-production cost price in order to eliminate the loss and provide for a reasonable profit.

Finally, with regard to state trading countries¹, normal value is determined by a different set of rules⁴⁹.

1.2.2.1. The Export Price to a Third Country

Normal value may be determined by the comparable price of the like product when exported to any third country⁵⁰. This may be the highest such export price but it should also be a representative one⁵¹. This method has been used by the Commission

46 Article 2(3)(b)(i) Regulation 2423/88.

47 Article 2(3)(b)(ii) Regulation 2423/88.

48 Article 2(4) Regulation 2423/88.

49 Article 2(5) Regulation 2423/88.

50 Article 2(3)(b)(i) Regulation 2423/88.

51 ibid.

infrequently⁵², as more often than not export sales to another country will also be at dumped prices⁵³.

1.2.2.2. The Constructed Value

The constructed value is the method most often used by the Commission when the domestic market price cannot be used. It is calculated by adding the cost of production plus a reasonable margin for profit⁵⁴. The cost of production is to be computed on the basis of all costs in the ordinary course of trade both fixed and variable in the country of origin, of materials and manufacture plus a reasonable amount for selling, administrative and other general expenses⁵⁵.

Article 2(3)(b)(ii) of Regulation 2423/88 permits the Commission to calculate selling, general and administrative expenses (hereinafter referred to as "SGAs") by reference to the expenses incurred by the producer or exporter on the profitable sales of the like product on the domestic market. In Compact Disc Players the Commission

52 See Saccahrin and its Salts (Korea) O.J. 1980 L331/25 where normal value was calculated on the basis of exports to the United States and Australia.

53 See Ballbearings (miniature) (Japan, Singapore) O.J. 1984 L79/8. The Minebea Group requested that normal value be constructed on the basis of the prices at which its products exported from Singapore are first resold to an independent buyer on the Japanese market. The Commission held that with regard to these exports it could be ruled out that dumping was being practised by Minebea on the Japanese market. See also UREA (Libya, USSR, GDR, Yugoslavia, Czechoslovakia, Saudi Arabia, Kuwait, Trinidad & Tobago) O.J. 1987 L317/1; Ferro Silicon (Iceland, Norway, Sweden, Venezuela, Yugoslavia) O.J. 1990 L38/1.

54 Article 2(3)(b)(ii) Regulation 2423/88.

55 ibid. For a detailed analysis of the factors involved in the calculation of cost of production see Van Bael & Bellis op. cit. pp. 37-40.

calculated SGAs on the basis of the weighted average of SGAs incurred by the exporters who had insufficient sales for some models by reference to sales of their other profitable models⁵⁶.

If such data is unavailable or unreliable or is not suitable for use, SGAs will be calculated by reference to the expenses incurred by other producers or exporters in the country of origin or export on their profitable sales of the like product⁵⁷. In Compact Disc Players the Commission calculated the SGAs for those exporters who had no sales, insufficient sales or who made sales at a loss on the domestic market, by reference to the weighted average of SGAs realised by all the other producers on the domestic sales of profitable models of compact disc players⁵⁸.

Article 2(3)(b)(ii) concludes by stating that, if neither of the above two methods can be applied, the expenses incurred shall 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. In Daisy Wheel Printers the Commission noted that the exporters in question had no or insufficient profitable sales of the product under consideration on the domestic market. It therefore calculated the SGAs for one exporter on its profitable sales of dot matrix printers and for the other, on its profitable sales of line printers. The Commission concluded these to be the most appropriate products in the same business sector⁵⁹.

56 O.J. 1989 L205/5.

57 Article 2(3)(b)(ii).

58 O.J. 1989 L205/5.

59 O.J. 1988 L177/1.

This concept of SGAs has given rise to controversy in the context of whether the selling expenses of sales companies should be included in the determination of the constructed value. In Electronic Typewriters⁶⁰ these sales companies were held in essence to be sales departments of the manufacturing company. The Commission held that such expenses should be included because:

- where normal value is based on domestic selling prices, these prices if they are in the ordinary course of trade cover all SG&A incurred by the sales organisation.
- 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 SG&A expenses be included⁶¹.

This means, and rightly so, that the constructed value is a constructed normal value. It, therefore, should yield as far as possible the same result as if there had been sufficient sales on the domestic market and if Article 2(3)(a) had applied⁶².

With regard to selling expenses, it should be emphasised these do not refer to expenses related to export sales as some authors have

60 O.J. 1984 L335/43.

61 ibid. See also Electronic Scales (Japan) O.J. 1985 L275/15 where the Commission held that: "this method [constructed value] is designed to lead to normal value as would be established if sales on the domestic market had taken place. Since sales prices have necessarily to reflect SG&A's by the seller, the amount of such expenses equal to that usually reflected in sales prices in the ordinary course of trade of a product of the same general class or kind has to be included in the constructed value"; Ballbearings (Thailand) O.J. 1986 L113/61; Photocopiers (Japan) O.J. 1986 L239/5; Dot Matrix Printers (Japan) O.J. 1988 L130/12.

62 See Case 260/85 and 106/86 TEC Co. Ltd. v. Council [1988] ECR 5855. The Court condoned the practice of the Community authorities.

suggested⁶³. Such a contention confuses a constructed export price with a constructed normal value. It is true that normal value and export price should be on an equal footing for the purposes of Article 2(9) of Regulation 2423/88⁶⁴. Article 2(9), however, refers to the adjustments which have to be made in order to make the normal value and the export price comparable. It has nothing to do with the constructed normal value.

To the cost of production a reasonable margin of profit has to be added. Article 2(3)(b)(ii) states that the margin of profit is to be determined, on the basis of "the profitable sales of the like product on the domestic market". This new wording as opposed to that under Regulation 2176/84, namely "the profit normally realised on the sales of products of the same general category on the domestic market of the country of origin" reflects the recent Commission practice to use profit margins from profitable sales⁶⁵.

Where an exporter has no domestic sales or insufficient domestic sales or where these are made at a loss, Article 2(3)(b)(ii) permits the Commission to calculate the margin of profit by reference to the profit realised by other exporters in the country of origin on profitable sales of the like product. In Electronic Typewriters the Commission, in considering the profit margins of those exporters who had insufficient sales on the domestic market, thought it reasonable to include a margin of 32.39 per cent which corresponded to the lowest profit margin of the three exporters who had sufficient domestic sales⁶⁶.

63 cf. Van Bael & Bellis op. cit. at p. 40.

64 ibid.

65 Photocopiers (Japan) O.J. 1987 L54/12; O.J. 1986 L239/5.

66 O.J. 1985 L163/1; see also Dot Matrix Printers (Japan) O.J. 1988 L317/33.

Article 2(3)(b)(ii) does not specify a single percentage rate of profit unlike the American regulations which state that profits shall not be less than 8 per cent of direct costs and general overheads⁶⁷.

Exporters have argued that the present practice of the Community authorities in determining profit margin results in high dumping margins and does not reflect the true position⁶⁸. The practice, now codified in Article 2(3)(b)(ii), allows them to use artificially high profit margins in constructing normal value given that unprofitable unit sales do not have to be included.

1.2.2.3. Remaining Sales on the Domestic Market, if they have been made at a Price not less than the Cost of Production

When some sales on the domestic market have been made at a loss, the Commission can, if it wishes, determine normal value by using the remaining sales if they have been made at a price not less than the cost of production⁶⁹. For instance, in Potato Granules⁷⁰ the Commission concluded that since one-third of the sales on the domestic market were not made at a loss, these could be used as a reliable basis for determining normal value. The Commission in Photocopiers⁷¹ established normal value on the basis of remaining i.e. profitable sales only, even though according to some exporters

67 CFR S.353 (6)(a)(2) 1983.

68 See case 277 and 300/85 Canon Inc. v. Council [1988] ECR 5731. The Court held however that the authorities were not in error when they established normal profit on basis of data relating to other electronic typewriter models.

69 Article 2(4) Regulation 2423/88.

70 O.J. 1981 L116/11.

71 O.J. 1987 L54/12.

by restricting the calculation to these sales and thereby eliminating certain sales at a loss, an artificially high profit margin was established.

1.2.2.4. Adjusting the Sub-production Cost Price in order to Eliminate Loss and Allow for a Margin of Profit

Alternatively, when sales are made at a loss the Commission can calculate normal value by adjusting the sub-production cost price in order to eliminate loss and allow for a margin of profit. It is basically a simplified form of the constructed value and is quite often used by the Commission to determine normal value⁷². For example in Outboard Motors⁷³, the prices of the product on the domestic market by one company were lower than the costs ordinarily incurred in its production. Normal value was therefore determined by adjusting the sub-production cost prices in order to eliminate losses and allow for a reasonable margin of profit.

⁷² See Van Bael & Bellis op. cit., p. 42 at footnote 78.

⁷³ O.J. 1983 L152/18. See also Textured Polyester Fabrics (USA) O.J. 1981 L133/17; Perchlorethylene (Czechoslovakia, Romania, Spain, USA) O.J. 1982 L371/47; Electronic Scales (Japan) O.J. 1984 L80/9; Artificial Corundum (Czechoslovakia, China, Spain, Yugoslavia) O.J. 1984 L255/9; Hydraulic Excavators (Japan) O.J. 1985 L68/13.

1.2.2.5. State Trading Countries

In the case of state trading countries (or non-market economies)⁷⁴ the domestic market prices are not used. Instead the Regulation lays down special rules for the determination of the normal value⁷⁵. It states that:

... normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

- (a) the price at which the like product of a market economy third country is actually sold:
 - (i) for consumption on the domestic market of that country; or
 - (ii) to other countries, including the Community; or
- (b) the constructed value of the like product in a market economy third country;
- (c) if neither price nor constructed value as established under (a) or (b) provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin⁷⁶.

In determining normal value the first step is to select the analogue country, i.e. the comparable free market economy. In doing this the

74 This concept is not defined in Article 2(5). It basically refers however to those state trading countries outlined in Regulations 1765/82 and 1776/82. (They are: Bulgaria, Romania, Poland, GDR, USSR, Hungary, Czechoslovakia, Vietnam, North Korea, Mongolia, People's Republic of China). The use of the words "in particular" in Article 2(5) suggest however that other countries could be classified as non-market economies. It should be noted that, as a result of the changes in Eastern Europe the German Democratic Republic has now merged with the Federal Republic of Germany to form a unified Germany in the EEC.

75 Article 2(5).

76 ibid.

Commission is guided by Article 2(5) which states that normal value has to be determined in an appropriate and not unreasonable manner⁷⁷. In most cases, the Commission will proceed by considering the proposal put forward by the complainants. In a number of cases this was not objected to by the other parties involved⁷⁸. It will, however, consider the alternatives suggested by the importer or exporter in question. For example in Barium Chloride the main importer of the product from China suggested the German Democratic Republic. This was rejected however, since the prices were not representative, i.e. they were made at a loss and fell outside the reference period⁷⁹. Generally speaking, if the

77 Under the American Regulation, the market economy used should be at the same stage of economic development. This is to be determined inter alia by the per capita gross national product and the infrastructure development in the industry producing the product in question, 19 CFR s. 353(8)(b) [1983].

78 See Photographic Enlargers (Poland, USSR, Czechoslovakia) O.J. 1982 L212/32 (Japan was used); Trichloroethylene (GDR, Poland, Romania, Spain, USA, Czechoslovakia) O.J. 1982 L223/76 (prices on American domestic market were used); Kraftliner (USSR) O.J. 1983 L64/25 (American domestic prices were used); Sanitary Fixtures (Czechoslovakia, Hungary) O.J. 1983 L325/18 (Austria was used); Paint, Distemper, Varnish and Similar Brushes (China) O.J. 1987 L46/45 (Sri Lanka was used).

79 O.J. 1983 L110/11. See also Natural Magnesite (China) O.J. 1982 L371/21 (the importer suggested Austria, no evidence was produced to show that this would be more suitable); Unwrought Nickel (USSR) O.J. 1983 L159/43 (the exporter and one dealer suggested the London Metal Exchange quotations. The Commission rejected this on basis that they doubted whether the quotations covered production costs in market economy countries); Non-alloyed Unwrought Aluminium (USSR) O.J. 1984 L57/19 (London Metal Exchange was again suggested as an alternative, again rejected.)

case involves a market and a non-market economy the Commission will invariably use the prices on the free market economy⁸⁰.

In determining the analogue country, the Commission will normally look to see if the product in question has undergone a similar production process and whether it is subject to the same degree of technology and technical standards⁸¹. On a number of occasions it has also taken into account the fact that production has been carried out on a substantial scale⁸² and that there has been strong

80 See Codeine (Hungary) O.J. 1983 L16/30. The Hungarian exporter suggested that normal value should be based on the export price in Germany and not the domestic price in Yugoslavia. The Commission held however that the additional administrative burden which would be imposed on it by carrying out investigations in a further market economy country would be unjustified, unless it could be demonstrated that it would be manifestly more appropriate and reasonable to use another third country's normal value rather than use the prices or costs in Yugoslavia.

81 See for example Oxalic Acid (China, Czechoslovakia) O.J. 1982 L19/26; Standardized Multiphase Electric Motors (Bulgaria, Czechoslovakia, GDR, USSR, Poland, Romania) O.J. 1982 L85/9; Refrigerators (Yugoslavia, USSR, GDR, Poland, Romania, Hungary, Czechoslovakia) O.J. 1982 L184/23; Sodium Carbonate (GDR, Bulgaria, Poland, Romania, USSR) O.J. 1983 L160/18; UREA (GDR, Czechoslovakia, USSR) O.J. 1987 L121/11.

82 See for example Sodium Carbonate (USSR) O.J. 1979 L297/12; Lithium Hydroxide (USA, USSR) O.J. 1980 L23/19; Standardized Multiphase Electric Motors (Bulgaria, Czechoslovakia, GDR, USSR, Romania, Poland) O.J. 1982 L85/9; Natural Magnesite (China) O.J. 1982 L371/21; Hexamethylenetetramine (GDR, Czechoslovakia, Romania) O.J. 1983 L40/24; Glass Textile Fibre (Rovings) (Japan, GDR, Czechoslovakia) O.J. 1983 L160/18.

internal competition. This latter factor usually guarantees that price levels are in a reasonable proportion to costs⁸³.

Usually, the Commission uses the domestic price prevailing on the analogue market in order to determine the normal value⁸⁴. When this is unreliable the Commission has used either the constructed value⁸⁵ or the export prices of the analogue country⁸⁶.

As a last resort the Commission can establish normal value by the price actually paid or payable in the Community for the like product duly adjusted, if necessary, to include a reasonable margin of

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- 83 See for example Hexamethylenetetramine (GDR, USSR, Czechoslovakia, Romania) O.J. 1983 L40/24; Glass Textile Fibre (Rovings) (Japan, GDR, Czechoslovakia) O.J. 1983 L160/18. Note: the existence of price controls also ensures that price levels are in reasonable proportion to costs; Sodium Carbonate (USSR) O.J. 1979 L297/12.
- 84 Sodium Carbonate (USSR) O.J. 1979 L297/12; Lithium Hydroxide (USA, USSR) O.J. 1980 L23/19; Cylinder Vacuum Cleaners (Poland, GDR, Czechoslovakia) O.J. 1982 L172/47; Kraftliner (USSR, Sweden, USA, Austria, Canada, Finland, Portugal) O.J. 1983 L64/25.
- 85 Angles, Shapes and Sections of Iron and Steel (Romania) O.J. 1980 L56/34; Hardboard (Czechoslovakia, Spain, Hungary, Poland, Bulgaria, Sweden, Norway, Finland, USSR, Romania) O.J. 1982 L181/19; Paracetamol (INN) (China) O.J. 1982 L236/23; Unwrought Nickel (USSR) O.J. 1983 L159/43; Asbestos-Cement Corrugated Sheets (GDR, Czechoslovakia) O.J. 1984 L259/48.
- 86 Mechanical Alarm Clocks (GDR, USSR) O.J. 1980 L185/5 (exports to EEC); Saccharin and its Salts (China, Japan and USA) O.J. 1980 L331/41 (Exports to third countries); Ballbearings (Japan, Romania, USSR, Poland) O.J. 1981 L152/44 (exports to EEC); Photographic Enlargers (Poland, USSR, Czechoslovakia) O.J. 1982 L212/32 (exports to EEC); Sanitary Fixtures (Czechoslovakia, Hungary) O.J. 1983 L325/18 (export prices to third countries); Mechanical Wrist Watches (USSR) O.J. 1987 L213/5 (exports to third countries and the EEC).

profit⁸⁷. The Commission did so in Oxalic Acid⁸⁸ having rejected every other possibility. It rejected the following:

- South Korea: the South Korean exporters refused to co-operate.
- Domestic prices charged in China: China was one of the countries under investigation. Article 2(5) did not cover such a possibility.
- Taiwan: it was rejected on the ground that the prices charged on the Taiwanese market were artificially high.
- Japan: as the manufacturing processes and raw materials were different, Japan was rejected.
- Prices of exports to the United States from Brazil: the Commission considered that it was highly likely that such products were dumped. It therefore rejected this possibility.
- Domestic prices charged in Brazil: the Brazilian exporter refused to co-operate.
- India: the Indian producer also refused to co-operate.

1.3. Export Price

Dumping is determined by comparing normal value with the export price of the like product. Article 2(8)(a) of Regulation 2423/88 states that:

The export price shall be the price actually paid or payable for the product sold for export to the Community net of all taxes, discounts and rebates actually granted and directly related to the sales under consideration. Deferred discounts shall also be taken into consideration if they are actually granted and directly related to the sales under consideration.

87 Article 2(5)(c) Regulation 2423/88.

88 O.J. 1988 L343/34.

This price, however, may not always be reliable, where for example there is no export price, or where there is an association or compensatory arrangement between the exporter and the importer or a third party⁸⁹. In such a case the Commission can construct the export price on the basis of "the price at which the imported product is first resold to an independent buyer, or if the product is not sold to an independent buyer or not resold in the condition imported, on a reasonable basis"⁹⁰.

The normal method for constructing the export price is on the basis of the price at which the product is first resold to an independent buyer. In constructing this, the Regulation states that allowance shall be made for all costs incurred between importation and resale including all duties and taxes and for a reasonable profit margin⁹¹. The Regulation provides in Article 2(8)(b) that these costs shall include those normally borne by an importer but paid by any party either in or outside the Community which appears to be associated or to have a compensatory arrangement with the importer or exporter. This provision permits the Community authorities to

89 Article 2(8)(b) Regulation 2423/88. See supra footnote 42.

90 ibid. The latter method, i.e. on any reasonable basis, has never been used by the Commission. In Textured Polyester Fabrics (USA) O.J. 1981 L133/17 an adjustment was made to the processing costs where the products were not resold in the state in which they had been imported.

91 Article 2(8)(b) Regulation 2423/88 provides that:
The allowances shall include, in particular the following:
(i) usual transport, insurance, handling, loading and ancillary costs;
(ii) customs duties, any antidumping duties and other taxes payable in the importing country by reason of the importation on the sale of the goods;
(iii) a reasonable margin for overheads and profit and/or any commission usually paid or agreed.
For an analysis of the Institutions practice with regard to allowances see Van Bael & Bellis op. cit. at pp. 52-54.

deduct not only the costs of the related sales subsidiary but also the export costs borne by the parent company, for example where the parent company has paid the advertising costs of its subsidiary in the Community. One commentator has criticised this provision on the basis that it permits the Community authorities to construct the export price in such a way that it results in a higher dumping margin⁹².

The Commission will not use the profit margin of the related importer since this is in essence a transfer price between associated companies. Rather it will look to an independent importer and the profit margin it would have made if it had been in the position of the related importer⁹³. Such a profit margin has so far ranged from 2 to 12.7 per cent⁹⁴.

92 See Norall, "The New Amendments to the EC's Basic Anti-dumping Regulation" 29 CMLRev. 83 at 89.

93 See Commission Intervention in the Electronic Typewriter Cases (case 56/85 and 250/85 Brother v. Commission & Council [1988] ECR 5655 and 5683; case 260/85 and 106/86 TEC & Co. Ltd. v. Council [1988] ECR 5855; case 273/85 and 107/86 Silver Seiko Ltd. v. Council [1988] ECR 5927; case 277 and 300/85 Canon Inc. v. Council [1988] ECR 5731; case 301/85 Sharp v. Council [1988] ECR 5813.

94 Chemical Fertilizer (USA) O.J. 1981 L39/4 (3%); Textured Polyester Fabrics (USA) O.J. 1981 L133/17 (5%); Ballbearings (Japan, USSR, Poland, Romania) O.J. 1981 L152/44 (6%); Phenol (USA) O.J. 1982 L12/1 (5%); Polypropylene (Japan) O.J. 1983 L152/18 (5%); Dicumyl Peroxide (Japan) O.J. 1983 L203/13 (5%); Caravans for Camping (Yugoslavia) O.J. 1983 L240/12 (5%); Ballbearings (Japan, Singapore) O.J. 1984 L79/8 (6%); Electronic Scales (Japan) O.J. 1984 L80/9 (8%); Sensitized Paper for Colour Photographs (Japan) O.J. 1984 L124/45 (5%); Artificial Corundum (Czechoslovakia, China, Spain, Yugoslavia) O.J. 1984 L255/9 (5%); Electronic Typewriters (Japan) O.J. 1984 L335/43; Ballbearings (Japan) O.J. 1984 L340/37 (6%); Ballbearings (Thailand) O.J. 1985 L113/61 (6%); Housed Bearing Units (Japan) O.J. 1987 L35/32 (6%); Urea and Ammonium Nitrate (USA) O.J. 1987 L208/1 (2%); Vinyl Acetate Monomer (USA) O.J. 1987 L213/32 (5%); Video Cassette Recorders (South Korea, Japan) O.J. 1989 L57/55 (12.7%).

In calculating the export price the Commission will normally include all exports to the Community even those which enter the Community for inward processing and which will subsequently be re-exported⁹⁵.

Finally the Commission has, on a number of occasions constructed the export price on the "basis of the facts available" where it lacked full and reliable information on the real export prices⁹⁶. In the majority of cases it used the Community's import statistics⁹⁷.

1.4. The Comparison between Normal Value and the Export Price

Once the normal value and the export price have been determined the Regulation stipulates that:

For the purposes of a fair comparison, due allowance in the form of adjustments shall be made in each case, on its merits, for the differences affecting price comparability, i.e. for differences in:

- (i) physical characteristics;
- (ii) import charges and indirect taxes;
- (iii) selling expenses resulting from sales made:
 - at different levels of trade, or
 - in different quantities, or
 - under different conditions and terms of sale⁹⁸.

95 Acrylonitrile (USA) O.J. 1983 L101/29; Propan-I-OL (USA) O.J. 1984 L106/55.

96 Article 7(7)(b) Regulation 2423/88.

97 Trichloroethylene (GDR, Poland, Romania) O.J. 1982 L223/76; Perchloroethylene (Czechoslovakia, Romania) O.J. 1982 L371/47.

98 Article 2(9)(a).

The Regulation further provides that the comparison shall be made as nearly as possible at the same time⁹⁹. The adjustments will be granted if an interested party can show that they are justified¹⁰⁰. The adjustments listed in Article 2(9)(a) which are required to be made in order to take account of the differences affecting price comparability shall be made in accordance with the rules laid down in Article 2(10)(a) to (e). In Freezers¹⁰¹ it was argued that the list of factors in Article 2(9) of Regulation 2176/84 was not exhaustive and that Article 2(10) of said Regulation merely laid down guidelines for determining these allowances. The Commission rejected this, concluding that the list of factors enumerated was exhaustive. The new wording of Articles 2(9) and (10) of Regulation 2423/88 put beyond doubt the fact that the only adjustments allowed to effect a fair comparison are those listed in Article 2(10).

On a number of occasions the Commission has made adjustments even though these were not requested by the parties involved¹⁰². There is nothing in the wording of the revised Articles to suggest, that should the need arise again, the Commission may not make such adjustments.

Article 2(10) specifies the rules to be considered in establishing whether an adjustment will be granted. It is an area in which the Commission has considerable discretion with the result that it has a powerful influence on what the level of the dumping margin will be.

99 ibid.

100 Article 2(9)(b) Regulation 2423/88.

101 O.J. 1986 L259/14.

102 Upright Pianos (USSR, GDR, Poland, Czechoslovakia) O.J. 1982 L101/30; Photographic Enlargers (Czechoslovakia, Poland, USSR) O.J. 1982 L212/32.

The new Articles 2(9) and (10) were introduced in order to codify the existing practice of the Community authorities in the granting of adjustments in order to effect a fair comparison between the normal value and export price as established under their separate rules.

When constructing the export price the Commission will normally deduct all costs of a related sales subsidiary in the Community from its prices to independent buyers. More recently, many exporters whose sales were made through an associated sales company argued that an identical approach should be adopted when constructing the normal value¹⁰³. The Commission has consistently argued that this confused two distinct issues namely, the establishment of normal value and the export price, and the adjustments allowed for differences affecting price comparability when comparing these prices.

For the purpose of constructing the export price, Regulation 2423/88 permits the deduction of all costs incurred between importation and resale, thereby arriving at an export price which is not influenced by the relationship between the exporter and its associated importer. Normal value is established by using the comparable price in the ordinary course of trade or on a constructed basis where no such price is available. As regards the subsequent comparison between normal value and export price as determined above other rules apply which lead to price adjustments for all allowable expenses. The same criteria apply whether the factors to be taken into consideration are in respect of sales on the domestic market or those

103 See Electronic Typewriters (Japan) O.J. 1985 L163/1; Photocopiers (Japan) O.J. 1986 L239/5; Compact Disc Players (Japan, South Korea) O.J. 1989 L205/5.

destined for export. Many commentators¹⁰⁴ have argued that such a practice invariably always leads to a finding of dumping.

The Commission's practice has, however, been endorsed by the Court in the Mini Ballbearing¹⁰⁵ and Electronic Typewriter¹⁰⁶ cases. The Court has held that:

there are three sets of distinct rules, each of which must be complied with separately for the respective purposes of determining the normal value, establishing the export price and making the comparison between the two¹⁰⁷.

1.4.1. Differences in Physical Characteristics

The Regulation provides that where there are differences in the physical characteristics of the product, normal value "shall be adjusted by an amount corresponding to a reasonable estimate of the value of the difference in the physical characteristics of the product concerned"¹⁰⁸. In Photocopiers some exporters supplied photocopiers without reprographic drums. Where a comparable machine was sold for export along with a reprographic drum, an adjustment to normal value was allowed in order to take account of this difference. For some exporters the prices of drums on the domestic

104 See Norall op. cit. at 97; Bell, "Anti-dumping Practice in the EEC: The Japanese Dimension", LIEI (1987) 21; Kuzmik, "A Community Export Price Offset", [1988] 2 CMLRev 317.

105 Cases 240/84 NTN Toyo Bearing Co. Ltd. v. Council [1987] ECR 1809; 255/84 Nachi Fujikoshi Corpn. v. Council [1987] ECR 1861; Case 256/84 Koyo Seiko Co. Ltd. v. Council [1987] 1899; Case 258/84 Nippon Seiko KK v. Council [1987] ECR 1923; 260/84 Minebea Co. Ltd. v. Council [1987] ECR 1975.

106 supra at footnote 93.

107 Cases 260/85 and 106/86 TEC & Co. Ltd. v. Council supra at 5920 paragraph 31 of Judgment.

108 Article 2(10(a)).

market were not separately available and in such cases the adjustment was calculated on the basis of the constructed value of the drums. This was determined by adding the cost of production as defined in Article 2(3)(b)(ii) plus a reasonable margin of profit¹⁰⁹. In the majority of cases, adjustments under this heading have involved the price of an exported product being compared with a similar rather than identical product¹¹⁰.

109 Photocopiers (Japan) O.J. 1986 L239/5.

110 Note that in Article 2(12) Regulation 2423/88 the definition of like product includes products which have characteristics which closely resemble those of the product under consideration. See also Section 1.1. supra.

The Commission has granted adjustments for differences in physical specifications¹¹¹ and of the quality of the product in question¹¹². It has in the past relied on its own judgment in determining the amount of the adjustment although on one occasion it consulted an outside expert¹¹³. Article 2(10)(a) now provides that the amount of the adjustment shall be calculated on the basis of

- 111 See Upright Pianos (USSR) O.J. 1982 L101/30 (adjustments were allowed for differences in quality of action, the type of sound board used and the raw material of the cabinet); Refrigerators (Yugoslavia, USSR, Hungary, Poland, Romania, GDR, Czechoslovakia) O.J. 1982 L184/23 (adjustments were allowed for differences in volume freezing capacity and type of defrosting system); Photographic Enlargers (Poland, USSR, Czechoslovakia) O.J. 1982 L212/32 (10% adjustment for differences in physical characteristics); Ceramic Tiles (Spain) O.J. 1984 L168/35 (adjustments were allowed for differences in size, colour and pattern); Ferroboron Alloy (Japan) O.J. 1990 L73/6 (adjustments were allowed for differences in the boron content of the product). No adjustment for differences in physical specifications was allowed in the following: Refrigerators (Hungary, Poland) O.J. 1982 L184/23; Glycine (Japan) O.J. 1985 L107/8.
- 112 Studded Welded-Link Chain (Spain, Sweden) O.J. 1980 L231/10 (differences in steel qualities); Upright Pianos (USSR) O.J. 1981 L101/30 (adjustment was allowed to take account of inferior conditions in which the pianos were delivered); Photographic Enlargers (Czechoslovakia, Poland, USSR) O.J. 1981 L212/32 (adjustment of 5% allowed for differences in quality with Japanese product [10% for Poland]); Copper Sulphate (USSR, Czechoslovakia) O.J. 1983 L151/24 (adjustment was allowed for the lower quality of the product); Sanitary Fixtures (Czechoslovakia, Hungary) O.J. 1983 L325/18 (allowance was made for inferior glazing and polishing of the imported product); Artificial Corundum (Spain, China, Yugoslavia, Czechoslovakia) O.J. 1984 L255/9 (allowances were made for any transformation of the product after its importation from the point of view of quality). Adjustments were rejected in the following cases because of the lack of proof: Hardboard (Hungary, Czechoslovakia, Poland, Spain, Bulgaria, Norway, Sweden, Finland, USSR, Romania) O.J. 1982 L181/19; Barium Chloride (GDR, China) O.J. 1983 L110/10.
- 113 Mechanical Clocks (GDR, USSR) O.J. 1980 L344/34.

relevant data for the investigation period or the data for the last available financial year.

1.4.2. Differences in Import Charges and Indirect Taxes

Article 2(10)(b) states that normal value shall be reduced by an amount corresponding to any import charges or indirect taxes as defined in the notes to the Annex, 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. Such an adjustment was allowed in Video Cassette Recorders in respect of import charges included in video cassette recorders destined for consumption on the Korean market. The Commission did not have sufficient information to prove the exact amount of the import charges on parts physically incorporated into the domestically sold models. In these circumstances, it estimated the adjustment on the basis of the value of the raw materials directly imported into Korea by the companies in question using an average import tax rate of 20 per cent¹¹⁴. This approach was confirmed by the Council¹¹⁵.

1.4.3. Differences in Selling Expenses

1.4.3.1. Sales Made at Different Levels of Trade

The Commission has granted adjustments for differences in the level of trade only in a small number of cases¹¹⁶. The new text of Article 2(10) retains the possibility of such an adjustment but gives

114 O.J. 1988 L57/55; see also: Polyester Yarn (Mexico, South Korea, Taiwan, Turkey) O.J. 1988 L151/39.

115 O.J. 1988 L240/5.

116 Vinyl Acetate Monomer (USA) O.J. 1980 L311/13; Electronic Scales (Japan) O.J. 1984 L80/9; Copper Sulphate (Poland, Spain, Hungary, Bulgaria) O.J. 1984 L275/12.

no guidance on how it should apply. The Commission has recently, in concluding that the comparison was made at the same level of trade, looked at the categories of customers to whom the product was sold¹¹⁷. These categories of customers usually take the form of OEMs or national/regional distributors. In Compact Disc Players¹¹⁸ several exporters contended that some of their sales were made to these special categories of clients and were therefore at a different level of trade to sales on the domestic market. The Community authorities noted the quantities sold, the pricing policy and the consistent pattern of prices. It held, taking into account these criteria, that normal value should be calculated on the basis of the weighted average domestic prices of their sales to these categories of independent customers. This was also held to be the case with respect to the export prices for sales to OEMs. These were established on the basis of prices charged when the products were sold for export by the manufacturers to the OEMs¹¹⁹.

1.4.3.2. Sales Made in Different Quantities

The old Regulation - Regulation 2176/84 - set out at length the adjustment allowed for differences in quantities. Unlike the present Regulation, it did not limit the claim to adjustments for differences in selling expenses resulting from sales made in different quantities¹²⁰.

117 Electronic Typewriters (Japan) O.J. 1985 L163/1; Electronic Scales (Japan) O.J. 1985 L275/5; Photocopiers (Japan) O.J. 1986 L239/5; Compact Disc Players (Japan, South Korea) O.J. 1989 L205/5; O.J. 1990 L13/21.

118 ibid.

119 ibid.

120 Emphasis added.

1.4.3.3. Sales Made under Different Conditions and Terms of Sale

The Regulation provides that the normal value shall be reduced by the directly related costs incurred for conveying the product under consideration from the premises of the exporter to the independent buyer¹²¹. This wording gives effect to previous practice in that it excludes the possibility of deducting transport costs incurred by the manufacturer to its warehouse or related sales company. In the same way, the export price shall be reduced by any directly related costs incurred by the exporter for conveying the product from its premises in the exporting country to its destination in the Community¹²². In both cases these costs include transport¹²³, insurance, handling, loading and ancillary costs.

The Regulation provides that both the normal value and export price shall be reduced by the respective directly related costs of the packing for the product concerned¹²⁴ and they shall be reduced by the cost of any credit granted for the sales under consideration¹²⁵. The amount of the reduction for the cost of any credit given shall be calculated by reference to the normal commercial credit rate applicable in the country of origin or export in respect of the currency expressed on the invoice¹²⁶.

121 Article 2(10)(c)(i).

122 ibid.

123 See Synthetic Fibres of Polyester (USA, Mexico, Taiwan, Romania, Turkey, Yugoslavia) O.J. 1988 L348/49.

124 Article 2(10)(c)(ii).

125 Article 2(10)(c)(iii).

126 See Synthetic Fibres of Polyester (USA, Romania, Mexico, Taiwan, Turkey, Yugoslavia) O.J. 1988 L348/49; Video Cassette Recorders (South Korea, Japan) O.J. 1989 L57/55.

The Regulation provides that both the normal value and export price shall be reduced by an amount corresponding to the direct costs of providing warranties, guarantees, technical assistance and services¹²⁷. In Mica the exporter claimed an adjustment corresponding to the direct costs incurred for cutting the product into slices. This was rejected by the Commission on the grounds that Article 2(10)(c)(iv) only covers after-sales services, whereas the services allegedly being rendered related to pre-sales services¹²⁸.

Where commissions have been paid in respect of the sales under consideration both the normal value and export price shall be reduced by the corresponding amount paid¹²⁹. Article 2(10)(c)(v) also provides that the salaries paid to salesmen shall be deducted. The term "salesmen" is defined as "personnel wholly engaged in direct selling activities".

Regulation 2176/84 provided that as a general rule no allowance or adjustment could be made for overheads, research and development and advertising costs¹³⁰. This is due mainly to the fact that there

127 Article 2(10)(c)(iv).

128 O.J. 1989 L284/45.

129 Article 2(10)(c)(v) Regulation 2423/88. See Synthetic Fibres of Polyester USA, Romania, Mexico, Taiwan, Turkey, Yugoslavia) O.J. 1988 L348/49.

130 This meant that allowances may only have been granted for overheads and general expenses where it could be shown that they had a "direct relationship to domestic or export sales under consideration". For example, one could have a situation where the overhead is related directly to the individual sale, for instance - if you have the sale of a particular car. The person buying it wants to leave the country for 6 months and therefore wants the car stored. He pays for this. One can therefore say that such an overhead is directly related to the sale in question and will be granted.

are huge difficulties involved in allocating overhead costs satisfactorily¹³¹. The position regarding these costs was explained in Electronic Typewriters:

... Under Regulation (EEC) No. 2176/84 allowances can only be granted for differences in the factors mentioned in Article 2(9). One of these factors is "conditions and terms of sale". This is a relatively narrow technical term referring to the obligations inherent in a sales contract which may be laid down in the contract itself or in the general conditions of sale issued by the seller. What is decisive is whether the costs are strictly necessary to fulfil the terms of the sales under consideration. Where this first criterion is met it must be shown in addition that these costs bear a direct functional relationship to the sales under consideration, i.e. that they are incurred because a particular sale is made. In general, overheads and general expenses, wherever they occur, do not have such a direct functional relationship and are therefore not allowable ...¹³².

Under the wording of the new Regulation no mention is made of these costs, thereby confirming the fact that they are not deductible.

1.4.4. Amount of Adjustment

The Regulation provides that the amount of the adjustment shall be calculated on the basis of the relevant data for the investigation period or the data for the last available financial year¹³³.

131 The question of overheads was discussed in great length in GATT during the Tokyo Round of Trade Negotiations. Because of the difficulties involved no rule was incorporated into the new GATT Code.

132 O.J. 1985 L163/1.

133 Article 2(10)(d).

1.4.5. Insignificant Adjustments

A new provision has been introduced by Regulation 2423/88¹³⁴ whereby claims for individual adjustments having an ad valorem effect of less than 0.5 per cent of the price or value of the affected transactions shall be considered insignificant.

1.5. The Reference Period

In considering whether or not a product has been dumped the Commission compares the normal value and the export price over a given period of time. This is known as the reference period. This is important when considering the dumping margin, because prior to the changes in Regulation 2176/84 the Commission had complete discretion to choose whatever reference period it liked¹³⁵. The problem with this was that if dumping occurred for only a short time and if the reference period happened to be during that time, then the resultant dumping margin may have been higher than would otherwise have been the case. The Regulation now provides that the reference period shall:

cover a period of not less than six months immediately prior to the initiation of the proceeding¹³⁶.

134 Article 2(10)(e).

135 See e.g. Lithium Hydroxide (USA, USSR) O.J. 1979 L274/26 (Jan.-April 1979: 4 months); Mounted Piezo-Electric Quartz Crystal Units (USA, Japan, Korea) O.J. 1980 L162/62 (1st Jan. 1979-31st Jan. 1980: 13 months); Chemical Fertilizer (USA) O.J. 1981 L39/5 (1st Jan.-30th Sept. 1980: 9 months); Hermetic Compressors (Spain) O.J. 1981 L113/53 (1st July-31st Dec. 1980: 6 months); Fluid Cracking Catalysts (USA) O.J. 1982 L11/25 (1st Jan. 1980-30th April 1981: 16 months); Hardboard (USSR, Romania, Hungary, Bulgaria, Poland, Spain, Sweden, Finland, Norway, Czechoslovakia) O.J. 1982 L181/19 (1st Jan.-30th June 1980: 6 months).

136 Article 7(1)(c).

1.6. The Dumping Margin

Once the normal value and the export price of the like product have been calculated and the proper adjustments made to make them comparable the dumping margin is determined. This is defined as "the amount by which the normal value exceeds the export price"¹³⁷. The Regulation further provides that where dumping margins vary, weighted averages may be established¹³⁸.

The new Article 2(13) of Regulation 2423/88 confirms the Community authorities' existing practice when prices vary¹³⁹. It provides that normal value shall normally be established on a weighted average basis. For the weighted average method, all the domestic prices are averaged, the average being weighted by the volume of the goods sold at each price. With regard to the export price, the Regulation provides that these prices shall normally be compared with the normal value on a transaction-by-transaction basis¹⁴⁰ except where the use of weighted averages would not materially affect the results of the

137 Article 2(14)(a) Regulation 2423/88.

138 Article 2(14)(b).

139 See Ballbearings (Miniature) (Japan, Singapore) O.J. 1984 L193/1. The Commission held that a comparison of normal value with a weighted average export price comprising dumped and non-dumped sales would be in contradiction with the Council's amendment of the Community's anti-dumping legislation. Therefore it has been a consistent practice of the Commission not to use weighted average export prices for the determination of the dumping margin except in cases where for administrative reasons it was not considered feasible to employ the transaction by transaction method or where the averaging of the export prices would have had no effect on the overall outcome of the proceedings.

140 See e.g. Sodium Carbonate (USA) O.J. 1982 L317/5; Electronic Typewriters (Japan) O.J. 1984 L335/43.

investigation¹⁴¹. By the transaction-by-transaction method, normal value is compared with the export price for each sale to the Community. All transactions below normal value are considered but sales above normal value (say 10 per cent) are not allowed to offset sales below normal value by the same volume (say 10 per cent). Export prices above normal value are treated as if they were made at normal value. Lastly, it provides for the use of sampling, i.e. 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.

Where the dumping margin is 1 per cent or less the Commission will consider this minimal, and therefore not such as would cause injury to the Community producers¹⁴².

2. INJURY

There must be injury to Community industry in order for anti-dumping duties to be imposed. The criteria for the determination of injury are laid out in Article 4 of Regulation 2423/88. It provides that:

A determination of injury shall be made only if the dumped or subsidized imports are, through the effects of dumping or subsidization, causing injury i.e. causing or threatening to

¹⁴¹ Ballbearings II (Japan, Poland, Romania, USSR) O.J. 1981 L152/44.

¹⁴² See Polyester Yarn (USA) O.J. 1980 L358/91 (for non-textured yarn a dumping margin of 0.2% was considered de minimis; for textured yarn a dumping margin of 0.5% and 1.1% were considered de minimis); Non-alloyed Unwrought Aluminium (Egypt) O.J. 1983 L161/13 (a dumping margin of 0.3% was considered de minimis); Sensitized Paper for Colour Photographs (Japan) O.J. 1984 L124/45 (a dumping margin of 0.54% was considered de minimis); Ceramic Tiles (Spain) O.J. 1984 L168/35 (a dumping margin of less than 0.5% was considered de minimis).

cause material injury to an established Community industry or materially retarding the establishment of such an industry¹⁴³.

This involves three main stages each of which will be considered individually. They are as follows:

- 2.1. What constitutes Community industry ?
- 2.2. What is meant by the terms "material injury" , "material retardation", and "threatening to cause material injury" ?
- 2.3. Is there a "causal link" between the dumped imports and the injury to Community industry ?

Before considering these criteria two points should be made. First, it should be noted that the effect of the dumped imports has to be assessed in relation to the Community production of the like product¹⁴⁴. Secondly, in the majority of cases where dumping has been found to exist a determination of injury has been made.

143 Article 4(1).

144 Article 4(4) Regulation 2423/848. See also Section 1.1. supra.

However, in a small number of cases, even though there has been dumping this has resulted in a no injury determination¹⁴⁵.

2.1. What Constitutes Community Industry ?

Community industry is defined in the Regulation as:

the Community producers as a whole of the like product or to those of them whose collective output constitutes a major proportion of the total Community production of those products¹⁴⁶.

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- 145 The cases in which no injury determinations have been made are as follows:
- (i) when dumping is considered de minimis; see footnote 142 supra.
 - (ii) when the Community producers show no interest in the investigation. See Peaches (Greece) O.J. 1980 L110/35; Hammers (China) O.J. 1986 L29/36; Stainless Steel House Cooking Ware (South Korea) O.J. 1986 L74/33.
 - (iii) low level of market penetration so that material injury is not being caused. See Mechanical Wrist Watches (USSR) O.J. 1982 L11/14.
 - (iv) the existence already of other safeguard measures. See Mechanical Wrist Watches (USSR) O.J. 1982 L11/14 (existence of quantitative restrictions); Seamless Tubes of Non-alloy Steel (Spain) O.J. 1980 L196/34 (existence of countervailing duties).
 - (v) decrease in consumption and increase in the volume of imports from other countries. See Glass Textile Fibres (Rovings) (GDR, Japan, Czechoslovakia) O.J. 1983 L160/18.
 - (vi) the complainant, who accounted for 90% of Community industry, was the main importer of the dumped imports. Furthermore he was able to increase his market share. See Ice Skates (Czechoslovakia, Hungary, Romania, Yugoslavia) O.J. 1985 L52/48.

146 Article 4(5).

What constitutes 'a major proportion of total Community production' has not been defined in the Regulation or in decided cases¹⁴⁷. For instance, in one case the Commission still held that the rest of the Community producers represented a major part of the Community production of the product in question even though the main Community producer did not support the complaint and where the German producer considered that it was not injured¹⁴⁸. Furthermore in some cases the Commission has held that a producer in one Member State may satisfy the requirements of Article 4(5), if its output constitutes a major proportion of the total Community production¹⁴⁹.

Two major exceptions are provided for in Article 4(5) to this basic rule: related parties and regional industry.

2.1.1. Related Parties

The Regulation provides that "when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product the term 'Community industry' may be interpreted as referring to the rest of the producers¹⁵⁰". This provision has

147 Dr. Beseler, then Head of the Commercial Defence Division DG-1 at the CEFIC Anti-dumping Seminar held in Brussels on 2-3 April 1981, suggested that a share of production of 25 per cent or more would be regarded as acceptable.

148 See Cylinder Vacuum Cleaners (Czechoslovakia, Poland, GDR) O.J. 1982 L172/47.

149 See Edible & Pharmaceutical Gelatine (Sweden) O.J. 1980 C219/2; Louvre Doors (Malaysia, Singapore) O.J. 1980 C286/4; Mechanical Wrist Watches & Movements (USSR) O.J. 1980 C181/3. In all 3 cases, the Member State involved was the United Kingdom.

150 Article 4(5).

been used on a few occasions to exclude Community producers from the examination of injury suffered by the complainant industry¹⁵¹.

It may nevertheless be reasonable for a Community producer to import the dumped goods and still be included in the assessment of injury in certain cases¹⁵². This has now been recognised by the Court¹⁵³. First, a Community producer of certain models of the product in question may import some models which have been dumped and include them as part of its overall range at prices corresponding to its own prices. In this case the producer is not causing injury to itself or anyone else. For example, in Dot Matrix Printers, one of the grounds considered by the Commission for not excluding three Europrint members who imported dumped printers from Japan, was that it was necessary for printer manufacturers to offer a full range of printers in order to defend their position on the market. Potential clients are more likely to buy equipment from a supplier who offers a full range of products¹⁵⁴. Second, a Community producer may import dumped products in order to avoid or minimise injury to itself or as part of its overall policy to maximise its competitiveness while at the same time not taking advantage of the dumped imports to make windfall profits. Lastly, a Community producer may import dumped products as a means of self protection while an anti-dumping investigation is ongoing. It should be stressed that these

151 See for example Textured Polyester Yarn (USA) O.J. 1981 L133/17; Electronic Scales (Japan) O.J. 1984 L80/9; Skates (Czechoslovakia) O.J. 1985 L52/48; Video Cassette Recorders (South Korea, Japan) O.J. 1988 L240/5; DRAMS (Japan) O.J. 1990 L20/5.

152 Private conversation with Commission officials, November 1985.

153 See cases 133&150/87 Nashua Corpn. v. Commission & Council [1990] 2 CMLR 6; case 156/87 Gestetner Holdings Plc v. Commission & Council [1990] 1 CMLR 813.

154 O.J. 1988 L130/12; O.J. 1988 L317/33.

situations will arise only where the Community producer is an importer and is not related to the exporter¹⁵⁵.

2.1.2. Regional Industry

In exceptional circumstances the producers within a region of the Community may be treated as constituting Community industry if the producers within such market sell all or almost all of their production of the product in question in that market, and the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community¹⁵⁶.

This concept of regional industry was considered by the Commission in Portland Cement¹⁵⁷. It held that as the producers in Ireland, United Kingdom and Denmark sold almost all their production in their domestic markets (95 per cent, 99 per cent and 93 per cent respectively) and that the demand in each of these markets was not supplied to any substantial degree by producers of the product in question located elsewhere in the Community, therefore they constituted isolated markets within the meaning of Article 4(5)(a) and (b). In Synthetic Fibres of Polyester the Italian market was most affected by the dumped imports. The Commission considered Article 4(5)(a) and (b) with a view to possible measures on a regional basis. It concluded, however, given the size of the Italian market (30 per cent in 1985), the share held by other Community producers and the volume of sales made by Italian producers outside their home market, the Italian market could not be considered an isolated market within the meaning of Article 4(5)(a) and (b)¹⁵⁸.

155 See Electronic Scales (Japan) O.J. 1984 L80/9; Photocopiers (Japan) O.J. 1986 L239/5; Dot Matrix Printers (Japan) O.J. 1988 L130/12.

156 Article 4(5)(a) and (b) Regulation 2423/88.

157 O.J. 1986 L202/43.

158 O.J. 1987 L103/38.

Finally, where the Community production of the like product has no separate identity the effect of the dumped imports 'shall be assessed in relation to the production of the narrowest group or range of production which includes the like product for which the necessary information can be found'¹⁵⁹. This provision has the effect of widening the scope of Community industry but to date it has never been used by the Commission¹⁶⁰.

2.2. What is Meant by the Terms "Material Injury"
"Material Retardation" and "Threatening to
Cause Material Injury" ?

2.2.1. Material Injury

The term "material injury" is not defined in the Regulation. Article 4(2) provides however that "an examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

- (a) volume of dumped or subsidized 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 or subsidized 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 such as:

159 Article 4(4) Regulation 2423/88.

160 Standardized Multiphase Motors (Bulgaria, Czechoslovakia, GDR, Hungary, USSR, Poland, Romania) O.J. 1980 L53/15;
Louvre Doors (Malaysia, Singapore) O.J. 1981 L135/33.

- production,
- utilization of capacity,
- stocks,
- sales,
- market share,
- prices (i.e. depression of prices or prevention of price increases which otherwise would have occurred),
- profits,
- return on investment,
- cash flow,
- employment.

In establishing whether the dumped imports have caused material injury to Community industry, the Commission is required, where more than one country is under investigation, to decide whether to cumulate overall imports originating in all these countries or whether to treat them separately. In coming to its decision the Commission will take into account the comparability of the imported products in terms of their physical characteristics, the volumes imported, price levels and the degree of competition with similar Community products¹⁶¹.

In Polyester Yarn¹⁶² the Commission, having considered these factors, held that between 1986-87 the volume of imports from all the countries had increased. In these circumstances, there should be cumulation. On the other hand, in Synthetic Fibres of Polyester¹⁶³ the United States contended that their products should be viewed in isolation from those of the other countries under investigation. It argued that the volume of exports was small, their market share had fallen and the quality of the product exported differed from the exports of other countries. The Commission held that all imports except those of the American producers should be cumulated.

161 Synthetic Fibres of Polyester (Mexico, Romania, Turkey, Taiwan, USA, Yugoslavia) O.J. 1988 L151/47.

162 O.J. 1988 L151/39.

163 O.J. 1988 L151/47; see also Tungsten Carbide (China, Korea) O.J. 1990 L83/36.

2.2.1.1. The Volume of Dumped Imports

Under this heading the Commission normally examines the increase in the volume of the dumped imports in the Community and also the market share they attain. Unlike the investigation to determine whether or not dumping has taken place, which usually covers a period of less than a year¹⁶⁴, the Commission views the effect of the volume of dumped imports over the preceding few years¹⁶⁵. Generally speaking this is the reason for the small number of decided cases which refer to the increase in the volume of dumped imports¹⁶⁶. Normally they refer to the increase in the total volume of imports.

For the most part the Commission considers the increase in the volume of dumped imports and the market share they attain in relation to the Community as a whole, though on a few occasions it considered these in relation to specific Member States¹⁶⁷. In the majority of

164 See footnote 136 supra.

165 e.g. Electronic Scales (Japan) O.J. 1985 L275/5 (imports rose from 4167 units in 1980 to 8315 units in 1982, 11,605 units in 1983 and 10,222 units in first half of 1984); Paint, Distemper, Varnish and Similar Brushes (China) O.J. 1989 L79/24. (In 1980 imports amounted to 10 million pieces, in 1986 to 33 million pieces, in 1987 to 46 million pieces and in 1988 to 31 million pieces - equivalent to 62 million pieces per annum.)

166 e.g. Paraxylene (USA, Puerto Rico, Virgin Islands) O.J. 1981 L158/7 approximately 80% of the total imports were made at dumped prices. Increase in the volume of dumped imports: e.g. Mechanical Wrist Watches (USSR) O.J. 1982 L11/14.

167 Market share attained: e.g. Chromium Sulphate (Yugoslavia) O.J. 1985 L205/12 (Italy most affected).

cases the increase in the volume of dumped imports is represented by an increase in absolute volume¹⁶⁸.

2.2.1.2. The Prices of the Dumped Imports

A finding of price undercutting has been made in virtually all cases. It is an essential prerequisite to a finding of injury and the imposition of an anti-dumping duty, since no duty can be imposed if the export price is at existing price levels in the Community¹⁶⁹.

To date, a finding of price undercutting as high as 56.7 per cent has been made by the Commission¹⁷⁰. In some cases the Commission found that undercutting persisted even though the Community producers reduced their prices in order to meet the competition and preserve their market share¹⁷¹. In Photocopiers the Commission, in order to facilitate a more comprehensive analysis of price undercutting, entered into a contract with a German Market Research agency, Info-Markt, to undertake a technical study of model comparisons on the German market. It concluded that undercutting took the form not just of lower prices but also of more highly featured machines being sold at prices at or even below those of the Community producers¹⁷².

168 e.g. Polystyrene (Spain) O.J. 1985 L97/30 average annual rate of increase in imports of around 100% over 1980-84 period.

169 See the Opinion of Advocate-General VerLoren van Themaat in Joined Cases 239/82 and 275/82 Allied Corporation & Ors. v. Commission [1984] ECR 1005 at 1037.

170 Glass (Turkey, Romania, Yugoslavia, Bulgaria, Hungary, Czechoslovakia) O.J. 1986 L51/73.

171 Polyester Yarn (USA) O.J. 1980 L231/5.

172 O.J. 1987 L54/12. See also Dot Matrix Printers (Japan) O.J. 1988 L317/33. The analysis of price undercutting was based on an Ernst & Whinney Conseil Study.

2.2.1.3. Consequent Impact on Community Industry

Under this heading the Community authorities consider the effects of the dumped imports on the overall performance of the Community producers of the like product. The factors listed in Article 4(2)(c) are merely a guide and are by no means exhaustive¹⁷³. Further, the Community authorities do not have to consider all the factors in Article 4(2)(c) but only those which provide a sufficient basis for forming a judgment¹⁷⁴.

An analysis of the impact of dumped imports on Community industry generally begins with a reference to their effect on the Community production of the like product. In most cases the fall in production will be quite evident, though in one case the Commission held that a fall in production of 2 per cent had an impact on Community industry¹⁷⁵. In some cases it has referred to the fact that the effect on production was so severe that it ceased either temporarily or completely¹⁷⁶. Closely interrelated with the fall

173 Paraxylene (Puerto Rico, USA, Virgin Islands) O.J. 1981 L158/7 - referred to orders lost by Community producers; Orthoxylene (Puerto Rico, USA) O.J. 1981 L141/7 - referred to cancellation of contracts; Electronic Typewriters (Japan) O.J. 1984 L335/43 - referred to the fact that Research and Development investment was threatened.

174 Cases 277&300/85 Canon Inc. v. Council [1988] ECR 5731 at 5808 paragraph 56 of Judgment.

175 Paraformaldehyde (Spain) O.J. 1984 L282/58.

176 Ferro-Chromium (Sweden, South Africa) O.J. 1978 L165/20 (production was ceased temporarily); Copper Sulphate (Poland, Bulgaria, Hungary, Spain) O.J. 1984 L275/12 (fall of 40%).

in production is the resultant under utilisation of capacity¹⁷⁷ and the accumulation of unsold stocks¹⁷⁸.

In addition to these, the Commission normally considers how the dumped imports have affected the share of the market held by the Community producers. In the majority of cases they have had quite a marked effect¹⁷⁹. However, in a number of other cases a small decrease has been held by the Commission to have had an impact on Community industry¹⁸⁰. A corollary to the reduction in the market share is a fall in sales¹⁸¹. On a number of occasions the Commission has noted that the detrimental effect caused by a fall in sales would have been greater but for the fact that the producer increased his sales outside the Community. This meant a reduction in profits because products were sold at lower prices¹⁸².

177 UREA (Austria, Hungary, Malaysia, Romania, USA, Venezuela) O.J. 1988 L235/5.

178 Copper Sulphate (Yugoslavia) O.J. 1982 L308/7; Chromium Sulphate (Yugoslavia) O.J. 1985 L205/12; Glass (Bulgaria, Romania, Turkey, Yugoslavia, Hungary, Czechoslovakia) O.J. 1986 L51/73; Potassium Permanganate (China) O.J. 1988 L138/1.

179 e.g. Glass (Czechoslovakia, Turkey, Romania, Yugoslavia, Hungary, Bulgaria) O.J. 1986 L51/73 (decrease of 41.9%).

180 e.g. Glycine (Japan) O.J. 1985 L107/8 (decrease of 2.3%).

181 e.g. Glass (Czechoslovakia, Turkey, Romania, Yugoslavia, Hungary, Bulgaria) O.J. 1986 L51/73 (fall of 70%). At the other end of the spectrum: Non-alloyed Unwrought Aluminium (USSR, Norway, Yugoslavia, Surinam) O.J. 1984 L57/19 (only a fall of 4%).

182 e.g. Chromium Sulphate (Yugoslavia) O.J. 1985 L205/12.

One of the most important factors is the depression of prices¹⁸³ or the prevention of price increases which otherwise would have occurred. Frequently the Commission refers to the fact that prices have failed to develop in line with production costs, resulting in these costs not being covered¹⁸⁴. The overall picture is usually one of a fall in profits with an associated fall in employment.

In Electronic Typewriters, the Commission noted that apart from the fall in profits, profitability had reached a level where there was little or no investment in research and development facilities, vital for the future of the industry¹⁸⁵. This was also a factor referred to by the Commission in Photocopiers. It noted that not only would there be insufficient resources devoted to Research and Development, but Community producers would either have to postpone or abandon the launching of new models¹⁸⁶.

As regards the effect on employment, this normally takes the form of a reduction in working hours¹⁸⁷, the absence of new orders¹⁸⁸ or plant closures¹⁸⁹.

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- 183 See Video Cassette Recorders (Japan) O.J. 1988 L249/5. The sharp and accelerating price depression for video cassette recorders coincided with the appearance of the exporters in question on the Community market. The European producers were forced to follow in order to maintain a foothold in the market.
- 184 e.g. Vinyl Acetate Monomer (Canada) O.J. 1984 L57/17.
- 185 O.J. 1984 L335/43.
- 186 O.J. 1986 L239/5.
- 187 Louvre Doors (Taiwan) O.J. 1981 L158/5.
- 188 Herbicide (Romania) O.J. 1979 L44/8.
- 189 Roller Chains for Cycles (China, USSR) O.J. 1985 L217/7.

2.2.2. Material Retardation

Article 4(1) of Regulation 2423/88 also provides that a determination of injury may be made where the dumped imports are materially retarding the establishment of Community industry. This term is not defined in the Regulation and, up until very recently, it had not been resorted to by the Community authorities.

In DRAMs¹⁹⁰, however, the Commission in determining whether injury had been caused to the complainant industry had to consider whether the complainant industry was established. If this was not the case then it had to consider whether it had been materially retarded. As far as it was concerned, the decisive factor in determining establishment was the existence of commercial production. The Commission noted that Community industry had all the necessary production facilities, equipment, technical know-how and that it had produced DRAMs though not on a commercial basis.

On the assumption that complainant industry was not yet an established industry, the Commission noted the following:

- The three complainant companies had made detailed plans on investment, production, costs, marketing and strict timing schedules with a view to commercial DRAM production in the Community. It noted that funds were available to implement these plans. All three companies had acquired the most advanced technical know-how necessary for DRAM production, very costly new facilities were built and state of the art machinery acquired and installed. Prior to the investigation period several hundred million ECUs had been spent. In these circumstances, these three companies had made a serious commitment to start commercial production of DRAMs. This was confirmed by the fact that two of the companies successfully produced one mega bit DRAMs.
- Due to low prices, two of the companies delayed the start of mass production. The third company temporarily abandoned its DRAM project.

190 O.J. 1990 L20/5.

- All three companies suffered heavy financial losses as a result of the delay or abandonment of mass production. There was no return or a smaller return on investment and two of the companies had to lay off staff.

Taking into account all these factors the Commission held that Community industry had been materially retarded.

2.2.3. Threatening to Cause Material Injury

Article 4(1) further provides that a determination of injury may be made where the dumped imports are threatening to cause material injury. Article 4(3) Regulation 2423/88 states that a determination of threat of injury may only be made where a situation is likely to develop into actual injury. It then provides that account may be taken of the rate of increase in the dumped imports¹⁹¹; the export capacity already in existence in the country of origin or that which will be operational in the foreseeable future¹⁹²; and the likelihood that such exports will be exported to the Community¹⁹³.

191 e.g. Methylamine, Dimethylamine, Trimethylamine (GDR, Romania) O.J. 1982 L238/35; Vinyl Acetate Monomer (Canada) O.J. 1984 L57/17; Binder and Baler Twine (Brazil) O.J. 1987 L34/55.

192 e.g. Barium Chloride (China, GDR) O.J. 1983 L228/28; Electronic Typewriters (Japan) O.J. 1984 L335/43; Herbicide (Romania) O.J. 1988 L26/107; Small Screen Colour Televisions (Korea) O.J. 1989 L314/1.

193 e.g. Methylamine, Dimethylamine, Trimethylamine (GDR, Romania) O.J. 1982 L238/35; Barium Chloride (GDR) O.J. 1983 L228/28; Vinyl Acetate Monomer (Canada) O.J. 1984 L58/17; Electronic Typewriters (Japan) O.J. 1984 L335/43; Synthetic Fibres of Polyester (GDR, Romania, Turkey, Yugoslavia) O.J. 1987 L103/38; Small Screen Colour Televisions (Korea) O.J. 1989 L314/1.

In the case of Small Screen Colour Televisions¹⁹⁴ the Commission considered that there was a threat of increased injury to Community industry, from Korean exports in the future, in view of the availability of a large production capacity. This, it noted, was out of proportion to the size of the domestic market - the capacity of twenty five million tubes per year corresponded to one-third of the world's consumption. In addition, the Korean companies had been installed in the United States for some time with the result that it was no longer capable of absorbing the huge volumes involved leading them to turn for expansion to the Community.

On the other hand, in Photocopiers the Commission, guided by the factors in Article 4(3), decided there was no threat of injury from the imports of a certain model of copier from the end of the reference period. It concluded that there was little evidence that such copiers made in Japan had increased their share of the market rapidly since the end of reference period. Furthermore there was no evidence regarding the export capacity of the exporter for the copier in question¹⁹⁵.

2.3. Is There a "Causal Link" between the Dumped Imports and the Injury to Community Industry ?

Article 4(1) states that:

a determination of injury shall be made only if the dumped or subsidized imports are, through the effects of dumping or subsidization, causing injury ...

194 O.J. 1989 L314/1.

195 O.J. 1987 L54/12; see also Synthetic Fibres of Polyester - (GDR, Romania, Turkey, Yugoslavia) O.J. 1987 L403/38; Mica (Japan) O.J. 1989 L284/45.

This causality test, taken from the Anti-Dumping Code concluded at the Tokyo Round of Multilateral Trade Negotiations in 1979, is much more lenient than its predecessor in Article 4(1) of Regulation 459/68¹⁹⁶. It stated that a determination of injury could only be made if the dumped imports were the principal cause of such injury¹⁹⁷.

The Community authorities have recently held that Article 4(1) should not be interpreted narrowly. In Dot Matrix Printers¹⁹⁸, the Commission had concluded that dumped imports had caused injury to Community industry. The exporters argued, however, that the Commission had failed to show specific injurious effects of the dumped imports on each of the complainant producers. The Council contended that such an approach would in most cases be impossible and would render Regulation 2423/88 unworkable. It referred to the decision of the Court of Justice in Technointorg v. Commission and Council¹⁹⁹ where it held that:

It should also be borne in mind that where, as in this case, the dumped products come from different countries, it is in principle necessary to assess the combined effects of such imports. It is consistent with the objectives of Regulation No. 2176/84 that Community authorities should be able to examine the effect on Community industry of all such imports and consequently take appropriate action against all exporters, even if the volume of each individual exporter's exports is relatively small²⁰⁰.

196 O.J. 1968 L93/1. See footnote 5 supra.

197 This was taken directly from Article 3(c) of the Anti-Dumping Code concluded at the Kennedy Round of Multilateral Trade Negotiations in 1967; reproduced in GATT 1968, GATT 15th Supp. BISD 1966-7 at p. 24.

198 O.J. 1988 L317/33.

199 Joined cases 294/86 and 77/87 [1988] ECR 6077.

200 ibid. at 6116 paragraph 41 of Judgment.

Article 4(1) also stipulates that:

injuries caused by other factors such as volume and prices of imports which are dumped or subsidized or contraction in demand, which, individually or in combination, also adversely affected the Community industry must not be attributed to the dumped or subsidized imports.

These, however, are only guidelines with the result that the list is not exhaustive²⁰¹. For example, the Commission has referred to other factors in the decided cases to date: exchange rate fluctuations²⁰², miscalculations regarding investment²⁰³, decrease in exports from the Community²⁰⁴, substitution by other products²⁰⁵ and competition among Community producers²⁰⁶ to name a few.

By far the most important factors considered are the volume and prices of other non-dumped imports. In one case the Commission concluded that the fall in imports from other sources benefited the dumped imports more than Community production²⁰⁷. In another case the Commission rejected the exporter's argument that injury was caused by imports from other countries. It noted that, with the

201 Article 3(4) GATT Anti-Dumping Code refers to the following: changes in the pattern of consumption, trade restrictive practices of and competition between foreign and domestic producers, developments in the technology and the export performance and productivity of the domestic industry.

202 e.g. Upright Pianos (USSR) O.J. 1982 L101/30.

203 e.g. Dicumyl Peroxide (Japan) O.J. 1983 L203/13;
Photocopiers (Japan) O.J. 1986 L239/5.

204 e.g. Cycle Chains (Taiwan) O.J. 1976 L312/41.

205 e.g. Mechanical Wrist Watches (USSR) O.J. 1982 L11/4;
Hardboard (Switzerland, Yugoslavia, Argentina) O.J. 1986 L157/63.

206 e.g. Textured Polyester Fabrics (USA) O.J. 1981 L133/17;
Freezers (USSR, GDR, Yugoslavia) O.J. 1986 L259/14.

207 See Electronic Scales (Japan) O.J. 1984 L80/9.

exception of the German Democratic Republic, these imports declined in line with the fall in demand²⁰⁸.

More recently, however, the Commission has referred to the changes in the pattern of consumption as an important factor in considering causality²⁰⁹. In Paraformaldehyde the Commission found that whilst consumption in the Community had dropped, the market share of the imported products increased. It concluded that the decline in consumption affected the Community producers more than the imported products²¹⁰. The Commission noted in Photocopiers that whereas the market share held by other exporters remained around 1 per cent that held by the Community producers fell from 19 per cent to 15 per cent, whilst consumption increased by 100 per cent²¹¹.

3. COMMUNITY INTERESTS

Even though it has been established that dumping exists and as a result injury has occurred, a further condition has to be satisfied before duties can be imposed. The Community authorities must show that it is in the interests of the Community to impose such duties²¹². This concept is peculiar to the Community. Neither Article VI of the GATT nor the Anti-Dumping Code refer to the need to take into account the interests of others who may be affected by the imposition of duties such as consumers and processors.

208 See Shovels (Brazil) O.J. 1984 L231/29.

209 See Electronic Typewriters (Japan) O.J. 1984 L335/43;
Glass Mirrors (South Africa) O.J. 1985 L36/10.

210 O.J. 1984 L282/58.

211 O.J. 1986 L239/5.

212 Articles 11(1), 12(1) Regulation 2423/88.

From the decided cases to date, the Community authorities tend to give more weight to the interests of the complainant industry than that of the processors or consumers. For example, in Electronic Typewriters the Community authorities held that it was in the Community's overriding interest to maintain the stability of the industry. They contended that in the long term it was in the consumers' interest to have a viable Community industry which would compete with and offer an alternative to imports²¹³.

In a number of cases the consumers have argued that it would be in the interests of the Community for imports to continue, since this would give them another source of supply and would increase the competition among the suppliers²¹⁴. The Commission normally rejects this, stating that if the Community producers were to disappear from the market this would mean a dependence on an external source of supply, something which is not in the interests of the Community²¹⁵.

Since the effect of an anti-dumping duty is to raise the price of the product, users and processors have argued in a number of cases that their competitiveness will decrease²¹⁶. In Sensitized Paper, it was argued that the increase in price could not be passed on either by the photo-finishing laboratories or the dealers to the consumers thereby resulting in losses for them. The Commission rejected this, contending that since only one quarter of the total cost of colour

213 O.J. 1985 L163/1.

214 e.g. Sodium Carbonate (USA) O.J. 1982 L317/5; Kraftliner (USSR, USA, Sweden, Austria, Finland, Canada, Portugal) O.J. 1983 L64/25; Sodium Carbonate (USA) O.J. 1984 L206/15.

215 e.g. Natural Magnesite (China) O.J. 1982 L371/21.

216 e.g. Methylamine, Dimethylamine, Trimethylamine (GDR, Romania) O.J. 1982 L238/35; PVC Resin Compounds (Czechoslovakia, GDR, Romania, Hungary) O.J. 1982 L274/15; Orthoxylene (Puerto Rico, USA) O.J. 1983 L101/4.

print was attributable to the cost of sensitised paper, a moderate increase in the price of this product would have a minor impact on the cost for the consumer²¹⁷. Furthermore, as the Commission pointed out in Dot Matrix Printers, the price advantages which buyers previously enjoyed originated from unfair business practices²¹⁸.

In UREA²¹⁹, the importers argued that it was not in the Community interests to take protective measures against Malaysia. They argued that this was in conflict with the Community's general policy of increasing commercial co-operation with ASEAN countries. The Commission noted that, although it was in the interests of the Community to maintain good relations with ASEAN countries, the maintenance of free trading systems implied that sales did not take place at dumped prices. The Community would be acting in a discriminatory manner if it took protective measures against exporters in some countries which sold at dumped prices in the Community, but not against exporters in other countries which were engaged in the same practices.

In some cases the Community authorities have decided that it is in the Community interests to adopt protective measures without fully eliminating injury. For example, in Glycine it was held that in view of the competitive situation and structure in the Community market characterised by the presence essentially of one Community producer and two non-Community firms, it was considered in the interests of the Community to take protective measures without fully eliminating the injury²²⁰. The concept was also used in Unwrought

217 O.J. 1984 L124/45.

218 O.J. 1988 L130/12; O.J. 1988 L317/33; see also Daisy Wheel Printers (Japan) O.J. 1988 L177/1.

219 O.J. 1988 L235/5.

220 O.J. 1985 L218/11.

Nickel to limit the amount of duty imposed²²¹. There was a genuine fear in this case that the goods from the Soviet Union would be displaced from the market thereby opening the way for other low priced products from other third countries²²².

Finally, on a number of occasions the Community authorities have not adopted any protective measures since they considered this was in the best interests of the Community²²³.

4. PROTECTIVE MEASURES

The protective measures that can be taken under Regulation 2423/88 are:

- 4.1. Anti-dumping duties
- 4.2. Undertakings.

221 O.J. 1983 L159/43. See also Van Bael & Bellis op. cit. at p. 89 who contend that "it may be questioned whether the Community interest criterion is at all relevant for the determination of the level of duty. It would seem to result from the wording of Articles 11(1) and 12(1) of the Regulation that 'Community interests' come into play only to determine whether 'intervention' is called for but that once a decision to intervene has been made, the level of the duty must be fixed exclusively on the basis of the dumping and injury findings". C.f. Opinion of Advocate-General VerLoren van Themaat in case 239 and 275/82 Allied Corporation v. Council & Commission [1985] ECR 1005 where he developed a theory that the amount of the duties should not exceed the level required by the Community interest.

222 ibid.

223 Furfural (Dominican Republic, China, Spain) O.J. 1981 L189/57; Codeine (Czechoslovakia, Hungary, Poland, Yugoslavia) O.J. 1983 L16/30; Acrylonitrile (USA) O.J. 1983 L101/29; Non-alloyed Unwrought Aluminium (USSR, Norway, Yugoslavia, Surinam) O.J. 1984 L57/19; Tube and Pipe Fittings (Japan, Taiwan, Brazil, Yugoslavia) O.J. 1986 L313/20.

4.1. Anti-Dumping Duties

Such duties can either be provisional²²⁴ or definitive²²⁵.

They apply in general to future imports of the product with the result that if the duty collected exceeds the dumping margin then the only remedy available to the exporter is to apply for a refund²²⁶.

Article 13 of Regulation 2423/88 lays down a number of general points in relation to anti-dumping duties. First, the duties are to be imposed by Regulation²²⁷. Second, the rate of duty will normally conform to the margin of dumping. However, Article 13(3) gives the Community authorities the discretion to impose a lesser duty if the lesser amount would be sufficient to eliminate injury²²⁸. The duty may take the form of an ad valorem duty, i.e. a percentage of the import price²²⁹, or the difference between a floor price and

224 Article 11 Regulation 2423/88.

225 Article 12 Regulation 2423/88.

226 Article 16 Regulation 2423/88.

227 In the case of provisional duties this is a Commission Regulation, and for definitive duties, a Council Regulation. A Regulation is defined in Article 189 of the EEC Treaty as:

[a Regulation] shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

228 See Photocopiers (Japan) O.J. 1987 L54/12; Oxalic Acid (South Korea, Taiwan) O.J. 1988 L72/12.

229 e.g. Glass Mirrors (South Africa) O.J. 1985 L36/10 (rate of duty was 17.5%); Clogs (Sweden) O.J. 1986 L32/1 (rate of duty was 7%); Copper Sulphate (Yugoslavia) O.J. 1986 L113/4 (rate of duty was 27%); Paint, Distemper, Varnish and Similar Brushes (China) O.J. 1988 L272/16 (rate of duty was 69%).

the import price²³⁰ or it could be a specific duty, i.e. a fixed amount²³¹. Third, Regulation 2423/88 provides that anti-dumping duties shall be neither imposed nor increased with retroactive effect²³². There are two exceptions to this general rule, however. Anti-dumping duties may be imposed on products which were entered for consumption not more than 90 days prior to the imposition of provisional duties where:

- there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
- that the injury is caused by sporadic dumping, i.e. massive dumped imports of a product in a relatively short period, to such an extent that, in order to preclude it recurring, it appears necessary to impose an anti-dumping duty retroactively on those imports, or
- that an undertaking has been violated²³³.

In three cases the Commission has had to consider whether pursuant to Article 13(4)(b) of Regulation 2423/88, the imposition of anti-dumping duties with retroactive effect was warranted²³⁴. In Mercury the Council confirmed the Commission's finding that this was a case of sporadic dumping, but it did not consider it necessary to impose an anti-dumping duty with retroactive effect on these imports. It took into account that imports from the USSR during the

230 e.g. Copper Sulphate (Czechoslovakia, USSR) O.J. 1983 L274/1; Vinyl Acetate Monomer (Canada) O.J. 1984 L58/17.

231 e.g. Sodium Carbonate (USA) O.J. 1984 L317/5.

232 Article 13(4). Note the position with regard to Article 13(11) Regulation 2423/88. See Section 6 infra .

233 See Article 13(4)(b)(i) and (iii) Regulation 2423/88.

234 UREA (Czechoslovakia, GDR, Kuwait, Libya, USSR, Saudi Arabia, Trinidad & Tobago, Yugoslavia) O.J. 1987 C34/3; Mercury (USSR) O.J. 1986 C67/3; Video Cassette Tapes (South Korea, Hong Kong) O.J. 1989 L174/1.

ninety days preceding the importation of the provisional duty were negligible²³⁵. Fourth, the duty must be imposed on a non-discriminatory basis where the product is imported into the Community from more than one country²³⁶. Finally, the Regulation stipulates that no product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with the same situation arising from dumping or the granting of a subsidy²³⁷.

4.2. Undertakings

The injurious effects of dumping may also be eliminated with the acceptance by the Commission of a price undertaking, in which case the investigation is brought to an end without the imposition of anti-dumping duties²³⁸.

The decision whether or not to accept the undertaking is that of the Commission subject, when appropriate, to the powers of the Council and review by the Court. In Minebea v. Council²³⁹ the Commission suggested that the Court should be slow to interfere with the decision of whether an undertaking should be accepted on the grounds that this has been made on purely pragmatic, practical and administrative grounds and in the light of the Commission's manpower and workload, and not on grounds of principle. The Court held that there was no provision in Regulation 2176/84 which compelled the Institutions to accept an undertaking offered. It was clear from Article 10 of that Regulation that it was for the Institutions in the

235 O.J. 1987 L346/27.

236 Article 13(5) Regulation 2423/88.

237 Article 13(9) Regulation 2423/88; see Seamless Steel Tubes (Spain) O.J. 1981 L165/27.

238 Article 10(1) Regulation 2423/88.

239 Case 260/84 [1987] ECR 2049.

exercise of their discretionary power to determine whether such undertakings were acceptable²⁴⁰.

Neither the GATT Anti-Dumping Code nor the Regulation itself specify what conditions have to be fulfilled for the undertaking to be acceptable. Some idea of the necessary conditions may be obtained by considering the reasons given for rejecting price undertakings. In a number of cases the undertaking was found unacceptable because, in view of its special features, its implementation could not have been adequately monitored²⁴¹. The Commission has also rejected undertakings on the ground that the price increase was not sufficient to eliminate the injury²⁴². In one case it rejected the undertaking because of the non-existence in the country of origin of a similar procedure²⁴³. Where there was a breach of a previous undertaking, a new undertaking will usually be rejected²⁴⁴.

Undertakings have the advantage that the investigation is terminated in a friendly manner. For the exporter it means that the price increase will accrue to him and not to the Community which would be the case if duties were imposed. Undertakings, furthermore, are highly flexible and they save on administrative cost and time. On the other hand, they do have certain drawbacks. First and foremost, they are very often difficult to draft so as to prevent their circumvention. Second, in a small number of cases they have proved to be difficult to monitor and supervise, e.g. the ballbearing

240 ibid. at 2011 paragraph 48 of Judgment. See also Joined cases 133&150/87 Nashua Corpn. v. Commission & Council [1990] 2 CMLR 6.

241 e.g. Sodium Carbonate (USA) O.J. 1984 L206/15.

242 e.g. Electronic Scales (Japan) O.J. 1985 L275/5.

243 e.g. Vinyl Acetate Monomer (Canada) O.J. 1984 L170/70.

244 e.g. Hardboard (Czechoslovakia, Poland, Sweden) O.J. 1983 L361/6.

industry²⁴⁵. Third, as a corollary of the above, undertakings require compliance, which is not the case for anti-dumping duties. Lastly, there are no sanctions for breach of the undertaking except that duties may be imposed retroactively in terms of Article 13(4)(b).

Between 1980-83, 50 per cent of all anti-dumping proceedings were terminated by undertakings. However, this policy has been reversed, as the Community authorities strive to bring about more transparency to anti-dumping proceedings. This change is reflected in the Community authorities' attitude towards the acceptance of undertakings in relation to potential exporters. In Sodium Carbonate the Council concluded that, in general, undertakings from potential exporters should not be accepted on the following grounds:

- (a) it is difficult to determine an appropriate export price for a company that has not exported to the Community;
- (b) it is difficult or impossible to determine the volume of any possible future exports and the impact they would have on the Community;
- (c) an anti-dumping investigation should, in the interests of all parties, be conducted expeditiously²⁴⁶.

Finally, the Regulation provides that where an undertaking has been withdrawn²⁴⁷ or where it has been violated²⁴⁸, the Commission can, if it considers it to be in the interests of the Community,

245 See Ballbearings (Miniature) (Japan, Singapore) O.J. 1984 L193/1.

246 O.J. 1984 L311/26; see also Electronic Typewriters O.J. 1984 L335/43; Hydraulic Excavators (Japan) O.J. 1985 L63/13.

247 See e.g. Sodium Carbonate (Bulgaria) O.J. 1981 L246/14; Fibre Building Board. (Czechoslovakia) O.J. 1983 L241/9.

248 See e.g. Hardboard (USSR) O.J. 1984 L61/21; Copper Sulphate (Yugoslavia) O.J. 1985 L296/26.

apply provisional anti-dumping duties on the basis of facts established before the acceptance of the undertaking²⁴⁹.

5. THE DUMPING OF COMPONENTS

If a component is sold in the ordinary course of trade to independent buyers in both the exporting country and the importing country, an anti-dumping duty may be imposed on it if the conditions for doing so are fulfilled. In this way, the component is treated in the same manner as any other product that has been dumped.

Recently, however, it has been the practice of exporters, in particular the Japanese who face anti-dumping duties, to circumvent duties that have been imposed on products which have been dumped by setting up so-called "screwdriver" assembly plants in the Community producing the same product but which rely heavily on cheap imported components. The existing anti-dumping rules would not permit an anti-dumping duty to be imposed on such a component, since no finding of dumping has been or could be made, merely because a finding of dumping has been made in respect of the complete product. For this reason the Council adopted Regulation 1761/87²⁵⁰ which provided the Community authorities with the means, if certain conditions were fulfilled, of imposing duties on such components.

Regulation 1761/87 has now been incorporated into Article 13(10) of Regulation 2423/88. It provides that definitive anti-dumping duties may be imposed by way of derogation from the second sentence of

249 Article 10(6) Regulation 2423/88. See also Paint, Distemper, Varnish and Similar Brushes (China) O.J. 1988 L272/16.

250 O.J. 1987 L167/9.

paragraph (4)(a) which states that anti-dumping duties shall neither be imposed or increased with retroactive effect²⁵¹.

Such duties are only to be imposed on products that are introduced into the commerce of the Community after having been assembled or produced in the Community where three criteria are fulfilled²⁵².

First, the assembly or production has to be carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to a definitive anti-dumping duty. In Electronic Scales the Commission found that TEC (UK) Ltd was a subsidiary of TEC (Japan) and that TEC-Keylard had substantial capital links and close economic and commercial links with TEC (Japan)²⁵³. In Electronic Typewriters Silver Reed International (Europe) Ltd contended that it should not be included in the investigation because the assembly was not carried out by Silver Reed but by Astec Europe Ltd. The Commission held, however, that they were in essence those of Silver Reed. It noted that Astec Europe Ltd simply assembled the parts of typewriters which were delivered to its premises by Silver Reed. Furthermore, these assembled typewriters were exclusively sold on the Community market by the Silver Reed Group who bore all the costs between importation of the parts and the sale of the finished product²⁵⁴.

251 Emphasis added.

252 Article 13(10)(a) Regulation 2176/84. Proceedings have been initiated in 6 cases. Electronic Typewriters (Japan) O.J. 1987 C235/2; Electronic Scales (Japan) O.J. 1987 C235/3; Hydraulic Excavators (Japan) O.J. 1987 C285/4; Plain Paper Photocopiers (Japan) O.J. 1988 C44/3; Ballbearings (Japan) O.J. 1988 C150/4; Dot Matrix Printers (Japan) O.J. 1989 L291/52.

253 O.J. 1988 L101/1

254 O.J. 1988 L101/4.

Second, the assembly or production operation has to be started or substantially increased after the opening of the anti-dumping investigation 255.

Third, the value of the parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty must exceed the value of all other parts or materials used by at least 50 per cent. This is usually determined on the basis of the company's purchase prices of the parts or materials when delivered to the factories in the Community i.e. on an into-factory duty paid basis²⁵⁶. However, in Electronic Typewriters some companies' purchase prices were not used since they did not adequately reflect their true value. In these cases, the sales prices were adjusted in order to ensure that they reflected the companies' purchase prices of those parts manufactured by third parties on the totality of the companies' own production costs plus the sales, general and administrative expenses incurred by them and shown in their public accounts²⁵⁷. In Dot Matrix Printers²⁵⁸, the value supplied to the Commission for some parts corresponded to the parent company's purchase price on the Japanese market, adjusted to include costs of transport and customs duties paid. The Commission rejected this method of determining the value of the products on the ground that it did not reflect a reasonable profit and did not include selling expenses for the selling company. It considered that such prices appeared to be influenced

255 Electronic Typewriters (Japan) O.J. 1988 L101/4; Electronic Scales (Japan) O.J. 1988 L101/1; Photocopiers (Japan) O.J. 1988 L284/60; Dot Matrix Printers (Japan) O.J. 1989 L291/52.

256 Electronic Scales (Japan) O.J. 1988 L101/1; Dot Matrix Printers (Japan) O.J. 1989 L291/52.

257 O.J. 1988 L101/4 (Canon, Kysuhu Matsushita, Sharp).

258 O.J. 1989 L291/52.

by a relationship between the seller (the parent company) and the buyer (the subsidiary company).

In determining the value of the parts, some exporters have argued that certain sub-assembled items of significant value used for some models were of Community origin and therefore should not be included. In Electronic Scales the product was assembled in the Community by an independent Community producer from parts imported from Japan and from parts manufactured by this producer itself. The Commission held that this constituted a substantial process or operation as required by Article 5 of Regulation 802/68 and was therefore of Community origin²⁵⁹. In a recent case²⁶⁰ the Court stated the tests which require to be fulfilled in order to satisfy Article 5 of Regulation 802/68. It held that the assembly in Taiwan of electronic typewriters from Japanese components would be the last substantial process and thereby confer Taiwanese origin if technically and in the light of the definition of the goods the assembly represented the decisive production stage, that if that test was inconclusive then it could be supplemented by a test of applicable value. The Court went on to hold that even if it passed those tests - under Article 5 of Regulation 802/68 the assembly could still be disregarded if it was transferred solely in order to circumvent anti-dumping duties on typewriters from Japan. In Electronic Typewriters Canon contended that the product was assembled in the Community entirely from parts imported from Japan by a subsidiary company of a Japanese producer which normally manufactured them in Japan and supplied Canon's Mother company there. On the other hand, Sharp Corporation sold all the individual parts to an unrelated Community company which carried out the sub-assembly and subsequently sold to Sharp. In both cases the Commission held that

259 O.J. 1988 L101/1.

260 Case C-26/88 Brother International GmbH v. Hauptzollamt Giessen [1990] 3 CMLR 658.

the simply assembly was of a basic and unsubstantial nature compared with the manufacture of the components which was performed in Japan. The parts were therefore not of Community origin²⁶¹.

The Commission noted in two cases²⁶² that for some companies the weighted average value of the Japanese parts produced by them for all models did not exceed 50 per cent. In such cases, anti-dumping duties could not be extended to such parts.

The Regulation states that each case is to be decided on its merits and that account should be taken of the circumstances of each case. In doing so, it provides a number of factors that can be taken into consideration namely: the variable costs incurred in the assembly or production operation, research and development carried out and the technology applied within the Community²⁶³.

5.1. Source of the Parts

The Commission noted in Electronic Typewriters that, with the exception of Brother, the nature of the parts sourced in the Community was relatively simple and that they were of a low value. Those parts of a higher technological value were imported from Japan. It concluded that there were few attempts substantially to change the sourcing pattern²⁶⁴.

261 O.J. 1988 L101/4 Para. 11

262 ibid.; Photocopiers (Japan) O.J. 1990 L34/28.

263 Article 13(10)(a) Regulation 2423/88.

264 O.J. 1988 L101/4; see also Photocopiers (Japan) O.J. 1988 L284/60.

5.2. Research and Development

In Electronic Scales, TEC (UK) Ltd. claimed that its technical manager visited TEC Japan's factory for two months in order to receive training. It also claimed that its decision to set up a Research and Development Centre should be taken into consideration. The Commission held that these did not constitute Research and Development²⁶⁵. Likewise in Electronic Typewriters the Commission was not convinced that the activities of Sharp's 'Creative Center Europe' or its 'Engineering Research Office' related to Electronic Typewriters²⁶⁶.

5.3. Effects on Employment

In both Electronic Scales and Electronic Typewriters the Commission found that only a limited number of jobs had been created. It noted that the companies investigated carried out simple assembly operations of a very basic nature whereas the Community producers normally had an integrated in depth production which required more personnel. The net result of these assembly operations was that there had been a fall in sales by Community producers leading inevitably to a loss of employment in the Community²⁶⁷.

5.4. Protective Measures

When components are found to have been dumped, protective measures can take one of two forms:

- 5.4.1. Application of an anti-dumping duty
- 5.4.2. Acceptance of an undertaking.

265 O.J. 1988 L101/1.

266 O.J. 1988 L101/4.

267 O.J. 1988 L101/1; O.J. 1988 L101/4; see also Photocopiers (Japan) O.J. 1988 L284/60.

5.4.1. Application of an Anti-Dumping Duty

The Regulation provides that the rate of duty shall be that applicable to the manufacturer in the country of origin of the like product subject to an anti-dumping duty to which the party in the Community carrying out the assembly or production is related or associated²⁶⁸. In both Electronic Scales and Electronic Typewriters, the Commission held that the rate of duty was to be calculated in a manner to ensure that it corresponded to the percentage rate of duty applicable to the exporters in question, on a CIF value of the parts from Japan as established for the investigation period²⁶⁹. In Dot Matrix Printers, a flat rate duty on two companies was imposed²⁷⁰.

5.4.2. Acceptance of an Undertaking

The provisions of Regulation 2423/88 relating to undertakings apply also to the dumping of components²⁷¹. In Electronic Typewriters the Commission accepted an undertaking from Kyushu Matsushita (UK) which removed the conditions justifying the extension of anti-dumping duties to typewriters assembled in the Community²⁷².

268 Article 13(10)(c).

269 O.J. 1988 L101/1; O.J. 1988 L101/4.

270 O.J. 1989 L291/52.

271 Article 13(10)(d).

272 O.J. 1988 L128/39. See also Photocopiers (Japan) O.J. 1988 L284/60; O.J. 1988 L355/66; O.J. 1989 L340/25; Dot Matrix Printers (Japan) O.J. 1989 L291/52; O.J. 1989 L340/25.

5.5. Protective Measures Unnecessary

Where the value of the Japanese parts for the product in question is less than 60 per cent the Commission has concluded that the adoption of protective measures are unnecessary and has consequently terminated proceedings²⁷³.

5.6. Application of Anti-Dumping Laws to Components:

Some Problems

The new anti-dumping law was shrouded in controversy even before it was adopted and it is likely that this controversy will continue.

It is possible to pinpoint three main problem areas:

- 5.6.1. The legality of the new law in relation to the GATT and the Anti-Dumping Code
- 5.6.2. Administration of the new law
- 5.6.3. Effect on foreign investment.

5.6.1. The Legality of the New Law in Relation to the GATT and the Anti-Dumping Code

Neither the provisions of Article VI nor the Articles of the Anti-Dumping Code suggest in any way that an anti-dumping duty can be imposed on components as such²⁷⁴. Furthermore, Article VI and the Code constitute exceptions to the rules of the GATT. For this reason, they should be interpreted narrowly. It would be contrary

273 Hydraulic Excavators (Japan) O.J. 1988 L101/24 - Komatsu (UK) Ltd.; Electronic Typewriters (Japan) O.J. 1988 L101/26 - Brother; Electronic Scales (Japan) O.J. 1988 L101/28 - TEC Keylard; cf. Photocopiers (Japan) O.J. 1989 L126/83 the weighted average value of parts and materials of Japanese origin incorporated in all models assembled or produced by Sharp Manufacturing (UK) Limited was more than 60 per cent.

274 See Chapter 2 supra.

to such an interpretation to hold that they allow duties to be imposed on components which are not necessarily sold elsewhere and which, if sold separately, had not been dumped merely because there had been dumping of the completed product of which the components form a part²⁷⁵.

In introducing an anti-dumping law which produces such a result, the Community authorities have increased the protectionist and anti-competitive effect of the anti-dumping rules. The European Community has long argued that its approach differed from the United States in respect of Article VI and the GATT Code in that it remained within the parameters of the GATT whereas the United States felt able to ignore such constraints. The position now, however, is that the Community seems to be shifting away from respecting the spirit of the GATT. It appears concerned more with maximising the benefits that accrue from interpreting the rules to its own advantage²⁷⁶.

The Japanese, at whom this new law was chiefly aimed, filed a complaint with the GATT. In October 1988 they requested the GATT Council to establish a panel to examine their complaint. They argued that the anti-dumping measures adopted by the Community authorities on the basis of this provision were contrary to the GATT in that, they had been applied without the requirements in Article VI having been fulfilled and further, they were aimed at obliging firms to use parts originating in the Community. The Community authorities on the other hand contended that this new law was fully justified by Article XX(d) which permitted a party to adopt measures necessary to secure compliance with laws or regulations which were not inconsistent with the GATT rules²⁷⁷.

275 Private conversation with Commission officials.

276 Financial Times, 22 June 1987.

277 Focus, GATT Newsletter 58 (1988).

The Panel in its report in March 1990²⁷⁸ concluded that Article 13(10) of Regulation 2423/88 was contrary to Article III. It provided further that Article XX(d) could not be invoked by the Community authorities to justify this law. The Panel recommended that the Community bring its application of Article 13(10) Regulation 2423/88 into conformity with its obligations under the GATT. The Community has advised that it will not oppose the adoption of the report but that the implementation of its recommendations will have to wait until the results of the Uruguay Round are clear with respect to the circumvention of anti-dumping duties²⁷⁹.

More importantly, the Court may be called upon to consider the legality of the new law in relation to the Anti-Dumping Code. Even though there are convincing arguments for the view that the Code is not directly effective²⁸⁰, such a challenge to the new legislation would force the Court to declare once and for all whether this is the case. The Court has held recently in the Third Fediol case²⁸¹ that for the purposes of the New Commercial Policy Instrument private parties could rely directly on the provisions of the GATT. It is arguable that is now an open issue as to whether the Commission's practices and its interpretation of Regulation 2423/88 are in accordance with the GATT and the Anti-Dumping Code.

278 GATT BISD 36th Supp. 1990.

279 Focus: GATT Newsletters 70 and 71 (1990).

280 In case 240/80 NTN Toyo Bearing Company Ltd. v. Council [1979] ECR 1185 the Council has argued that the Code is not directly effective. This was also stated by the Commission in the case 191/82 Fediol [1983] ECR 2913.

281 Case 70/87 Judgment of 22nd June 1989 not yet reported.

5.6.2. Administration of the New Law

Even before this new provision came into force, the average time taken for an investigation over the past few years, from the moment of initiation until the imposition of duties, doubled from four and a half months to almost nine. Two main reasons can be put forward to explain this. First, the nature of the products involved in the complaint has changed from simple products in small markets such as fertilizers to technologically complicated items such as electronic typewriters, photocopiers, semi-conductors, etc. In economic and monetary terms these are very important. Second, until recently only twenty-six officials were employed by the Commission to investigate complaints of dumping made by European manufacturers, compared with one hundred and ten in the United States for the same purpose. This new Regulation is creating another and even more complex type of investigation which will mean more work for the already over stretched officials, longer delays and inevitably more actions being brought before the Court.

5.6.3 Effect on Foreign Investment

This new provision will undoubtedly affect Japan more than any other third country. It has many related or associated firms in the Community manufacturing products comprised mainly of Japanese components. The Japanese have declared that the new provision will slow down investment in the European Community. Toshiba have stated that it would have to raise the local content of the 100,000 photocopiers it produces each year at its French plant. Other Japanese producers contend that the European components are not always reliable²⁸². Upon the adoption of the new provision, Commissioner De Clercq, then Commissioner for External Relations, declared that the provision would only discourage assembly plants

282 Financial Times, 24 June 1987.

with small added value and very limited, if any, transfer of technology.

6. POWER TO INCREASE ANTI-DUMPING DUTIES

Regulation 2423/88 introduced a new provision which permits the Community authorities to impose an additional duty where an exporter bears the existing duty in whole or in part instead of increasing its prices²⁸³. In theory, it was possible under the old Regulation to deal with such a situation, by initiating a review under Article 14. In practice, however, due to the Commission's limited resources, the procedure was never invoked. The new procedure was introduced in order to provide the authorities with a less onerous procedure. It can also be viewed as a means of discouraging exporters from bearing the duties, and instead raising their prices.

The Article viewed as a whole appears to be aimed primarily at related importers. For example it provides that:

In so far as the results of the investigation show that the absence of a price increase by an amount corresponding to the anti-dumping duty is not due to a reduction in the costs and/or profits of the importer for the product concerned then the absence of such price increase shall be considered as an indicator that the anti-dumping duty has been borne by the exporter²⁸⁴.

Such a provision, as Norall points out²⁸⁵, makes no sense in the case of an unrelated importer. He notes, however, that it seems the provision does apply in the case of a related importer but there is no clear indication what proof is necessary.

283 Article 13(11)(a).

284 Article 13(11)(c).

285 op. cit. pp. 83-101.

The Regulation provides that there has to be a complaint from an interested party before the procedure can be set in motion²⁸⁶. If the Commission finds that the anti-dumping duty has been borne in whole or in part by an exporter then the duty can be imposed in accordance with Articles 11 and 12²⁸⁷. This implies that the duty can be increased at either provisional or definitive stage. The imposition of an additional duty is not automatic where the Community authorities make a finding that an exporter has borne the duty. On the contrary, it has to be in the interests of the Community²⁸⁸.

The Regulation also provides that the duties may be applied retroactively²⁸⁹. It appears to be the case that the idea of retroactivity in this context is the same as that which applies in respect of Article 13(10). If this is so, then retroactive application can be justified in circumstances other than those specified in Article 13(4). In theory, this would mean that additional duties could be applied from the moment that the exporter bore the duty. It is unlikely, however, that this would extend back beyond the adoption date of the new Regulation.

Finally, owing to the problems associated with proof and the fact that the Commission's resources are limited, it is unlikely that the Commission will extend the new provision to Article 13(10)²⁹⁰.

286 Article 13(11)(b).

287 ibid.

288 ibid.

289 ibid.

290 See Norall op. cit. at pp. 98-100.

7. PROCEDURE

7.1. Initiation

The initiation of an anti-dumping investigation is preceded by the lodging of a written complaint. According to the Regulation a complaint may be made by "any natural or legal person or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped imports"²⁹¹. They are usually brought by European Manufacturers' Associations, for example "The European Council of Chemical Manufacturers' Federation (CEFIC)"²⁹², but it can be brought by an individual company so long as it states that it is acting on behalf of a Community industry²⁹³.

A complaint may be withdrawn²⁹⁴. In such a case the proceedings may be terminated unless such action would not be in the interests of the Community²⁹⁵. This has occurred on three occasions. In Paracetamol the main Community producer withdrew its support but the Commission decided to continue the investigation²⁹⁶. However, in Television Image and Sound Recorders or Reproducers the complaint was withdrawn after the Japanese offered a unilateral restraint agreement, whereupon the Commission decided that it was not in the Community's interest to continue²⁹⁷. More recently, in Portland

291 Article 5(1).

292 e.g. Styrene Monomer (USA) O.J. 1981 L42/14.

293 e.g. Copper Sulphate (Yugoslavia) O.J. 1982 L308/17.

294 Article 5(4) Regulation 2423/88. See Cellular Mobile Radio Telephones (Canada, Hong Kong, Japan) O.J. 1988 L362/59.

295 ibid.

296 O.J. 1982 L236/23.

297 O.J. 1983 L86/23.

Cement the Commission continued with its investigation even though a Greek manufacturer, representing approximately 11 per cent of the total Community production, withdrew its support from the complaint, on the ground that the allegation of dumped imports was not likely to cause it injury²⁹⁸.

The Regulation stipulates that "the complaint shall contain sufficient evidence of the existence of dumping and the injury resulting therefrom"²⁹⁹. The usual practice, however, is for the Commission to send the complainants a questionnaire which specifies the information required. If there is sufficient evidence to justify initiating a proceeding, and after consultation with the Advisory Committee, the Commission announces this in the Official Journal of the European Communities³⁰⁰.

7.2. Investigation

All interested parties are invited by way of a questionnaire to supply information to the Commission within a specified time, usually 30 days (which may be extended by 7 days)³⁰¹.

Basically, the Commission is seeking to determine whether there are sufficient domestic sales in the country of origin, to allow it to calculate the normal value, using the domestic prices and so enable it to establish if dumping is taking place. Once the information is received it can be verified, if necessary, by carrying out investigations in the countries involved. This is dependent,

298 O.J. 1986 L202/43.

299 Article 5(2).

300 Article 7(1)(a) Regulation 2423/88.

301 See Van Bael & Bellis, op. cit. p. 110 at footnote 4.

however, on the consent of the firms involved and if the governments in those countries raise no objections³⁰².

Unlike the field of competition law an anti-dumping investigation does not give rise to any question of extraterritoriality³⁰³. Extraterritoriality refers simply to the application of laws outside the territory of the state which enacted them. Controversy, however, arises where this concept is used in another sense. This is where a state extends its jurisdiction on the basis of an effect on its own territory to conduct outside the limits of that state (i.e. the "effects doctrine").

International law permits a state to legislate as it wishes on virtually any matter whatsoever so long as that state respects the sovereignty of other states in the execution of its laws. What is objected to with respect to the "effects doctrine" is that it occurs wholly outside the territory of the state where its effects are felt.

The problems associated with extraterritoriality do not arise in anti-dumping investigations for a number of reasons. First, the investigating country does not claim a right to investigate any matter whatsoever on the territory of another state. The investigation is carried out on the basis of co-operation (the Community authorities can however proceed on the basis of the facts

302 Article 7(2)(b) Regulation 2423/88.

303 See generally Lowe "Extraterritorial Jurisdiction"; An annotated collection of legal materials (1983).

available³⁰⁴ where the country alleged to have dumped refuses to co-operate). Second, both Article VI and the GATT Anti-Dumping Code permit States to impose duties. Finally, the authorities carrying out the investigation are concerned with the prices at which the goods are sold in the importing country³⁰⁵.

During the investigation, the interested parties have certain rights. These are access to information "relevant to the defence of their interests and which is not confidential within the meaning of Article 8"³⁰⁶, and a right to be heard³⁰⁷.

7.2.1. Access to Information and Confidentiality

Interested parties have the right to inspect, on a written request, any information made available to the Commission, which is relevant to the defence of their interests and which is not confidential.

³⁰⁴ Article 7(7)(b) Regulation 2423/88. The Regulation introduced a new concluding sentence which provides that "where the Commission finds that any interested party or third party has supplied it with false or misleading information, it may disregard any such information and disallow any claim to which this refers". It is, however, in the interests of those concerned to co-operate since the Commission will very often rely on the allegations of complainants e.g. Chromium Sulphate (Yugoslavia) O.J. 1985 L205/12 (the Commission used prices quoted in the complaint to determine normal value); Paratungstate (China, Korea) O.J. 1990 L83/117. (The export price was determined on the basis of a reply to the questionnaire received from one importer and information gathered during inspections at the premises of the two Community importers which imported Ammonium Paratungstate from China during the investigation.)

³⁰⁵ See Temple Lang "European Community Anti-dumping and Competition Laws: their actual and potential application to EFTA countries" (unpublished).

³⁰⁶ Article 7(4)(a) Regulation 2423/88.

³⁰⁷ Article 7(5) & (6) Regulation 2423/88.

The Court has held that failure to comply with this procedural requirement will lead to the Regulation in question being annulled. In Timex v. Council and Commission the Court held that:

all non confidential information, whether supplied by a Community undertaking or an undertaking in a non-member country which has been used by the Commission during its investigation and which has had a decisive influence on its decision regarding the anti-dumping duty must be made available to the complainant requesting it.³⁰⁸.

Furthermore, the Regulation provides that the exporters and importers of the product in question may request to be informed of the essential facts and considerations on the basis of which the definitive duties are to be imposed, or the collection of amounts secured by way of provisional duties³⁰⁹.

All information submitted to the Commission is subject to the confidentiality rules. Such information can be used only for the purpose for which it was requested³¹⁰. This rule is important for two reasons. First, it means that the information submitted for an anti-dumping action cannot be passed on to other Directorates-General, e.g. D.G. IV (Directorate-General for Competition). Second, it is important in securing the co-operation of an Analogue Country which is necessary in order to determine the normal value of a product originating in a state trading country.

The Regulation defines information as confidential "if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information"³¹¹. For example in Thiophen the

308 Case 264/82 [1985] ECR 849 at paragraph 25 of Judgment.

309 Article 7(4)(b).

310 Article 8(1) Regulation 2423/88.

311 Article 8(3).

Commission held that the information which it received if published, even in summarised form, would have a significantly adverse effect upon these firms³¹².

The Regulation allows the Commission to disregard the information as confidential where the request for confidentiality is not warranted and the supplier is unwilling either to make it public or to authorise its disclosure in generalised or summary form, or the request for confidentiality is warranted but the supplier is unwilling to submit a non-confidential summary, provided that the information is susceptible of such a summary³¹³.

Furthermore, the confidentiality rules do not prevent the disclosure of general information by the Community authorities, in particular, the reasons on which decisions taken are based or the evidence relied on by the Community authorities which are necessary to explain those reasons in court proceedings³¹⁴. Such disclosure must take into account the legitimate interests of the parties so as to ensure that their business secrets are not divulged.

7.2.2. The Right to be Heard

The Regulation provides for two types of hearing³¹⁵. First, there is an oral hearing which takes place between one of the parties

312 O.J. 1982 L295/35; see also Diesel Engines (Finland, Sweden) O.J. 1990 L76/28.

313 Article 8(4). See also Thiophen (United States) O.J. 1982 L295/35.

314 Order of the Court in Case 236/81 Celanese Chemical Co. v. Council and Commission [1982] ECR 1183.

315 The Commission has in the past used another type of meeting - A "Disclosure Conference" - this depends on the acquiescence of the parties. Source: private conversation with Commission officials. See Ballbearings (Japan) O.J. 1985 L167/3.

and Commission Representatives³¹⁶. The Commission will hear an interested party if they have made a written request and can show that they are likely to be affected by the results of the proceeding and that there are particular reasons why they should be heard orally³¹⁷. These meetings tend to be informal with no official record being kept of the proceedings. Some Commission officials would, however, favour a more formal approach to these meetings similar to the system under United States law where official records are kept. Such records would be of great value should the outcome of the anti-dumping proceedings lead to Court action³¹⁸. Second, there is a confrontation meeting which takes place between the complainants and those accused of dumping with a Commission official presiding³¹⁹. Confrontation meetings are not as common as oral hearings³²⁰. The Regulation states that there is no obligation on any party to attend. This is usually what happens when the Commission arranges such a meeting³²¹, since the issues raised are those at the centre of the dispute and no doubt involve confidential information.

316 Article 7(5) Regulation 2423/88.

317 ibid.

318 Private conversation with Commission officials.

319 Article 7(6) Regulation 2423/88.

320 Confrontation meeting was arranged and took place in the following cases:

Mechanical Wrist Watches (USSR) O.J. 1982 L11/4

Decabromodiphenylether (USA) O.J. 1982 L319/16.

321 See Barium Chloride (China) O.J. 1983 L110/11; Outboard Motors (Japan) O.J. 1983 L152/18; Ferro-chromium (South Africa) O.J. 1983 L161/15; Nickel (USSR) O.J. 1983 L159/43; Caravans for Camping (Yugoslavia) O.J. 1983 L240/12; Sensitized Paper for Colour Photographs (Japan) O.J. 1984 L124/45; Glycine (Japan) O.J. 1985 L207/85; Hardboard (Argentina, Switzerland, Yugoslavia) O.J. 1986 L157/61; Ferro Silicon (Brazil, USSR) O.J. 1987 L219/24; Herbicide (Romania) O.J. 1988 L26/107; Oxalic Acid (China, Czechoslovakia) O.J. 1988 L343/34.

7.3. Termination of Proceedings

An anti-dumping investigation can be terminated in one of three ways:

- 7.3.1. where protective measures are unnecessary
- 7.3.2. the acceptance of an undertaking
- 7.3.3. the imposition of anti-dumping duties.

7.3.1. Where Protective Measures are Unnecessary

If, after consultation it becomes apparent that protective measures are unnecessary, and where the Advisory Committee does not object, the proceedings shall be terminated³²². This usually occurs where there is no evidence of dumping (or where it is minimal) or where there is no injury to Community industry³²³. If the Advisory Committee objects, the Commission can submit a proposal to the Council that the proceedings be terminated. The proceedings will stand terminated, if the Council acting by qualified majority has not decided otherwise³²⁴.

7.3.2. The Acceptance of an Undertaking

The Commission may terminate proceedings if, after consultation, it finds the offering of an undertaking acceptable³²⁵. An undertaking may not be offered later than the end of the period during which representations may be made under Article 7(4)(c)(iii). The Commission may continue the investigation, even

322 Article 9(1) Regulation 2423/88.

323 See footnotes 142 and 145 supra.

324 Article 9(1) Regulation 2423/88; see also Portland Cement (GDR, Poland, Yugoslavia) O.J. 1986 L202/43.

325 Article 10(1) Regulation 2423/88.

if it accepts the undertaking either after consultation or where it is requested to do so by exporters representing a significant percentage of the trade involved³²⁶. In such a situation, if a no injury determination is made the undertaking lapses³²⁷.

7.3.3. The Imposition of Anti-Dumping Duties

The Community authorities may impose protective measures which take the form of:

7.3.3.1. Provisional Duties

7.3.3.2. Definitive Duties.

7.3.3.1. Provisional Duties

If, after the preliminary examination, the Commission determines that, as a result of dumping, injury has been caused to Community industry and where it is in the interests of the Community, it may impose a provisional anti-dumping duty³²⁸. It may do this either by acting on a request of a Member State³²⁹ or alternatively on its own initiative³³⁰.

Even though the Commission decides not to impose a duty, this does not rule out the possibility of imposing one at a later date³³¹. Provisional duties are valid for four months³³² but they can be

326 Article 10(4) Regulation 2423/88.

327 ibid.

328 Article 11(1) Regulation 2423/88.

329 Article 11(2)-(3) Regulation 2423/88.

330 Article 11(1) Regulation 2423/88.

331 Article 11(4) Regulation 2423/88.

332 Article 11(5) Regulation 2423/88.

extended for a further two months³³³ by submitting a proposal to the Council not later than one month before the expiry of the period of validity of the provisional duty³³⁴. This also applies in the case of a proposal for definitive action.

When a duty has been imposed, the product in question cannot enter the Community unless a security for the amount of the duty has been posted³³⁵. On the expiry of the period of validity, the security shall be released only to the extent that the Council has not decided to collect it definitively³³⁶.

7.3.3.2. Definitive Duties

When it is finally established that the injury has resulted from dumping and where it is in the Community's interest a definitive duty may be imposed³³⁷. Such duties are imposed by the Council and it also decides the proportion of the provisional duty that is to be definitively collected. It usually collects the amount secured by way of provisional duties or those secured by way of provisional duties to a maximum of the duty definitively imposed³³⁸.

333 ibid.

334 Article 11(6) Regulation 2423/88.

335 Article 11(1) Regulation 2423/88.

336 Article 11(7) Regulation 2423/88.

337 Article 12(1) Regulation 2423/88.

338 e.g. Electronic Typewriters (Japan) O.J. 1985 L163/1; Ballbearings (Miniature) (Japan, Singapore) O.J. 1984 L193/1; Video Cassette Tapes (Hong Kong, South Korea) O.J. 1989 L174/1.

7.4. The Review Procedure

Regulation 2423/88 provides that the Regulation imposing the definitive duties and the decisions to accept undertakings are subject to review³³⁹. Such a review may be initiated:

- (a) at the request of a Member State;
- (b) on the initiative of the Commission; or
- (c) where an interested party so requests and submits evidence of changed circumstances sufficient to justify the need for such a review, provided that at least a year has elapsed since the conclusion of the investigation³⁴⁰.

With regard to this last category, an important issue which remains unanswered is whether or not the concept of "changed circumstances" includes an increase in the prices of an exporter who previously dumped or whether it only refers to the circumstances not under its control. The wording of the Regulation seems to favour the former since its aim is to bring about an increase in prices, thereby eliminating dumping. On the other hand, if the latter was favoured, it would imply that the exporter could not eliminate the dumping by his own efforts. He would have to wait for five years or until the circumstances altered. This would result in increased administrative costs and the paying of refunds until the Commission on its own initiative decides to end them. Until such a situation arises the question remains open. It is hoped that when it does, the former interpretation is chosen, i.e. an exporter can produce evidence of changed circumstances as a result of its own efforts - an increase in its export prices.

339 Article 14(1).

340 ibid.

In the majority of cases, it is the complainant industry that requests a review³⁴¹. Where after consultation it becomes apparent that review is warranted, the investigation shall be reopened in accordance with Article 7 where the circumstances so require. The reopening of an investigation does not, however, affect the operation of the measures in question³⁴². If, as a result of the review investigation, the measures are to be repealed, annulled or amended, this is the task of the Community institution which was responsible for their introduction³⁴³.

7.5. The "Sunset" Procedure

Article 15 of Regulation 2423/88 provides that anti-dumping duties and undertakings lapse after 5 years from the date on which they entered into force or were last modified or confirmed³⁴⁴.

It has also stipulated, however, that if an interested party shows that such an expiry would lead again to injury or a threat thereof, the Commission shall carry out a review of the measure³⁴⁵. In such a situation the measure shall remain in force pending the outcome of the review³⁴⁶. The Regulation further provides that,

341 e.g. Lithium Hydroxide (USA, USSR) O.J. 1980 C181/4; Sodium Carbonate (Bulgaria) O.J. 1981 C220/2; Kraftliner (USA, Austria, Canada, Finland, Portugal) O.J. 1982 C217/2; Herbicide (Romania) O.J. 1987 C142/4. But see Saccharin & its Salts (China, S. Korea, USA) O.J. 1983 C119/3 (here it was the American exporter who requested a reivev of its undertaking).

342 Article 14(2) Regulation 2423/88.

343 Article 14(3) Regulation 2423/88.

344 This concept was introduced in 1984 under Regulation 2176/84.

345 Article 15(3). See Paracetamol (China) O.J. 1987 C236/2.

346 ibid.

where the initiation of the review has not been published within six months after the end of the relevant five year period, the measure shall lapse at the end of that six month period³⁴⁷. Furthermore, the new text of Article 15 states that, where anti-dumping duties and undertakings lapse, the Commission shall publish a notice to that effect in the Official Journal stating the date of expiry of the measure³⁴⁸.

The Commission has stated³⁴⁹ that it will on its own initiative review the position of individual exporters (but not all the exporters of the product under consideration) who, because they had been subject to an earlier review, are not eligible for one under the "Sunset provisions".

7.6. Refunds

A definitive duty remains in force for a period of five years³⁵⁰ unless, as a result of a review, it is amended³⁵¹. However, during this period a refund can be obtained, if an importer can show that the duty exceeds the actual dumping margin, i.e. the amount by which the price of the consignment in question is less than the normal value as calculated for the purposes of obtaining the definitive duty³⁵². The refund is merely a corrective factor designed to enable the rate of duty fixed by the Regulation imposing definitive duties to be adjusted in a particular case. It

347 ibid.

348 Article 15(6).

349 Statement to the Working Party on Commercial Questions of the Council of Ministers of 14th June 1988.

350 See footnote 344 supra.

351 See Section 7.4 supra.

352 Article 16(1) Regulation 2423/88.

presupposes that the duty is lawfully collected³⁵³. Furthermore, Article 16 does not permit the validity of the Regulation to be challenged or a review of the general findings made during the previous investigations to be requested³⁵⁴.

Prior to the new text in Article 16 of Regulation 2423/88 the Commission published a set of guidelines for importers³⁵⁵ in order to create a greater transparency in deciding whether or not refunds were to be granted. The new text of Article 16 codifies the existing practice outlined in the guidelines referred to above and in particular, the practice of deducting anti-dumping duties as a cost on the export side where the exports sales are made through a sales subsidy³⁵⁶.

The Regulation provides that all refund calculations shall be made in accordance with the provisions of Articles 2 or 3 and shall 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 techniques³⁵⁷.

The importer has to submit an application to the Commission via the Member State in which the products were released for free circulation. This must be done within three months of the date when the amount of the definitive duty was determined or the date on which

353 Opinion of Advocate-General Darmon in case 312/84 Continentale Produkten Gesellschaft v. Commission [1987] ECR 841 at 860.

354 Case 312/84 ibid., at paragraph 12 of Judgment.

355 O.J. 1987 C266/2. "Commission notice concerning the reimbursement of anti-dumping duties".

356 Such a deduction is being challenged in case 188/88 NMB Deutschland et al v. Commission (not yet reported).

357 Article 16(1).

the decision was made to definitively collect the provisional duties³⁵⁸. This application has to be forwarded to the Commission who then informs the other Member States and produces an opinion on the matter³⁵⁹. If the Member States do not object within one month, the Commission may act in accordance with the opinion³⁶⁰. In all other cases, it shall, after consultation, decide whether and to what extent the application should be granted³⁶¹. If it is granted the excess amount shall be reimbursed. To date the Commission has only published a small number of decisions on the question of refunds³⁶².

8. THE DIFFERENCES BETWEEN THE EEC AND ECSC ANTI-DUMPING RULES

The Treaty establishing the European Coal and Steel Community, as its name suggests, covers coal and steel products³⁶³.

Anti-dumping investigations concerning these two products are governed by Commission Decision 2424/88³⁶⁴ and the rules relating

358 Article 16(2) Regulation 2423/88.

359 ibid.

360 ibid.

361 ibid.

362 See Cotton Yarns (Turkey) O.J. 1985 L 11/34; Glass Textile Fibres (Czechoslovakia, Japan) O.J. 1985 L63/29; Acrylic Fibres (USA) O.J. 1985 L125/32; Ballbearings (Singapore) O.J. 1988 L148/26.

363 The Treaty of Paris - the Treaty establishing the European Coal and Steel Community - was signed in 1951. It should be noted that steel products which are the result of manufacturing basic steel products, such as tubes and pipes, are subject to the anti-dumping rules governed by Regulation 2423/88.

364 O.J. 1988 L201/18.

to the substance and procedure of such investigations are by and large the same as those under Regulation 2423/88.

There are, however, two major differences. First, Decision 2424/88 allows the Commission to determine normal value by using basic prices. Second, because of the institutional framework under the ECSC Treaty, the Commission's powers are much broader than those under the EEC Treaty.

8.1. The Basic Price System

Apart from the methods described earlier for determining normal value³⁶⁵, Decision 2424/88 allows for the determination of normal value on the basis of "Basic Prices". It states that

where several suppliers from one or more countries are involved and it is deemed appropriate to establish a basic price system the normal value may be derived from the basic price; however, normal value shall be determined in accordance with the preceding provisions of this article where it becomes apparent that such a method of determination would produce a significantly different result³⁶⁶.

Originally, a list of basic prices were compiled by reference to the lowest normal costs in the supplying country or countries where normal conditions of competition prevail³⁶⁷. This list is

365 See the methods for determining normal value under Regulation 2423/88, Section 1.2. supra.

366 Article 6(2)(b) Decision 2424/88.

367 See Recommendation 3004/77 O.J. 1977 L352/1. Article 14 ECSC Treaty defines recommendation thus:
"[Recommendations] shall be binding as to the aims to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed."

regularly revised by the Commission³⁶⁸. Generally speaking, in anti-dumping proceedings under Decision 2424/88, basic prices are used by the Commission to determine normal value.

8.2. The Powers of the Commission

The institutional framework under the ECSC Treaty is different from that under the EEC Treaty³⁶⁹. Under the ECSC Treaty the Commission has the power to take action which, under the EEC Treaty, is within the exclusive competence of the Council of Ministers. The reason for this is that the Commission, when it deals with matters relating to coal and steel, does so with the decision making powers that were vested in the High Authority under the ECSC Treaty³⁷⁰.

With regard to anti-dumping proceedings, the Commission has the power not only to impose provisional duties but also definitive duties³⁷¹, and to order the definitive collection of provisional duties³⁷². Even though the Commission has to consult the Advisory Committee in all instances, it can take decisions without the Committee being able to veto them.

368 e.g. O.J. 1982 L321/1..

369 See Chapter 1 supra which sets out the institutional framework under both Treaties.

370 As a result of the 1965 Merger Treaty, since 1967 the three Communities (EEC, ECSC, Euratom) have been represented by the one Commission.

371 Article 12(1) Decision 2424/88.

372 Article 12(2)(a) Decision 2424/88.

8.3. Other Minor Differences

First, with regard to the question of judicial review³⁷³, appeals can only be made to the Court by Community producers³⁷⁴ and not by exporters³⁷⁵. Secondly, representatives of Directorate General III which supervises the Community's steel industry, are actively involved in ECSC anti-dumping actions.

PART 2: COUNTERVAILING MEASURES

INTRODUCTION

Countervailing duties provide a defence to the introduction of unfairly low priced imports which take the form of subsidies granted to an exporter by its government. Regulation 2423/88³⁷⁶ provides that the Community authorities can impose countervailing duties on subsidised imports whose release for free circulation causes injury. This Regulation governs anti-subsidy actions for all products except those covered by the ECSC Treaty³⁷⁷.

The rules with respect to the substance and procedure in anti-subsidy actions are for the most part the same as those for anti-dumping actions. The one major exception, however, is that the Community

373 See Chapters 4, 5 and 6 infra.

374 See Articles 33 and 80 ECSC Treaty.

375 See Joined cases 239/82 and 275/82 Allied Corpn. v. Commission [1984] ECR 1005.

376 O.J. 1988 L209/1.

377 Decision 2424/88 (O.J. 1988 L209/18) governs those goods covered by the ECSC Treaty.

authorities are not required to determine the normal value and the export price. It is only necessary to establish that there is a subsidy which is causing injury and to determine the amount of that subsidy.

Unlike anti-dumping actions which are a common occurrence, there have been only a small number of anti-subsidy cases³⁷⁸. Various reasons for this state of affairs have been cited by writers who specialise in the field. For example, subsidies are granted by governments whereas dumping is practised by individual undertakings, with the result that this involves accusing foreign governments of unfair trading practices. Furthermore, anti-subsidy actions are usually initiated at the same time as anti-dumping actions. Normally this results in the imposition of anti-dumping rather than countervailing duties³⁷⁹.

Since the rules relating to anti-subsidy actions are virtually the same as those in the anti-dumping actions only the major differences between the two will be considered here³⁸⁰.

378 See Davey op. cit. at pp. 114-115.

379 See Article 13(9) Regulation 2423/88 which states that: "no product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from the granting of any subsidy".

380 For an analysis of the rules relating to the substance and procedure see the preceding section on the anti-dumping rules.

1. THE EXISTENCE OF A SUBSIDY

Article 3(1) states that:

A countervailing duty may be imposed for the purpose of offsetting any subsidy bestowed, directly or indirectly, in the country of origin or export, upon the manufacture, production, export or transport of any product whose release for free circulation in the Community causes injury.

Unfortunately, the Regulation does not define what is meant by a subsidy. Rather it lists a number of export subsidies in an annex to the Regulation but stresses that subsidies bestowed on exports include but are not limited to the practices listed³⁸¹.

In the majority of cases decided thus far, the subsidies held to be subject to duties have been mainly export subsidies. The Commission in Soya Meal identified two factors that are crucial in determining whether a subsidy is subject to duties. There has to be government intervention, in other words some charge on the public account and there has to be a benefit to the recipient with a resultant cost to the exchequer³⁸².

Some of the export subsidies held by the Commission to give rise to countervailing duties are as follows:

1. Credit premiums, e.g. in a number of cases the Commission held that the excessive remission of tax on industrial products (IPI), where the tax credit which was granted exceeded the amount of tax actually

381 Article 3(2).

382 O.J. 1985 L106/19; see generally Cuanne & Stanbrook op. cit. at pp. 51-54. In the Second Fediol Case (case 188/85 [1988] ECR 4193) the Court has held that Article 3 of Regulation 2176/84 presupposed the grant of an economic advantage through a charge on the public account.

collected at the production stage constituted an export subsidy³⁸³.

2. Access to working capital at lower rates of interest than those obtained on the commercial market³⁸⁴ or the availability of government loans to obtain working capital³⁸⁵ were held to be export subsidies.
3. Concessionary financing for exports. This occurred where the Banks who offered the finance facility obtained the re-financing at rates lower than the rate of increase in the value of variable treasury bonds³⁸⁶.
4. Exemption from Income Tax. Where the government exempted from income tax, profits made by the soya bean crushers from forward exchange (hedging) transactions on foreign markets. This was held to constitute an export subsidy³⁸⁷.
5. Tax rebate. This was held to constitute an export subsidy where the exporters received a tax rebate on the export of the finished product designed to offset indirect taxes levied on the finished product and on all prior transactions of the raw material involved in its production³⁸⁸.

The Regulation is not limited solely to export subsidies. It does not rule out the possibility of a domestic subsidy giving rise to the

383 Stainless Steel Bars (Brazil) O.J. 1980 L139/30; Sheets and Plates of Iron & Steel (Brazil) O.J. 1983 L45/11 (ECSC); Binder and Baler Twine (Mexico, Brazil) O.J. 1987 L34/55.

384 ibid.

385 Soya Meal (Brazil) O.J. 1985 L106/19.

386 ibid. See also Binder and Baler Twine (Mexico, Brazil) O.J. 1987 L34/55.

387 ibid. See also Binder and Baler Twine (Mexico, Brazil) O.J. 1987 L34/55.

388 Tube and pipe fittings (Spain) O.J. 1983 L322/13.

imposition of duties³⁸⁹. In Soya Meal the Commission stipulated that two factors had to be present before such a subsidy could give rise to duties. It has to distort competition. Therefore, as long as the impact of such interventions is "general" they do not distort competition. Second, the advantages must be conferred selectively, i.e. with the aim of helping specific firms³⁹⁰.

Measures which are regarded as being in the public interest, e.g. improving the infrastructure, health, education, etc., do not have a distorting effect on competition. Any attempt to call a measure of general nature a subsidy would be absurd, because by ignoring the fact that policies of all modern states imply to varying degrees some financial intervention of government, it would make large sections of social and economic policy subject to countervailing duties³⁹¹.

So far, the Commission has imposed a duty on a domestic subsidy in only one case. In Sheets & Plates of Iron or Steel it held that an investment programme which granted duty free treatment and exemption from tax on imported machinery warranted a countervailing duty³⁹². In Soya Meal the Commission held that the provision of a flat rate finance for the preparation and storage of soya beans constituted a domestic subsidy but not such as to give rise to the imposition of a duty since the loans were generally available³⁹³.

389 Article 3(1). See also Article 11(3) GATT Code on "Subsidies and Countervailing Duties" (Reproduced in O.J. 1980 L71/72).

390 See O.J. 1985 L106/19; see generally Cuanne & Stanbrook op. cit. at pp. 51-4.

391 ibid.

392 O.J. 1983 L45/11 (ECSC).

393 O.J. 1985 L106/19.

Article 3(4) governs the valuation of the subsidy in question. First, the Regulation provides that the exemption of a product from indirect taxes does not constitute a subsidy³⁹⁴. Second, the amount of the subsidy is to be determined per unit of the subsidised product exported to the Community³⁹⁵ but the Regulation allows for the following deductions to be made, if they are justified:

- (a) application fees or other costs incurred in order to qualify for the subsidy³⁹⁶.
- (b) export taxes, duties or other charges intended to offset the subsidy³⁹⁷.

The burden of proving these rests on the party making the claim³⁹⁸.

Where the subsidy is not granted by reference to quantities manufactured, produced, exported or transported, the amount shall be determined by allocating the value of the subsidy over the appropriate level of production and over a suitable period of time³⁹⁹. However, where the subsidy is based upon the acquisition or future acquisition of fixed assets, the value of the subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned⁴⁰⁰.

394 Article 3(3); see also Tube & Pipe Fittings (Spain) O.J. 1986 L103/4.

395 Article 3(4)(a) Regulation 2423/88.

396 Article 3(4)(b)(i).

397 Article 3(4)(b)(ii).

398 Article 3(4)(b) Regulation 2423/88.

399 Article 3(4)(c) Regulation 2423/88.

400 ibid. Where the assets are non-depreciating the subsidy shall be valued as an interest free loan - see Sheets and Plates of Iron or Steel (Brazil) O.J. 1983 L205/29.

Finally, with respect to state trading countries the amount of the subsidy is to be determined in an "appropriate and not unreasonable manner". This is to be established using the same methods used to determine dumping from state trading countries⁴⁰¹.

As in the case of dumping, where the authorities refuse to supply the Commission with the relevant information, the Commission will proceed on the basis of the facts available⁴⁰².

2. COMMUNITY INTERESTS

Where the Community authorities conclude that, as a result of subsidisation, Community industry has been injured, they may impose a countervailing duty but only where it is in the interests of the Community to do so⁴⁰³. The Commission has recently discussed this concept in relation to anti-subsidy actions. In Soya Meal⁴⁰⁴ it held that it was no longer in the interests of the Community to require the collection of countervailing duty, since the Brazilian Government had stopped granting concessionary financing for exports of soya meal. It held that the position with regard to subsidies can, in this respect, be distinguished from that faced in dumping where it is essential that account is only taken of the facts and elements which have occurred during the period covered by the investigation. It referred to the fact that a subsidy is granted not by an exporter but by a government and its introduction or removal normally follows considerations which are different from

401 Article 3(4)(d) Regulation 2423/88. See also section 1.2.2.5. supra.

402 Article 7(7)(b) Regulation 2423/88. See also Seamless Tubes (Spain) O.J. 1980 L196/34 (here information supplied by one of the complainants was used).

403 Articles 11(1), 12(1) Regulation 2423/88.

404 O.J. 1985 L106/29.

those which an exporter would take into account. It concluded that the risk of having a subsidy which has been removed in the course of an investigation and subsequently re-introduced is not the same as the subsequent re-appearance of dumping which had stopped during the investigation. This difference, it noted, is reflected in the relevant international rules which distinguish in this respect between anti-dumping and countervailing action.

3. PROTECTIVE MEASURES

The Community authorities can either impose a countervailing duty (provisional⁴⁰⁵ or definitive⁴⁰⁶) or it can accept an undertaking from the exporter in question⁴⁰⁷.

3.1. The Imposition of a Countervailing Duty

For the most part the rules are the same as those applying to anti-dumping actions⁴⁰⁸, therefore only the differences will be considered. First, the Regulation provides that the duty should be less if such lesser duty would be adequate to remove the injury⁴⁰⁹. In Soya Meal the Commission held that where the benefit to the recipient of the subsidy is less than the cost to the exchequer, a countervailing duty could only reflect the lesser amount⁴¹⁰. Second, with regard to the question of retroactivity,

405 Article 11(1) Regulation 2423/88.

406 Article 12(1) Regulation 2423/88.

407 Article 10 Regulation 2423/88.

408 See generally section 4 of Anti-Dumping Rules supra.

409 Article 13(3).

410 O.J. 1985 L106/29.

like anti-dumping duties, a countervailing duty shall be neither imposed nor increased with retroactive effect⁴¹¹.

3.2. The Acceptance of an Undertaking

With respect to the acceptance of an undertaking the rules are similar to those in anti-dumping actions⁴¹². The Regulation states that the Commission may accept an undertaking in an anti-subsidy action where:

- (i) the subsidy is eliminated or limited, or other measures concerning its injurious effects taken, by the government of the country of origin or export⁴¹³; or
- (ii) prices are revised or exports ceased to the extent that the Commission is satisfied that the amount of the subsidy or the injurious effects thereof, are eliminated. In the case of subsidization the consent of the country of origin or export shall be obtained⁴¹⁴.

411 Article 13(4)(a) Regulation 2423/88. Article 13(4)(b) specifies a number of situations where a countervailing duty may be imposed retroactively. They are as follows:

- (i) in critical circumstances that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from export subsidies paid or bestowed inconsistently with the provisions of the GATT and of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, and
- (ii) that it is necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on these imports;
- (iii) that an undertaking has been violated.

412 See generally section 4 of Anti-Dumping Rules supra.

413 Article 10(2)(a).

414 Article 10(2)(b) Regulation 2423/88.

Thus far there has only been one case in which the Commission has accepted an undertaking⁴¹⁵.

PART 3: COMMON RULES FOR IMPORTS

INTRODUCTION

In situations where the importation of goods is not objectionable either because it does not result from dumping or subsidisation, the Community authorities are permitted to adopt protective measures, if the goods in question are imported in such greatly increased quantities and on such terms or conditions as to cause injury or the threat thereof, to the Community producers of the like or directly competing goods⁴¹⁶.

Imports into the European Community from third countries, except for goods from state trading countries⁴¹⁷, China⁴¹⁸ and Cuba⁴¹⁹ are

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- 415 Women's Shoes (Brazil) O.J. 1981 L327/39; in Tubes and Pipe Fittings (Spain) O.J. 1983 L322/13, the Commission rejected the undertakings offered.
- 416 Article 15(1) Regulation 288/82; see also the Preamble to the Regulation.
- 417 Regulation 1765/82; O.J. 1982 L195/1. Amended by Act of Spanish and Portuguese Accession and by Regulation 1243/86 (O.J. 1986 L113/1).
- 418 Regulation 1766/82; O.J. 1982 L195/21. Amended by Act of Spanish and Portuguese Accession and by Regulation 35/83 (O.J. 1983 L5/12), Regulation 101/84 (O.J. 1984 L14/7), Regulation 268/85 (O.J. 1985 L28/39) and Regulation 1243/86 (O.J. 1986 L113/1).
- 419 Article 1(1) Regulation 288/82.

governed by Regulation 288/82⁴²⁰ (as amended by Regulation 3665/89⁴²¹). This section of the chapter will deal largely with the adoption of protective measures under Title V of Regulation 288/82. In order to complete the picture with regard to the common rules for imports, it is important to note the following:

- (a) Common rules for imports from state trading countries;
- (b) Imports from state trading countries not liberalised at Community level; and
- (c) Surveillance measures under Title IV Regulation 288/82.

(a) Common Rules for Imports from State Trading Countries

Regulation 1765/82 governs imports from state trading countries⁴²² and Regulation 1766/82 governs imports from China⁴²³. Both Regulations provide a common liberalisation list for those goods not subject to quantitative restrictions⁴²⁴. A product may be added to the list by the Council and in certain cases by the Commission. The Commission may add a product to the list where, by virtue of the revocation of a quantitative restriction by a Member State, a product has become liberalised in the Community. The Member State can, however, request that the matter be sent to the Council⁴²⁵.

420 O.J. 1982 L35/1. Successive Regulations have been in effect since 1969. Regulation 288/82 concerns goods covered by the EEC Treaty. As regards goods covered by the ECSC Treaty the relevant legislation is Recommendation 77/328 ECSC.

421 O.J. 1989 L325/1.

422 Footnote 417 supra.

423 Footnote 418 supra.

424 Article 1 and Annex of Regulations 1765/82 and 1766/82.

425 Article 2(2) Regulations 1765/82 and 1766/82.

(b) Imports from State Trading Countries not Liberalised at Community Level

Regulation 3420/83 governs the products from state trading countries which are not liberalised at Community level, i.e. those products which are still subject to quantitative restrictions at national level⁴²⁶. Even though this is a matter within the exclusive competence of the Community, the Member States are by virtue of specific authorisation from the Commission, permitted to maintain national measures, with respect to goods that are economically or politically sensitive⁴²⁷.

(c) Surveillance Measures under Title IV of Regulation 288/82

The Community authorities do not have to impose protective measures. Instead, they can if they wish adopt surveillance measures⁴²⁸. The primary aim of such action is to gather information on import trends, in that this may prove to be useful in deciding whether protective measures should be adopted.

In the majority of cases it is the Commission which adopts surveillance measures⁴²⁹, but the Council can do so when the imposition of such measures is taken simultaneously with the liberalisation of the importation of the product in question⁴³⁰. Surveillance may be at Community level⁴³¹ or at national level⁴³²

426 O.J. 1983 L346/6.

427 See Case 41/76 Donckerwolcke v. Procureur de la République [1976] ECR 1921 at 1937.

428 Article 10 Regulation 288/82.

429 Article 15(2) Regulation 288/82.

430 ibid.

431 Article 10 Regulation 288/82.

432 Article 12(2) Regulation 288/82.

and, unlike the adoption of protective measures, it can be taken at any time regardless of the Community investigation procedure under Title III⁴³³. In both cases, however, the products in question can only be put into free circulation on the production of an import document⁴³⁴.

SAFEGUARD MEASURES

Regulation 288/82 lays down the basic principle that importation of goods from third countries into the Community shall be free and therefore not subject to any quantitative restrictions without prejudice to:

- measures which may be taken under Title V (adoption of protective measures);
- measures maintained under Title IV (surveillance);
- quantitative restrictions for products listed in Annex 1 and maintained in the Member States indicated opposite these products in that Annex⁴³⁵.

1. THE SUBSTANTIVE RULES

Title V of Regulation 288/82 provides for the adoption of protective measures where a product is imported in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products⁴³⁶. Before protective

433 Article 7(4) Regulation 288/82.

434 Articles 11(1) and 13 Regulation 288/82.

435 Article 1(2).

436 Article 15(1) and 16(1)(a).

measures are adopted, the Community authorities carry out an investigation with respect to the imported product that is allegedly causing injury to Community industry⁴³⁷.

1.1. Like or Directly Competing Products

In determining whether injury has been caused to Community industry, Regulation 2423/88 governing anti-dumping and counter-vailing duties refers only to the Community producers of the like product⁴³⁸. Regulation 288/82 on the other hand refers to producers not only of the like product but also those of directly competing products.

Since the term is not defined in the Regulation, it is therefore necessary to consider the decided cases to date. This question confronted the Commission in Quartz Watches⁴³⁹, when it had to decide whether imported digital watches and Community mechanical and analogue quartz watches, were directly competing products. The Commission defined directly competing products as:

products which can essentially be substituted one for the other, that is to say, which are suitable for the same purposes and therefore are basically interchangeable.

It concluded that because of their high degree of interchangeability for the user, the watches in question were directly competing products. In coming to this conclusion, it took into account the fact that as regards general aspect, all watches look similar, all the watches in question possessed an essential function - that of giving the time, and that once a consumer bought a digital watch, he would not be concerned with buying another watch.

437 Title III Regulation 288/82.

438 See Section 1.1. Anti-dumping Rules, supra.

439 O.J. 1984 L106/31.

In Glass⁴⁴⁰, the Commission, having decided that drawn and float glass were not like products, had to determine whether they were directly competing products. It held that they could be substituted for one another and were therefore directly competing products. In arriving at this conclusion, the Commission noted that they used the same raw material and their chemical composition was virtually the same; they were the same shape and except for special uses were precut in standard sizes and thicknesses; finally, when looked at straight on, they were substantially the same and were both used for the same purposes.

1.2. The Determination of Injury

The Regulation expressly stipulates that the injury resulting from the imports in question must be "substantial" in order to permit the imposition of protective measures⁴⁴¹. Because such imports are not objectionable, in the sense that they are neither dumped or subsidised, the use of the word "substantial" suggests that a higher degree of injury is required, than the material injury requirement under Regulation 2423/88⁴⁴².

Regulation 288/82 uses the same criteria used in anti-dumping and anti-subsidy rules for determining injury. They are as follows:

- 1.2.1. The volume of imports, in particular where there has been a significant increase, either in absolute terms or relative to production or consumption in the Community⁴⁴³.

440 O.J. 1986 C128/7.

441 Article 15(1).

442 See Section 2 Anti-Dumping Rules supra.

443 Article 9(1)(a).

- 1.2.2. The prices of the imports, in particular where there has been a significant price undercutting as compared with the price of a like product in the Community⁴⁴⁴.
- 1.2.3. The consequent impact on the Community producers of similar or directly competitive products as indicated by actual or potential trends in the relevant economic factors such as:
- production
 - utilization of capacity
 - stocks
 - sales
 - market share
 - prices (i.e. depression of prices or prevention of price increases which otherwise would have occurred)
 - profits
 - return on investment
 - cash flow
 - employment⁴⁴⁵.

1.2.1. The Volume of Imports

As in the case of dumping and subsidisation, the Commission examines the increase in the volume of the imports and their consequent effect on the market share they attain in the Community. In some cases, the Commission will not only look at the Community as a whole, but will also take into account the Member States most affected⁴⁴⁶. In the decided cases to date, it has tended to rely on a period of 3-5 years in order to determine the effect of the imports in question on Community industry. The increase in volume

444 Article 9(1)(b).

445 Article 9(1)(c).

446 e.g. Quartz Watches (Hong Kong, Japan, Macao, South Korea, Taiwan) O.J. 1984 L106/31 (looked at the effect of imports on the French and German market); Glass (Spain, Turkey, Yugoslavia) O.J. 1986 C128/7 (looked at the Greek market which was most affected); Slide Fasteners (Taiwan) O.J. 1987 L353/11 (looked at Spanish and Italian market).

is normally represented in absolute terms, though sometimes the Commission will also refer to the rate of import growth⁴⁴⁷.

1.2.2. The Price of Imports

The wording of Article 15(1) and 16(1)(a) tends to suggest that a finding of injury could be made with reference to an increase in the volume of imports alone⁴⁴⁸. However, the Commission normally considers the other criteria laid down in Article 9(1) when making a determination of injury, and in all cases it usually makes a finding of price undercutting. In the decided cases to date it has found varying degrees of price undercutting, and in one case it noted that the price differences ranged from 12.1 per cent to 77.4 per cent⁴⁴⁹.

1.2.3. Impact on Community Industry

Article 9(1)(c) outlines a number of economic factors which may be considered in determining whether or not such imports have had an adverse impact on Community industry. In most cases, the Commission has usually found that over a 3-4 year period, a decline in production has resulted from an increase in the imports of the product in question⁴⁵⁰. A corollary of this, though not often

447 See Stoneware (South Korea, Taiwan) O.J. 1982 L369/27 - the Commission held that the increase in the volume of imports represented an average annual rate of import growth of 44.7% for the period 1977-81 and 31.2% for the period 1977-82.

448 See Van Bael & Bellis *op. cit.* at pp. 176-177 for a discussion of the wording of the two sections, which they see as being contrary to Article XIX of the GATT.

449 Quartz Watches (Hong Kong, Macao, Japan, South Korea, Taiwan) O.J. 1984 L106/31.

450 In Quartz Watches, (Hong Kong, Macao, Japan, South Korea, Taiwan) O.J. 1984 L106/31 - German watch production fell by 46.6 per cent.

referred to by the Commission in its decided cases, is a decline in the utilisation of capacity. However, the Commission noted in Glass that this resulted in the closing down of the largest and most modern furnace in the Community⁴⁵¹. A fall in sales, with the resultant increase in stocks has been noted, in some cases, by the Commission. In one case, the increase in stocks had to be financed and buildings had to be erected for storage, therefore leading to an increase in costs⁴⁵².

Two other factors that have a cumulative effect on each other are prices and market shares. The Commission has noted that price depression usually results in a fall in market share⁴⁵³. A fall in profits is not often expressly referred to by the Commission but in Glass it concluded that the overall effect of the imports in question had resulted in an erosion of profitability and financial losses⁴⁵⁴.

Finally, a decline in employment has been mentioned in all decided cases to date. In one case the Commission noted that employment had fallen by 91 per cent⁴⁵⁵. Apart from a reduction in the workforce the Commission has also referred to the fact that in one case, the number of manufacturers fell from 82 to 65⁴⁵⁶.

451 O.J. 1986 C128/7.

452 ibid.

453 Quartz Watches (Hong Kong, Macao, Japan, South Korea, Taiwan) O.J. 1984 L106/31. The Commission noted that the market share had dropped below 10% in 1983.

454 O.J. 1986 C128/7.

455 Stoneware (South Korea, Taiwan) O.J. 1982 L369/27.

456 Quartz Watches (Hong Kong, Taiwan, Macao, South Korea, Japan) O.J. 1984 L106/31; see also Beach Slippers (China) O.J. 1984 L340/30 where the number of producers dropped from 24 firms and 14 craftsmen in 1979 to 16 firms and 10 craftsmen in 1983.

1.3. Threat of Injury

As in anti-dumping and anti-subsidy actions, this can only be made where the situation is likely to develop into actual injury⁴⁵⁷.

In order to determine whether or not there is a threat of injury the Commission may take account of the following:

- (a) the rate of increase of exports into the Community;
and
- (b) the export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community⁴⁵⁸.

1.4. Causality

The Regulation expressly provides that there has to be a causal link between the import of the goods in question and the injury caused to Community industry⁴⁵⁹. Unlike Regulation 2423/88 it does not expressly state that injury caused by other factors, such as contraction in demand or competition, should be excluded⁴⁶⁰. The Commission has discussed the question of causality in Quartz Watches⁴⁶¹ and also in Glass⁴⁶².

457 Article 9(2) Regulation 288/82. The threat of injury was found to exist in Beach Slippers O.J. 1984 L340/30. Protective measures were therefore extended.

458 Article 9(2) Regulation 288/82.

459 Article 15(1).

460 Article 4(1) Regulation 2423/88.

461 O.J. 1984 L106/31.

462 O.J. 1986 C128/7.

In Quartz Watches⁴⁶³ the Commission noted that the imports of mechanical watches had never been in such quantities as to contribute significantly to the creation of substantial injury. Furthermore, it rejected the claim that the cause of economic difficulties was the drop in demand for mechanical watches in favour of quartz watches for reasons of consumer taste, and the fact that the digital watch had created its own market. The Commission contended that consumer preference would be reflected uniformly throughout the Community. Therefore, it held that the increase in demand for quartz watches was due to the low level of prices. Second, since the Community market was stable, any influx of imports on such a marked scale as that of the digital quartz watches would have led to a reduction in the outlets for domestic production. It concluded, therefore, that the imports of digital quartz watches, taken in isolation, caused substantial injury to the Community producers. On the other hand, the imports of analogue quartz watches contributed only to a minor degree in causing injury due to the lack of significant price undercutting.

In Glass⁴⁶⁴ the Commission considered whether the imports of wired and figure glass on the one hand, and the imports of drawn and float glass on the other caused substantial injury to Community industry. With regard to the former, it concluded that the imports in question were not in themselves the cause of any serious injury to Greek industry, owing to the fact that its problems had occurred before the increase in penetration of the imports in 1984. On the other hand, the Commission held that the imports of drawn and float glass contributed, to some extent, to the worsening of the difficulties facing Greek industry. At the same time, however, it noted that imports from the rest of the Community and from non-Community countries not covered by the investigation also increased and these

463 O.J. 1984 L106/31.

464 O.J. 1986 C128/7.

were at prices lower than the countries under investigation. It referred to the fact that there had been a contraction in demand for drawn glass and a corresponding increase for float glass. The Greek industry it concluded, did not have the necessary technology for producing float glass and, to add to its difficulties, the industry had recently invested in a drawn glass production line.

1.5. No Injury Determination

To date there has been only one instance in which the Commission has made a no-injury determination. In Stoneware⁴⁶⁵ it concluded that cheap imports into the Community of articles of common pottery could not, taken in isolation, be considered as constituting substantial injury. In coming to this conclusion, the Commission referred to the fact that imports of common pottery increased only slightly while the share of the Community market they held had remained stable.

1.6. Community Interests

Even though it has been established that substantial injury has been caused by the imports in question, protective measures will only be taken if it is in the interests of the Community to do so⁴⁶⁶. Since this term is not defined in the Regulation it is necessary to look at the findings of the Commission in the decided cases to date. The Commission has, in Quartz Watches⁴⁶⁷ discussed this term at length. It considered the effect of the imports in question on the Community industry in France and Germany. In the case of France, it concluded that it was in the interest of the Community to adopt protective measures. On reaching this conclusion it noted

465 O.J. 1982 L369/27.

466 Articles 15(1) and 16(1) Regulation 288/82.

467 O.J. 1984 L106/31.

that the French industry was largely concerned with the production of assembled watches. Secondly, the social consequences for the French were much higher, since watchmaking in the Franche-Comté area was the main source of employment. On the other hand, the Commission held that in relation to Germany protective measures were not necessary for the moment. This was due to the fact that the restructuring of the German industry was geared mainly to large scale watchmaking.

1.7. Protective Measures which may be adopted under Title V

Under Title V of Regulation 288/82, protective measures may be taken both by the Commission and the Council⁴⁶⁸. Also, if certain conditions are satisfied, the Member States may adopt interim protective measures⁴⁶⁹.

To date, only quotas have been imposed by the Community authorities under Title V, though in Stoneware⁴⁷⁰ and in Footwear⁴⁷¹ the Commission replaced the quota with an Export Restraint Agreement. In order to gain an indication of how these quotas operate in practice reference has to be made to the decided cases⁴⁷². First, the Commission has the discretion either to make it an overall quota, applicable to all Third Countries, or, within this, to make an allocation of quantities among the main supplier countries⁴⁷³. As

468 Articles 15(1)(a) and(b) and Article 16(1).

469 Article 17 Regulation 288/82.

470 O.J. 1982 L369/27.

471 O.J. 1988 L54/59.

472 The Regulation lays down a few guidelines with reference to quotas. See Article 15(2).

473 Quartz Watches (Hong Kong, Japan, Macao, South Korea, Taiwan) O.J. 1984 L106/31; Slide Fasteners (Taiwan) O.J. 1987 L353/11; Footwear (South Korea, Taiwan) O.J. 1988 L54/59.

the Commission pointed out in Quartz Watches⁴⁷⁴, account had to be taken not only with regard to direct imports but also with those in free circulation. It must be noted, however, that Regulation 288/82 does not apply to goods already in free circulation. In order to restrict such imports, the Member State in question has to seek authorisation from the Commission under Article 115 of the EEC Treaty. Second, the quota may be set in volume terms⁴⁷⁵ or in both volume and value terms⁴⁷⁶. Third, the duration of the quota should only be for as long as the injury remains⁴⁷⁷. The date on which these measures are to expire should be fixed immediately and the level of protection should be progressively reduced, by means of an annual increase of the quotas in question⁴⁷⁸. Last, and most importantly, the protective measures taken, whether they be quotas or some other measure, must be compatible with the Community's international obligations⁴⁷⁹. This means that they must apply to

474 O.J. 1984 L106/31.

475 Quartz Watches (Hong Kong, Japan, Macao, South Korea, Taiwan) O.J. 1984 L106/31; Footwear (South Korea, Taiwan) O.J. 1988 L54/59.

476 Stoneware (South Korea, Taiwan) O.J. 1982 L369/27.

477 Quartz Watches (Hong Kong, Japan, Macao, South Korea, Taiwan) O.J. 1984 L106/31; Footwear (South Korea, Taiwan) O.J. 1988 L54/59 (limited period of two and a half years).

478 ibid.

479 Stoneware (South Korea, Taiwan) O.J. 1982 L369/27.

all third countries covered by Regulation 288/82 who import the product in question⁴⁸⁰.

Unlike Regulation 2423/88, which expressly provides that the Commission may accept undertakings⁴⁸¹, Regulation 288/82 contains no similar provision. In Stoneware⁴⁸², however, the South Korean government offered an export restraint agreement⁴⁸³ with the result that the Commission decided to replace the protective measures by a system of automatic authorisation for the imports in question. It indicated that it would not be prepared to accept an export restraint agreement on an industry to industry basis, arguing that it considered such action as tantamount to a deviation from the procedure conducted under Regulation 288/82. In support of its argument it contended that the appraisal of the injurious effects of the imports on the Community industry, as well as the choice of any defensive measures, were matters which may be undertaken only by the Community authorities⁴⁸⁴.

480 The Commission has been prepared to apply the safeguard measures on a mfn basis in line with the GATT rules (i.e. on a non-discriminatory basis). This has been so even though it was in favour of a code on safeguard measures during the Tokyo Round of Multilateral Trade Negotiations which would permit the imposition of such measures on a discriminatory or selective basis. It has again raised the question of selective safeguard measures during the present round of trade negotiations. (See Section on GATT Safeguard Measures in chapter 2, supra); The only exception to this general rule, are those countries with which the EEC has concluded a Free Trade Agreement. This is permitted under Article XXIV(5)(b) GATT.

481 Article 10.

482 O.J. 1982 L369/27; see also Footwear (Taiwan, South Korea) O.J. 1988 L54/59.

483 On export restraint agreements see Section on GATT Safeguard Measures in chapter 2 supra.

484 Footwear (Taiwan, South Korea) O.J. 1988 L54/59; the Commission favours a State-to-State approach to export restraint agreements.

2. PROCEDURE

The rules relating to procedure are laid out in Titles II and III of Regulation 288/82. This is divided roughly into the following four stages:

- 2.1. Information and Consultation
- 2.2. Investigation
- 2.3. Adoption of Protective Measures
- 2.4. Review Procedure.

2.1. Information and Consultation

Unlike the regime under Regulation 2423/88 where it is the Community industry that makes the complaint⁴⁸⁵, under Regulation 288/82 it is the Member State which informs the Commission should trends in imports appear to call for surveillance or protective measures⁴⁸⁶.

Consultation takes place in an Advisory Committee, which is comprised of representatives of each Member State presided over by a Commission official⁴⁸⁷. Consultation may be held either at the request of the Member State or on the initiative of the Commission. It should take place within eight working days following the receipt of information provided by the Member State and in any event before the adoption of any measure whether it be one of surveillance or protection⁴⁸⁸.

It is provided that consultation should cover: terms and conditions of importation, import trends and the various aspects of the economic

485 See footnote 291 supra.

486 Article 3. See Stoneware (South Korea, Taiwan) O.J. 1982 L369/72.

487 Article 5(1) Regulation 288/82.

488 Article 4 Regulation 288/82.

and commercial situation as regards the product in question and the measures, if any, to be taken⁴⁸⁹.

2.2. Investigation

Where, after consultation, there is sufficient evidence to justify an investigation, the Commission announces the opening of the investigation in the Official Journal⁴⁹⁰. Some information may be confidential. The applicable rules are in Article 8 and they are the same as those for anti-dumping and anti-subsidy proceedings⁴⁹¹. Where information is generally not forthcoming the Commission has the right to proceed on the basis of the facts available⁴⁹². To date, it has not had to revert to this provision. The interested parties have a right to be heard, if they can show that they are likely to be affected by the outcome of the investigation and that there are special reasons for them to be heard orally⁴⁹³.

At the end of the investigation, the Commission submits a report of its findings to the Advisory Committee⁴⁹⁴. If the Commission considers that no Community surveillance or protective measures are necessary, it publishes a notice of termination along with its reasons in the Official Journal, after consulting with the Advisory Committee⁴⁹⁵. Only on one occasion has the Commission held this to be the case. In Glass the Commission held that, because of

489 Article 5(3) Regulation 288/82.

490 Article 6(1)(a) Regulation 288/82.

491 See Section 7.2.1. Anti-Dumping Rules supra.

492 Article 6(5) Regulation 288/82.

493 Article 6(4) Regulation 288/82.

494 Article 7(1) Regulation 288/82.

495 Article 7(2) Regulation 288/82.

anti-dumping measures and protective measures under Article 108(3) of the EEC Treaty already in force, the Greek glass industry enjoyed a degree of protection which was likely to obviate the effect of imports from non-EEC countries⁴⁹⁶.

2.3. Protective Measures

The Regulation provides for the adoption of protective measures by the Commission and the Council and for the adoption of interim protective measures by the Member States.

Where intervention is requested of the Commission by a Member State, then it has to take a decision within five working days of receipt of such a request⁴⁹⁷. Such a decision has to be communicated to the Council and the Member State whereupon any Member State may, within one month, refer such a decision to the Council⁴⁹⁸. The Council then has the power to amend, confirm or revoke the decision of the Commission⁴⁹⁹. If it has not given a decision within three months, the measure taken by the Commission is deemed to be revoked⁵⁰⁰. By virtue of Article 16, the Council may adopt appropriate measures. Such a decision is final, subject only to judicial review. Before a Member State adopts interim protective measures it has to inform the Commission and the other Member States of the reasons for and the details of the proposed measures. After the Advisory Committee has been consulted the Member State may adopt these measures⁵⁰¹. Where the matter is urgent, consultation shall

496 O.J. 1986 C128/7.

497 Article 15(4) Regulation 288/82.

498 Article 15(5) Regulation 288/82.

499 Article 15(6) Regulation 288/82.

500 ibid.

501 Article 17(2)(a) Regulation 288/82.

take place within five working days after the information has been given to the Commission. At the end of the period, the Member State may adopt the measures. During that period, it may make imports of the product subject to the production of an import authorisation which is to be granted at the end of the period⁵⁰². The Commission has to be notified of the measures immediately following their adoption and such measures will operate until the adoption of a decision by the Commission⁵⁰³.

2.4. Review Procedure

Article 18(1) allows for consultations with the Advisory Committee either at the request of a Member State or on the initiative of the Commission while any surveillance or protective measure is in operation in order to examine the effects of the measure; and to ascertain whether its application is still necessary.

PART 4 : THE NEW COMMERCIAL POLICY INSTRUMENT

INTRODUCTION

In 1984, the Council adopted Regulation 2641/84 "on the strengthening of the Common Commercial Policy with regard, in particular to the protection against illicit commercial practices"⁵⁰⁴. This was justified by the need to defend

502 Article 17(2)(b) Regulation 288/82.

503 Article 17(3) Regulation 288/82.

504 O.J. 1984 L252/1. For a detailed analysis of the new instrument see Bourgeois and Laurent "Le 'nouvel instrument de politique commerciale': un pas en avant vers l'élimination des obstacles aux échanges internationaux" 1985 RTDE 41; Steenbergen "The New Commercial Policy Instrument" 1985 CMLRev. 421; Van Bael & Bellis op. cit. pp. 197 et seq.

vigorously the legitimate interests of the Community in the appropriate bodies, in particular the GATT, and to make sure that the Community, in managing trade policy, acts with as much speed and efficiency as its trading partners⁵⁰⁵.

The Regulation, therefore, provides the Community authorities with procedures enabling it:

- (a) to respond to any illicit commercial practices with a view to removing the injury resulting therefrom; and
- (b) to ensure full exercise of the Community's rights with regard to the commercial practices of Third Countries⁵⁰⁶.

Because the rules relating to these procedures are different they will be discussed separately.

1. ILLICIT COMMERCIAL PRACTICES

1.1. What Constitutes an Illicit Commercial Practice ?

The Regulation defines an illicit commercial practice as:

any international trade practice attributable to Third Countries which are incompatible with international law or with the generally accepted rules⁵⁰⁷.

505 See Preamble to Regulation 2641/84.

506 Article 1.

507 Article 2(1).

Except for the few cases to date⁵⁰⁸, it is not clear what constitutes an illicit commercial practice. In the explanatory memorandum which accompanied the draft regulation, the Commission gave the following examples:

- restrictions on exports of raw materials contrary to the GATT;
- import restrictions and other charges that are incompatible with the GATT⁵⁰⁹.

Some commentators have indicated that illicit commercial practices are those trade practices which violate the rules laid down by international trade agreements such as the GATT or the GATT Codes⁵¹⁰ and also those laid down by the bilateral and multilateral agreements to which the Community or the Member States are a

508 Notice of initiation of an examination procedure concerning illicit commercial practices within the meaning of Regulation (EEC) No. 2641/84, consisting of the exclusion from the United States market of the unlicensed importation of certain aramid fibres manufactured by AKZO'NV or its affiliated companies outside the United States, O.J. 1986 C25/2; Notice of initiation of an "illicit commercial practice" procedure concerning the unauthorised reproduction of sound recordings in Indonesia, O.J. 1987 C136/3; Soyal Meal (Argentina) unpublished Decision dated 22nd December 1986; Commission Decision rejecting the complaint lodged by Smith Kline & French Laboratories Ltd. against Jordan O.J. 1989 L30/67.

509 Com(83) 87 final p. 2 note 1.

510 Such violations under the GATT or the GATT Codes include:

- export restrictions applied in an illicit manner.
- export subsidies prohibited by the GATT which cause injury to the Community exporters on a third country market.
- non respect for the rules relating to Customs valuation of imported merchandise.
- violation of code on Technical Barriers to Trade.
- systematic eviction of Community enterprises from the markets of States, contracting parties to the Government Procurement Code.
- violation of the Code on Import Licensing.

source: Bourgeois & Laurent op. cit. p. 51.

party⁵¹¹. In two Community complaints the Commission has given an indication of the type of commercial practice that is to be regarded as illicit. In Aramid Fibres⁵¹², the illicit commercial practice complained of was the finding by the United States International Trade Commission that Enka BV (the sole producer in the Community of Aramid Fibre) had violated section 337 of the United States Tariff Act 1930, by the unauthorised importation and sale of aramid fibres manufactured abroad by a process that, if practised in the United States, would infringe United States Patent Law. Enka BV claimed that this constituted a denial of national treatment in respect of the application of United States Patent Law which affected their sale in the United States, i.e. breach of Article III (4) of the GATT. Furthermore, such an exclusion order could not be exempted under Article XX(d) of the GATT. After investigating the matter, the Commission agreed with Enka BV's complaint that the procedure under section 337 was less favourable to them than that exercised by the American Courts in respect of American goods with the result that there was a denial of national treatment contrary to Article III⁵¹³. In November 1989 the GATT Council adopted a panel report finding Section 337 of the United States Tariff Act to be inconsistent with Article III(4)⁵¹⁴.

More recently, the International Federation of Phonogram and Videogram Producers(IFPI), on behalf of the Community producers in the sound recording industry, submitted a complaint to the Commission that, by failing to provide Community industry with effective

511 See generally Bourgeois & Laurent, op. cit. pp. 50-54; Van Bael & Bellis, op. cit. p. 202; Bourgeois "EC Rules against 'Illicit Trade Practices' Policy Cosmetics or International Law Enforcement ?" (ed.) B. Hawk in North American and Common Market Antitrust and Trade Laws (1988).

512 O.J. 1986 C25/2.

513 O.J. 1987 L117/18.

514 36th Supp. BISD (1990).

protection against unauthorised reproduction of sound recordings, Indonesia was in breach of both international law and of generally accepted rules. The breach of international law to which it referred was Article 10 bis and 10 ter of the Paris Convention for the Protection of Intellectual Property, of which Indonesia was a signatory. The unauthorised reproduction of phonograms in Indonesia they argued was an "act of unfair competition" since it enabled competitors to profit at no cost from major investments made by other firms. Second, Indonesia provided no effective protection or appropriate legal remedies to counter such unfair competition. The breach of generally accepted international rules related to the Rules of the Berne Convention for the Protection of Literary and Artistic Works and the Paris text of the Universal Copyright Convention, to which Indonesia was not a signatory. They contended that these must be regarded as generally accepted international rules, in view of the large number and importance of countries adhering to them. More specifically, it was argued that Indonesian copyright law failed to respect the national treatment rules laid down in these Conventions⁵¹⁴.

In two other cases the Commission refused to initiate proceedings on the ground that the measures complained of were not contrary to international law or generally accepted rules⁵¹⁵. In Soya Meal it held that the allegations of differential export taxes for soya products and export restrictions were not contrary to Articles III and XI of the GATT. They did not therefore constitute an illicit commercial practice. The Commission's decision has been upheld by

514 ibid.

515 Soya Meal (Argentina) unpublished Commission Decision dated 22nd December 1986; Commission Decision rejecting the complaint of Smith Kline & French Laboratories Ltd. against Jordan O.J. 1989 L30/67.

the Court in the Third Fediol case⁵¹⁶. In the complaint lodged by Smith Kline & French Laboratories Limited against Jordan, the allegation that an amendment to Jordan's intellectual property laws was contrary to the Paris Convention for the protection of intellectual property rights was rejected by the Commission, on the basis that legislative acts of a signatory State could not amount to "an act of unfair competition" as laid down in Article 10 bis(1) of the Convention.

This new Regulation, unlike the other Trade Protection Laws, is aimed at illicit commercial practices that affect not only imports into the Community but Community exports to third countries⁵¹⁷. This, however, is subject to two qualifications. First, the scope of the Regulation is limited to illicit commercial practices which are "attributable" to third countries. This, in essence, means unfair practices by foreign governments and not those carried out by private undertakings⁵¹⁸. Second, it does not apply to cases covered by the other existing rules in the field of trade regulation⁵¹⁹.

1.2. Injury

Before action can be taken by the Community authorities, the illicit commercial practice has to cause injury to Community

516 Case 70/87 [1989] ECR 1781.

517 Article 2(4) Regulation 2641/84.

518 Cf. The Economic and Social Committee contended that the practices do not refer solely to the practices of governments but also those of other public authorities - O.J. 1983 C211/26.

519 Article 13 Regulation 2641/84.

industry⁵²⁰. "Injury" is defined in the Regulation as:

any material injury caused or threatened to Community industry⁵²¹.

1.2.1. What is Meant by the Term "Community Industry"

This is defined⁵²² in the Regulation to mean all Community producers of products identical or similar to the product which is the subject of illicit practices or of products competing directly with that product⁵²³, or who are consumers or processors of the product which is the subject of illicit practices, or all those producers whose combined output constitutes a major proportion of total Community production of the products in question.

In Aramid Fibres the complaint was lodged on behalf of the AKZO Group by ENKA BV, the sole producer of aramid fibre in the Community⁵²⁴, and in Sound Recordings, it was submitted by the International Federation of Phonogram and Videogram Producers (IFPI) on behalf of the European producers said to represent virtually the whole Community sound recording industry⁵²⁵. The fact that consumers and processors are covered by the term "Community industry" goes further than Regulation 2423/88 and Regulation 288/82.

520 Article 1(a) Regulation 2641/84.

521 Article 2(3).

522 Article 2(4).

523 This is similar to Regulation 288/82 where consideration is taken not only of producers of the like product but also those of directly competing products.

524 O.J. 1986 C25/2.

525 O.J. 1987 C136/3.

There are, however, two exceptions to this basic principle. First, when the producers are related to the exporters or the importers or are themselves importers of the product alleged to be the subject of an illicit practice, the term Community industry may be interpreted as referring to the rest of the producers⁵²⁶. Second, a particular region of the Community may be regarded as a Community industry if their collective output constitutes a major proportion of the output of the product in question in the Member State or States where the region is located. However, they must show that the effect of the illicit practice where it concerns imports is concentrated in that Member State or States. Further, where the illicit practice concerns Community exports to a third country, a significant proportion of the output of those producers is exported to the third country concerned⁵²⁷.

1.2.2. What is Meant by the Term "Material Injury" ?

The term itself is not defined in the Regulation but Article 8(1) provides a list of criteria similar to those found in Regulation 2423/88 and 288/82 which are to be used in determining whether or not injury has been caused. They are as follows:

- (i) the volume of Community imports or exports concerned, notably where there has been a significant increase or decrease, either in absolute terms or relative to production or consumption on the market in question ⁵²⁸;

526 Article 2(4)(a) Regulation 2641/84.

527 Article 2(4)(b) Regulation 2641/84.

528 Unlike Regulation 2423/88, reference here is made not only to the increase in the volume of the imports or exports but also to their decrease.

- (ii) the prices of Community producers' competitors, in particular in order to determine whether there has been, either in the Community or in third country markets, significant undercutting of the prices of Community producers⁵²⁹;
- (iii) the consequent impact on Community industry as defined in Article 2(4) and as indicated by trends in certain economic factors such as:
 - production
 - utilization of capacity
 - stocks
 - sales
 - market share
 - prices (that is, depression of prices or prevention of price increases which would normally have occurred)
 - profits
 - return on capital
 - investment
 - employment

How these provisions will operate in practice is unclear in the absence of decided cases. Unfortunately, the complaint in Aramid Fibres was concerned with the threat of injury rather than material injury⁵³⁰. However, in Sound Recordings the complainant contended that the unauthorised reproduction of phonograms was causing serious injury to Community producers, in that it was restricting market access to the Indonesian and, more importantly, to the Middle Eastern countries with the result that there would be a significant loss of sales⁵³¹.

529 Unlike Regulation 2423/88, reference here is made to the prices of the Community producers' competitors.

530 O.J. 1987 L117/18.

531 O.J. 1987 C136/7.

1.2.3. Threat of Injury

Where a threat of injury is alleged, it has to be clearly foreseeable that a particular situation is likely to develop into actual injury⁵³². In order to determine this, the Commission may take into account inter alia factors⁵³³ such as:

- (a) the rate of increase of the exports to the market where the competition with the Community products is taking place;
- (b) the export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the exports resulting from that capacity will be to the market referred to in point (a).

In Aramid Fibres, the Commission considered whether there was a threat of injury as alleged by the complainant. It examined whether or not any future injury was clearly foreseeable, and concluded that the arguments of loss of direct sales to the United States and the Community in the period up to 1990 and beyond were convincing⁵³⁴.

1.2.4. Community Interests

As in the case with the other trade protection laws, the interests of the Community play a major part in determining whether protective

532 Article 8(2) Regulation 2641/84.

533 ibid.

534 O.J. 1987 L117/18. In the complaint ENKA BV contended that prior to the exclusion order exports were to be some 1000 tonnes by 1990. O.J. 1986 C25/2.

measures are to be adopted⁵³⁵ or whether the procedure is to be terminated⁵³⁶. In Aramid Fibres, the Commission noted that in the light of the results of the investigation, it appeared that an important question of the application of the GATT was at issue which had serious economic implications. It concluded therefore that it was in the Community interest to initiate international consultation and dispute settlement procedures, with a view to achieving the alignment of United States legislation with its international obligations⁵³⁷.

2. FULL EXERCISE OF THE COMMUNITY'S RIGHTS

The Regulation defines "Community rights" as

those international trade rights of which it may avail itself either under international law or under generally accepted rules⁵³⁸.

The major difference with regard to this procedure as compared with that in Article 1(a) as outlined above is that action may be taken without injury to Community industry being proved. As the Commission explained in its memorandum which accompanied the Draft Regulation, the practices covered by this procedure would be those involving recourse to the GATT dispute settlement procedures, notably Articles XXII and XXIII and those provisions of the GATT Codes that

535 Article 10(1) where it states that "where it is found as a result of the examination procedure that action is necessary in the interests of the Community ..."

536 Article 9(1) where it states that "when it is found as a result of the examination procedure that the interests of the Community do not require any action to be taken".

537 O.J. 1987 L117/18.

538 Article 2(2).

specifically lay down rules governing dispute settlement, e.g. Title II of the Subsidies Code⁵³⁹.

3. PROTECTIVE MEASURES

3.1. Acceptance of an Undertaking

The Council may accept an undertaking offered by a third country or by the country concerned, if this is considered satisfactory⁵⁴⁰. In Reproduction of Sound Recordings⁵⁴¹ Indonesia undertook, pending its eventual accession or adherence to the relevant international Conventions, to provide for sound recordings by nationals of the Community Member States the same protection on their territory as for sound recordings by Indonesian nationals. The Commission concluded that it was in the interests of the Community to accept the undertaking and terminate the procedure without taking protective measures pursuant to Article 10(3). If the measures proposed are considered satisfactory, the procedure will be terminated⁵⁴². It is the Commission which is entrusted with the task of supervising the application of these measures⁵⁴³. If they are rescinded, suspended or improperly implemented, or where the Commission has grounds for believing that this is the case, the Member States shall be informed and protective measures may be adopted in accordance with Article 11, where these are necessary and justified⁵⁴⁴.

539 See: Chapter 2, Section 2.3.2. supra.

540 Article 9(2)(a) Regulation 2641/84.

541 O.J. 1988 L123/50.

542 Article 9(2)(a) Regulation 2641/84.

543 Article 9(2)(b) Regulation 2641/84.

544 Article 9(2)(c) Regulation 2641/84.

3.2. Adoption of Commercial Policy Measures

The adoption of commercial policy measures is subject to the prior discharge of an international procedure for consultation or for the settlement of disputes where the Community's international obligations so require⁵⁴⁵. Once this has been completed and account has been taken of the results, commercial policy measures may then be imposed⁵⁴⁶. The Regulation provides that "any" commercial policy measure may be taken⁵⁴⁷ but stresses that such measures must be compatible with existing international obligations and procedures⁵⁴⁸. It then expressly refers to the following:

- (a) suspension or withdrawal of any concession resulting from commercial policy agreements;
- (b) the raising of existing customs duties or the introduction of any other charge on imports;
- (c) the introduction of quantitative restrictions or any other measure modifying import or export conditions or otherwise affecting trade with the third country concerned⁵⁴⁹.

4. PROCEDURE

For the most part, the procedural rules are the same for both regimes under Article 1 - where there are differences these shall be noted. The procedure to be followed can be divided into three main stages:

545 Article 10(2) Regulation 2641/84.

546 ibid.

547 Article 10(3). The adoption of commercial policy measures applies equally to both procedures in Article 1.

548 ibid.

549 ibid.

- 4.1. The complaint or referral
- 4.2. The examination
- 4.3. The adoption of measures.

4.1. The Complaint or Referral

The Regulation provides that:

any natural or legal person or any association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of illicit commercial practices may lodge a written complaint⁵⁵⁰.

This provision, however, does not apply in relation to the procedure for ensuring the full exercise of the Community's rights. The complaint must contain sufficient evidence of the existence of an illicit commercial practice and the injury resulting therefrom⁵⁵¹. The complaint may be withdrawn, in which case the procedure may be terminated unless such termination would not be in the interests of the Community⁵⁵². If it becomes apparent after consultation (in the Advisory Committee⁵⁵³) that there is insufficient evidence to justify initiating an investigation, the complainant is informed⁵⁵⁴. In the complaint lodged by Smith Kline & French Laboratories Limited against Jordan, the Commission rejected the complaint on the basis that it did not contain sufficient evidence in law of existence of an illicit commercial practice as required by Article 3(2) of Regulation 2641/84⁵⁵⁵. The complainant had argued

550 Article 3(1).

551 Article 3(2) Regulation 2641/84.

552 Article 3(4) Regulation 2641/84.

553 Article 5 Regulation 2641/84.

554 Article 3(5) Regulation 2641/84.

555 O.J. 1989 L30/67.

that new legislation in Jordan amending its patent laws, infringed Articles 10bis and 10ter of the Paris Convention for the Protection of Industrial Property by depriving it of the protection previously afforded. The Commission concluded that "acts of unfair competition" within the meaning of Article 10bis could only cover acts carried out by competitors and therefore could not include acts of a signatory State, e.g. the adoption of a new law⁵⁵⁶.

As far as a referral by a Member State is concerned it may ask the Commission to initiate the procedures referred to in Article 1⁵⁵⁷. The Commission will have to be supplied with the necessary evidence to support the requests and in the case of illicit commercial practices, proof of these and the resultant injury must be given⁵⁵⁸. If, after consultation, it is decided that an investigation should be initiated, the Member State shall be informed⁵⁵⁹.

4.2. The Examination

Where, after consultation, it is apparent that there is sufficient evidence to justify the start of an investigation and where this is in the interests of the Community, the Commission shall announce this in the Official Journal⁵⁶⁰. It then notifies the representatives of the country or countries involved⁵⁶¹.

556 ibid.

557 Article 4(1) Regulation 2641/84. This provision applies to both Article 1(a) and 1(b).

558 Article 4(2) Regulation 2641/84.

559 Article 4(4) Regulation 2641/84.

560 Article 6(1)(a) Regulation 2641/84.

561 Article 6(1)(b) Regulation 2641/84.

The Regulation gives the Commission the power to ingather all the information necessary and to check this with the importers, traders, agents, producers, trade associations and organisations, provided that the undertakings or organisations give their consent⁵⁶². The Commission can also carry out investigations in the territory of the countries concerned provided that their governments have been officially notified and raise no objection within a reasonable period⁵⁶³. Where such information is not supplied, the Commission may proceed on the basis of the facts available⁵⁶⁴. The Commission shall be assisted in its investigation by officials of the Member State in whose territory the checks are carried out, provided that Member State so requests⁵⁶⁵. Finally, the Member States, when requested shall supply the Commission with all the information necessary for the examination⁵⁶⁶.

All interested parties may inspect the information available to the Commission⁵⁶⁷. This information is limited to all internal documents for the use of the Commission and the administrations, provided that it is relevant to the protection of their interests, not confidential within the meaning of Article 7 and is used by the Commission in its examination procedure⁵⁶⁸. With regard to the rules relating to confidentiality, these are similar to those applied

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- 562 Article 6(2)(a).
 - 563 Article 6(2)(b) Regulation 2641/84.
 - 564 Article 6(7) Regulation 2641/84.
 - 565 Article 6(2)(c) Regulation 2641/84.
 - 566 Article 6(3) Regulation 2641/84.
 - 567 Article 6(4)(a) Regulation 2641/84.
 - 568 ibid.

in anti-dumping proceedings⁵⁶⁹. Finally, the interested parties concerned may ask to be informed of the principal facts and considerations resulting from the examination procedure⁵⁷⁰.

The interested parties concerned have a right to be heard by the Commission provided the request is made in writing within the prescribed period laid down in the Official Journal and they are a party primarily concerned with the result of the procedure⁵⁷¹. The Regulation also provides for a confrontation meeting. However, no party is under any obligation to attend and failure to do so will not be prejudicial to that party's case⁵⁷².

When it has concluded its examination, the Commission reports to the Advisory Committee. The report should normally be presented within five months (this can be extended to seven) of the announcement of the initiation of the procedure⁵⁷³.

The procedure can be terminated, without the adoption of protective measures, in one of two ways. When it is found as a result of the examination that it is in the interests of the Community that no action need be taken the procedure shall be terminated in accordance with Article 12⁵⁷⁴. By virtue of Article 12 it is the Commission who takes the decision, subject to a referral by the Member States to the Council. In such a situation, if the Council has not given a ruling within thirty days, the Commission's decision stands.

569 Article 7 Regulation 2641/84. See Section 7.2.1. under the Anti-dumping Rules supra.

570 Article 6(4)(b) Regulation 2641/84.

571 Article 6(5) Regulation 2641/84.

572 Article 6(6).

573 Article 6(9) Regulation 2641/84.

574 Article 9(1) Regulation 2641/84.

However, where the third country concerned has taken measures that are satisfactory the procedure is terminated in accordance with Article 11⁵⁷⁵. In this case it is the Council on a proposal from the Commission that takes the decision.

4.3. The Adoption of Measures

Where the Community has to fulfil the requirement of following formal international consultation or dispute settlement procedures in response to an illicit commercial practice within the meaning of Article 1(a), any decisions relating to the initiation, conduct or termination of such procedure shall be taken in accordance with Article 12⁵⁷⁶. In Aramid Fibres the Commission initiated the procedure for consultation and dispute settlement referred to in Article XXIII of the GATT⁵⁷⁷.

The Council has the power to take decisions in accordance with the procedure in Article 11 where after the conclusion of formal international consultation or dispute settlement in response to an illicit commercial practice, measures of commercial policy are to be adopted⁵⁷⁸ or where the full exercise of the Community's right within the meaning of Article 1(b) is to be ensured⁵⁷⁹.

575 Article 9(2)(a) Regulation 2641/84; see Reproduction of Sound Recordings (Indonesia) O.J. 1988 L123/50.

576 Article 11(2)(a) Regulation 2641/84.

577 O.J. 1987 L117/18.

578 Article 11(2)(b) Regulation 2641/84.

579 Article 11(3) Regulation 2641/84.

CHAPTER 4

PROCEDURAL ASPECTS OF
JUDICIAL REVIEW

PART 1: "LOCUS STANDI" - GENERAL

INTRODUCTION

In the legal systems of the Member States limits are laid down with regard to the powers exercised by the Executive. In the Community legal order the Executive institutions are the Commission and to some extent the Council, though the latter's function is primarily legislative.

The control of the Executive by the European Parliament is weaker than that by the Parliaments in the Member States. The Court is entrusted with the task of supervising the activities of the Executive. It is only proper that the acts of the Council and Commission are subject to review by the Court. By doing so, the rule of law is seen to be applied in that not only do the Community authorities enforce the law but they are also bound by it.

The Community authorities have considerable powers in the field of external relations and no more so than in relation to the measures designed to counteract unfair trade practices by Third Countries. In these circumstances it is necessary to ensure that there are "appropriate and corresponding judicial safeguards"¹.

¹ Bebr "Development of judicial control of the European Communities" p. 19.

This Chapter is concerned essentially with the question of 'locus standi' or the right of an interested party to challenge an act of the institutions imposing safeguard measures before the Court. This will vary according to whether it is a direct action or an indirect action. The former, for example an action for annulment, is where the interested party can bring his case directly before the Court. The object is to have the act declared void. The latter, for example an Article 177 reference is, where an action is brought via the national Court to the Court for a ruling on the validity of a Community act. The effect of the ruling is to have the act declared invalid in the particular case. The distinction between the effect of the two actions is slowly being eroded away. This will be considered in more detail below.

The Chapter will be divided into two parts. The first will deal generally with the jurisprudence of the Court with respect to locus standi in to both direct and indirect actions. The second part will deal more specifically with the jurisprudence of the Court with respect to safeguard measures. Emphasis will be placed on Article 173 of the EEC Treaty since by far the greatest number of actions involving safeguard measures have been raised under Article 173 and in particular judicial review of anti-dumping measures.

The system of judicial remedies in the European Community and in particular Articles 173 and 184 on the one hand and Article 177 on the other, according to the Court form a complete system designed to permit it to review the legality of measures adopted by the institutions². As a result, natural and legal persons are protected against the application to them of general measures which they cannot contest directly before the Court by reason of the criteria set down in Article 173(2) which will be considered below.

² Case 294/83 Parti Ecologiste "Les Verts" v. European Parliament [1986] ECR 1357 at 1365.

Where the Community authorities are responsible for the implementation of such measures, natural or legal persons may bring a direct action against such measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. If implementation is a matter for the national authorities, such parties may plead the invalidity of general measures before the national courts and the latter may or must in some situations request the Court for a preliminary ruling³. Each of these actions will be considered in detail below together with an analysis of Article 175 (action for failure to act) and Article 215(2) (action for damages).

1. ACTION FOR ANNULMENT - ARTICLE 173 EEC TREATY

This is the procedure whereby a direct challenge may be made against a Community measure which, it is claimed, is illegal. The object of the procedure is to secure the annulment of the measure.

1.1. What Measures can be Reviewed by the Court ?

Article 173(1) states that:

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions.

The Court has interpreted this provision liberally. In IBM v. Commission the Court stated that:

Any measure the legal effects of which are binding on, and capable of affecting the interest of, the applicant by bringing about a distinct change in his legal position is an

3 ibid.

act or decision which may be the subject of an action under Article 173 for a declaration that it is void⁴.

More recently, in Gestetner Holdings plc. v. Council and Commission the Court held that the rejection by the Commission of a proposed undertaking was not a measure having binding legal effects of such a kind as to affect the interests of the applicant. Such a rejection was an intermediate measure whose purpose was to prepare for the final decision⁵.

The Court has held that the form in which such acts are cast is immaterial in determining whether they are open to challenge under Article 173⁶. For example, in Cement Convention it held that a "communication" issued by the Commission under Article 15 of Regulation 17 did not constitute a decision⁷. On the other hand in the IBM Case⁸ it did not accept that a statement of objections which, under Regulation 17, the Commission is required to issue to a firm whose marketing practices are under investigation constituted a decision. The Court has not restricted its interpretation to mean those binding acts in Article 189⁹. In its ERTA judgment it held that:

4 Case 60/81 [1981] ECR 2639 at 2651.

5 Case 156/87 [1990] 1 CMLR 820; see also Cases 133/87 and 150/87 Nashua Corpn. v. Council and Commission [1990] 2 CMLR 6.

6 Case 60/81 supra.

7 Case 8-11/66 [1967] ECR 75.

8 Case 60/81 supra.

9 The binding acts enumerated in Article 189 are Regulations, directives and decisions. Recommendations and opinions have no binding force.

Article 173 treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force¹⁰.

1.2. The Capacity to bring an Action

1.2.1. Privileged Applicants

By virtue of Article 173(1) the Council, Commission or the Member States may contest the legality of a Community act so long as the action is taken within the prescribed time limits provided for in the Treaty¹¹. In an action for annulment by a Member State or by a Community institution there is no need to distinguish among the various binding acts. It is perfectly possible for a privileged plaintiff to challenge the legality of a Regulation under Article 173(1). In certain narrow circumstances which are not of concern in this paper, the action may also be raised by the European Parliament¹².

1.2.2. Non-Privileged Applicants

Article 173(2) states that:

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a Regulation or a decision addressed to another person is of direct and individual concern to the former.

¹⁰ Case 22/70 Commission v. Council [1971] ECR 263 at 276. Emphasis added. See also case 230/81 Luxembourg v. European Parliament [1983] ECR 255.

¹¹ Case 166/73 Italy v. Commission [1979] ECR 2575; the right of action conferred upon Member States to seek the annulment of a Community act is unconditional.

¹² Case 70/88 European Parliament v. Council (Chernobyl) judgment of 22 May 1990, not yet reported.

The first thing one notices about Article 173(2) is that, on its face, the only act a natural or legal person can challenge is a decision.

A natural or legal person has little problem where a decision is addressed to them¹³. A common example is where a natural or legal person has been held to have infringed the Community's competition law. In such a case the Commission will usually issue a decision to that effect addressed to the individual concerned¹⁴.

In the second situation enumerated in Article 173(2), a natural or legal person has to show that the decision, although addressed to someone else, is of direct and individual concern to him. In the last situation a natural or legal person has to show three things:

- (i) the act in question, although in the form of a Regulation is in essence a "decision";
- (ii) it is of individual concern to him;
- (iii) it is of direct concern to him.

The concepts 'direct' and 'individual' concern have been interpreted narrowly so that it is difficult for a natural or legal person to challenge a Community Regulation. The reasons for the Court's restrictive interpretation of these concepts will be considered later.

1.2.2.1. What is a 'Decision'?

The annulment of a Regulation can only be contested by a natural or legal person where it is in essence a decision, irrespective of its

¹³ See for example, Case 789/79 Calpak [1980] ECR 1949.

¹⁴ e.g. Case 58/64 Consten & Grundig v. Commission [1966] ECR 299; Case 17/74 Transocean Marine Paint v. Commission [1974] ECR 1063.

form. In Alcan v. Commission the Court held quite generally with regard to Article 173(2) that:

The aim of this provision is to ensure the legal protection of individuals in all cases in which they are directly and individually concerned by a Community measure - in whatever form it appears which is not addressed to them¹⁵.

It reiterated this view in Hans-Otto Wagner GmbH & Ors. v. Commission with specific reference to Regulations when it stated that the purpose of Article 173(2) is:

to prevent the Community institutions from being able to bar proceedings instituted by an individual against a decision of direct and individual concern to him simply by choosing the form of a Regulation¹⁶.

In cases where a natural or legal person seeks to have a Regulation annulled, that natural or legal person not only has to show that the measure is of direct and individual concern to him but also that by its nature it is a decision. The literal reading of Article 173(2) points to the fact that this condition is important.

The case-law of the Court has at times however not helped in reinforcing this point. There have developed two separate lines of case-law. There are certain judgments of the Court notably CAM v. Commission¹⁷ and Société pour l'Exportation des Sucres v. Commission¹⁸ which are authority for the view that a natural or legal person will have locus standi irrespective of the fact that the

15 Case 69/69 [1970] ECR 385 at 393.

16 Case 162/78 [1979] ECR 3467 at 3487.

17 Case 100/74 [1975] ECR 1393.

18 Case 88/76 [1977] ECR 709.

measure is a Regulation in form and substance if he satisfies the conditions of direct and individual concern.

These decisions must however be put into the context of the earlier and later judgments which stress the importance of establishing that the Regulation is in essence a decision. In these cases, the Court takes the view that if the act at issue was in the nature of a Regulation then it is immaterial that the measure was of direct and individual concern to the individual¹⁹. In Compagnie Francaise Commerciale et Financière S.A. v. Commission the Court held that the Regulation's legislative nature was not detracted from by the fact that the persons that it affected might be more or less ascertainable i.e. individually concerned²⁰.

The test for determining whether the Regulation in question is in essence a decision is analagous but not always the same as that for determining whether a measure is of individual concern to a particular person²¹.

The starting point is to decide whether the measure in question is a Regulation or a decision. In so doing, the Court will invariably revert to the definitions laid down in Article 189²². The Court

19 See Case 64/69 La Compagnie Française Commerciale et Financière S.A. v. Commission [1970] ECR 221; Case 162/78 Hans Otto Wagner GmbH Agrarhandel KG & Ors. v. Commission supra.

20 ibid.

21 See Opinion of Advocate General Warner in case 100/74 Cam v. Commission [1975] ECR 1393 at 1411.

22 A Regulation is defined thus:
"[A Regulation] shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A decision is defined thus:
"[A decision] shall be binding in its entirety upon those to whom it is addressed.

was faced with such a situation in Confédération Nationale des Producteurs de Fruits et Légumes v. Council²³. It referred to Article 189 and then stated that the criterion for the distinction must be sought in the "general application" or otherwise of the measure in question²⁴. In other words, where the applicant is affected as a member of a general class then the measure will be regarded as a Regulation. If, however, he is affected as an individual the measure will be regarded as a decision. The Court reiterated the point in Koninklijke Scholten Honig NV v. Council and Commission²⁵ when it stated that if the measure is applicable to objectively determined situations and involves legal consequences for categories of persons viewed in a general and abstract manner then it is a Regulation. If on the other hand it is applicable to a limited number of persons defined or identifiable it will be a decision.

A number of authors²⁶ have pointed to the fact that this distinction is difficult to apply where, although the number of persons is small they are designated as a general class, even though their identity is fixed and ascertainable at the time when the measure is adopted. The Court has on a number of occasions attempted to clarify this point²⁷. In Zuckerfabrik Watenstedt v. Council it held that:

a measure does not lose its character as a Regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time as long as

23 Cases 16 & 17/62 [1962] ECR 471 at 478.

24 ibid. at 478.

25 Case 101/76 [1977] ECR 797 at 808.

26 See for example, Vaughan, "Law of European Communities" p. 200; Hartley, "The Foundation of EEC Law", pp. 357 et seq.

27 Case 6/68 Zuckerfabrik Watenstedt v. Council [1968] ECR 409; case 101/76 Koninklijke Scholten Honig NV v. Council & Commission supra.

there is no doubt that the measure is applicable as the result of an objective situation of law or of fact which it specifies and which is in harmony with its ultimate objective²⁸.

As Hartley points out, the effect of this formulation makes it almost impossible to prove that an ostensible Regulation was actually a decision unless the persons affected by it were individually identified in the measure itself²⁹.

1.2.2.2. Individual Concern

The test of individual concern was first formulated in Plaumann & Co. v. Commission³⁰. Plaumann was an importer of clementines.

The Court held that:

The applicant is affected by the disputed Decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee³¹.

In order to be individually concerned the Court stressed that the decision must affect them "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed"³². Advocate-General Roemer noted that "concern"

28 Case 6/68 ibid. at p. 415.

29 "Article 173: Locus Standi to Challenge Regulations"
1 ELRev. (1975/6) 214.

30 Case 25/62 [1963] ECR 95.

31 ibid. at 107. Emphasis added.

32 ibid.

does not arise from the individuality of particular persons but from the membership of the abstractly defined group of all those who wished to import clementines during the period in question. This group he considered was not ascertainable when the decision was issued since it was constantly changing even though this in practice was only to a limited degree³³.

The Court also noted in Plaumann that it was appropriate to consider the question of individual concern first because if the applicant did not satisfy this criterion then it became unnecessary to consider the question of direct concern³⁴. The Court, it can be argued was concerned with the 'economy of judicial reasoning'. There is nothing, however, to prevent it considering direct concern first if it so chooses.

From the case-law of the Court 'individual concern' will be satisfied when the applicant can show that he belongs to a group of interested persons who can be identified and ascertained at the time when the decision was made. In such a case, as the Court has held, the applicant would be in position "similar to the persons to whom the decision was addressed"³⁵. At this point there is really no distinction between the notion of individual concern and the criteria necessary to establish that the measure in question is a decision as opposed to a Regulation.

1.2.2.3. Direct Concern

On the question of direct concern the Court has adopted the attitude that a measure will be of "direct concern" to a natural or legal person only if it affects that person's legal position without

33 ibid. at 116.

34 ibid. at 107.

35 Cases 106 and 107/63 Toepfer v. Commission [1965] ECR 405.

need for any further implementing action. As Advocate-General Roemer stated in Plaumann & Co. v. Commission:

Only when the Member State avails itself of the authorisation, which is left to its discretion, are legal effects created for the individual. The decision of the Member State is therefore an essential link inserted in the chain of various legal measures between the decision of the Commission and the concrete legal effect falling on the individual³⁶.

The Court did not rule on the question of direct concern, because it was of the opinion that if an applicant was not individually concerned there was no need to consider whether direct concern was satisfied³⁷.

In the Toepfer case, the Court considered the question of direct concern first. It held that the applicant was directly concerned by the measure in question. The measure provided that the Commission's decision "shall" come into force immediately. The Court held that the decision therefore to amend or abolish protective measures was directly applicable and concerned the interested parties subject to it as directly as the measures it replaced³⁸.

In many ways, the Court's ruling was similar to Advocate-General Gand's finding in the Getreide-Import case when he held that:

Where the intervention of a Member State is a purely technical implementation the Community decision is of direct concern to the individual³⁹.

36 Case 25/62 supra. at 115.

37 See footnote 34 supra.

38 Case 106 and 107/63 supra at 411.

39 Case 38/64 [1965] ECR 203 at 211.

On the whole, because Regulations are by their nature directly applicable, there will be little difficulty in showing that the natural or legal person caught by their provisions is directly concerned. Only in cases where the Regulations require or allow the authorities in the Member States to adopt implementing measures will the link between the authority adopting the measure and the individual affected by it be broken⁴⁰.

1.3. Why is Article 173(2) Interpreted so Restrictively ?

Smit and Herzog⁴¹ in their Commentary on the EEC Treaty are of the opinion that the restrictive interpretation of Article 173(2) is to be regretted. They contend that the rule of law would have been better served if each citizen were given the opportunity to take an action directly before the Court where their legal rights had been prejudiced by a Community measure. Why then has the Court interpreted Article 173(2) against individuals ?⁴².

Advocate-General Lagrange considered this question in Confédération Nationale des Producteurs de Fruits et Légumes v. Council⁴³. He noted that there existed two indirect remedies for individuals to challenge a Community Regulation, namely a plea of illegality under Article 184 and a ruling on validity under Article 177(1)(b). More importantly he emphasised the quasi-legislative character which Regulations normally assume and the fact that extremely grave

40 See Case 123/77 UNICME v. Council [1978] ECR 845 where the Court ruled that even though the persons affected by the Council measure could be determined more or less precisely the measure was not of "direct concern" to them as long as no application for an import permit had been denied by the national authorities.

41 Volume 5 at p. 379.

42 See generally Rasmussen "Why is Article 173 interpreted against Private Plaintiffs" 5 ELRev. (1980) 112; J. Dinnage "Locus Standi and Article 173" ELRev. (1979) 15.

43 Cases 16 & 17/62 [1962] ECR 471 at 486.

consequences would follow from even a partial annulment of the Regulations. Rasmussen⁴⁴ rejects this argument on the basis that the Court has annulled Regulations where their validity has been called into question under Article 177(1)(b) as well as under Article 173(2)⁴⁵. He points to the fact that the Court will take into account the instability that may occur as a result of the annulment when dealing with the merits of the case.

Stein and Vining⁴⁶ advance the argument that political considerations are buttressed by the inherent aversion of administrators to judicial control. Rasmussen⁴⁷ rejects this argument, since he believes there is little evidence that it has any bearing on the Court's rationale. There is also the argument by some⁴⁸ that the Court's attitude to Article 173(2) is aimed at trying to maintain a balance between allowing individuals an opportunity to seek annulment of acts of the Council and Commission, and a fear of opening itself up to a flood of such actions.

44 op. cit. at p. 120.

45 See for example Case 114/76 Bele-Mühle Joseph Bergman v. Grows-Farm GmbH [1977] ECR 1211; Japanese Ballbearing Cases - Case 113/177 NTN Toyo Bearing Co. Ltd. & Ors. v. Council and Commission; Case 118/77 Import Standard Office (ISO) v. Council; Case 119/77 Nippon Seiko KK & Ors. v. Council; Case 120/77 Koyo Seiko Co. Ltd. & Others v. Council and Commission and Case 121/77 Nachi Fujikoshi v. Council [1979] ECR 1185 et seq.

46 "Citizen Access to Judicial Review of Administrative Action in Transnational and Federal Context" in (ed.) Jacobs 'European Law and the Individual' 116 at 123.

47 op. cit. at p. 121.

48 See for example Stein & Vining op. cit. at p. 123; Brown & Jacobs "The Court of Justice of the European Communities" p. 97.

Finally, and possibly the most convincing reason for the Court's restrictive interpretation of Article 173(2), is the "Appellate Court" argument put forward by Rasmussen⁴⁹. He contends that not only the Court's interpretation of Article 173 but also of Articles 175 and 215(2), is evidence of the Court's policy to establish itself as an Appellate Court. This argument has gained weight with the establishment of the Court of First Instance⁵⁰.

1.4. The Position under the ECSC Treaty

In order to understand the reasoning for the Court's restrictive interpretation of Article 173 it is important to note the main differences under the ECSC Treaty.

Article 33, the provision which covers an action for annulment differs from Article 173 in several respects. First and foremost, only undertakings engaged in the production of coal and steel may sue. Second, an undertaking may challenge a decision or a recommendation⁵¹. It must show, however, that either the decision or recommendation "is individual in character" or, if it is general in character, that it involves a misuse of powers affecting that undertaking. Finally, there is no need to show direct concern. This invariably stems from the fact that it is the High Authority and not the Member States that has the power to adopt legally binding

49 op. cit. p. 124.

50 Council Decision 88/591 O.J. 1988 L319/1; amended text in O.J. 1989 C215/1.

51 Decisions are defined in Article 14 thus:
[Decisions] shall be binding in their entirety.

Recommendations are defined in Article 14 thus:
[Recommendations] shall be binding as to the aims to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed.

measures. In these circumstances the High Authority's relationship with coal and steel undertakings is assumed to be direct.

Because Article 33 is limited to a small number of undertakings the Court has interpreted the provision in a very liberal manner. For example, where an undertaking challenges a decision addressed to someone else, it does not have to show that the decision concerns them individually or directly. In the Second Limburg Coalmines Case the Court stated that:

... to enable an undertaking to institute proceedings against a decision concerning it which is individual in character, it is not necessary that it should be the only, or almost the only, party concerned by the decision⁵².

1.5. Is There a Time Limit ?

Article 173(3) states that there is a period of two months within which an interested party can bring proceedings to have a measure annulled. This period is calculated from the date of publication of the measure or from its notification or in the absence of both, from the date when it first came to the knowledge of the applicant⁵³.

**2. ACTION FOR FAILURE TO ACT -
ARTICLE 175 EEC TREATY**

This action provides a remedy when the Council or Commission fail to act where they are obliged to do so under the Treaties. The Court has indicated that it regards an action for annulment and an action for failure to act as "one and the same procedure"⁵⁴

52 Case 30/59 [1961] ECR 16 at 17.

53 Under the ECSC Treaty the time limit is only one month. For the method of computing time limits see Case 152/85 Misset v. Council [1987] ECR 223.

54 Case 15/70 Chevalley v. Commission [1970] ECR 975 at 979.

though the latter should not be used simply for purposes of evading the conditions for the former⁵⁵.

2.1. Capacity to Bring an Action

2.1.1. Privileged Applicants

The Member States and the other institutions of the Community can bring an action against the Council or Commission where they have failed to act, in infringement of the Treaty⁵⁶.

2.1.2. Non-Privileged Applicants

Article 175(3) provides that:

Any natural or legal person ... may complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

The term "act" should be given the same meaning as that under Article 173 and as a result is not limited solely to those binding acts enumerated in Article 189⁵⁷. Article 175(3) should be interpreted to allow any natural or legal person to raise any action against the Commission or Council for failure to perform any act that would have been of direct and individual concern to him. Only this interpretation would as the Court pointed out in Chevalley, permit Articles 173 and 175 to be viewed as one and the same procedure⁵⁸.

55 Joined Cases 10&18/68 "Eridania" [1969] ECR 459 at 483.

56 Article 175(1).

57 Case 15/70 Chevalley v. Commission, supra.

58 ibid.; see also the Opinion of Advocate General Dutheillet de Lamothe in Case 15/71 Mackprang v. Commission [1971] ECR 797.

2.2. Preconditions of an Action

An action under Article 175 involves two separate stages. First, the institution must be called upon to act as required by Community law⁵⁹. There is no time limit within which this must take place though it should be within a reasonable time of the institution having shown its intention not to act⁶⁰. Within two months of being called upon to act the institution concerned must define its position. Second, if at the end of the two months, the institution has not defined its position, Article 175(2) states that the applicant may bring proceedings within a further period of two months.

The grounds of review must be the same as those enumerated in Article 173 if the two Articles are to be of a mutually complementary nature. The effect of a successful Article 175 action is that the institution whose failure to act has been declared contrary to the Treaty must take the necessary measures to comply with the Court's judgment⁶¹. There has been to date only one successful action⁶².

2.3. Proceedings under the ECSC Treaty

Under Article 35 of ECSC Treaty, the procedure is similar in most respects in that the object and the effect of the judgment are the same. There are, however, a number of minor differences.

59 Article 175(2).

60 Case 59/70 Netherlands v. Commission [1971] ECR 639.

61 Article 176(1).

62 Case 13/83 European Parliament v. Council [1985] ECR 1513; there have also been two successful actions under the ECSC Treaty.

First, the only possible defendant is the Commission while the only applicants entitled to bring an action are the Council, the Member States and undertakings or associations⁶³; second, undertakings or associations may only challenge decisions which are individual in character⁶⁴; third, the only acts which the institution can be required to take are recommendations or decisions⁶⁵; fourth, a request for action under the ECSC Treaty can only be satisfied by a binding act, this may be subject to an action for annulment under Article 33 ECSC; fifth, the time limits are different in that proceedings have to be initiated within one month of a failure to take any decision or make any recommendation⁶⁶; and lastly, proceedings are initiated against the implied decision of a refusal which is in essence an annulment of that decision⁶⁷.

3. PLEA OF ILLEGALITY: ARTICLE 184 OF EEC TREATY

Article 184 is designed to overcome the limitations of an action for annulment under Article 173 namely the restrictions on locus standi.

The plea of illegality permits a natural or legal person who cannot challenge a true Regulation, i.e. a general legislative act, to do

63 Article 35(1).

64 Action for failure to act must have the same characteristics as an action for annulment. Joined Case 7&9/54 Groupement des Industries Sidérurgiques Luxembourgeoises v. High Authority [1954-56] ECR 175 at 191-2.

65 Article 35(1).

66 Article 35(3).

67 ibid.

so indirectly when it is applied to him by a subsequent individual act in order that the underlying "general measure" is declared inapplicable to him. The term "general measure" is used even though Article 184 specifically refers to a Regulation. The reason for this is that the Court in Simmenthal held that:

The field of application of [Article 184] must therefore include acts of the institutions which, although they are not in the form of a Regulation, nevertheless produce similar effects and on those grounds may not be challenged under Article 173 by natural or legal persons other than the Community institutions and Member States⁶⁸.

The plea cannot be brought independently but must arise in another action hence its description by one commentator - "it forms a shield not a sword"⁶⁹. Because it is an ancillary action the plea will fail if the other action is unsuccessful. Furthermore, a plea of illegality is applicable only in the context of proceedings brought before the Court under some other provision of the Treaty⁷⁰.

The grounds upon which the plea may be raised are the same as those laid down in Article 173. The effect of a successful plea is that the general act in question will be declared inapplicable to the party challenging it and the individual act, deprived of its legal basis, annulled. Unlike an action for annulment the act would not be declared void, though in practical terms the institution responsible for it will replace it in order to avoid a multiplicity of actions.

68 Case 92/78 [1979] ECR 777 at 800.

69 Paisley "Guide to EEC Law in Northern Ireland" (1986).

70 Cases 31&33/62 Milchwerke Heinz Wöhrmann & Sohn KG and Alfons Lütticke GmbH v. Commission [1962] ECR 501 at 507.

4 . ACTION FOR DAMAGES -
ARTICLE 215(2) EEC TREATY

Article 215(2) states that:

The Community shall in accordance with the general principles common to the laws of the Member States make good any damage caused by its institutions or by its servants in the performance of its duties.

The action for damages is a distinct and separate form of legal recourse from Articles 173 and 175⁷¹. In Lütticke v. Commission the Court held that:

The action for damages provided for by Article 178 and the second paragraph of Article 215 was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose⁷².

As Vaughan⁷³ stresses, the Court in developing its case-law has proceeded cautiously in order to avoid extending the non-contractual liability of the institutions. The result has been that a number of limitations have been placed on the liability of the Community. This is especially so in relation to liability for legislative measures. Undoubtedly, this restrictiveness does have consequences in the field of external relations where safeguard measures adopted to counteract unfair trade practices invariably take the form of Regulations.

71 Originally the Court treated an action for damages under Article 215(2) as a subsidiary form of action in that it had to be coupled with an action for annulment under Article 173 or an action under Article 175 for failure to act. If these failed so also did the action for damages; see generally Case 25/62 Plaumann v. Commission [1963] ECR 95.

72 Case 4/69 [1971] ECR 325 at 336.

73 op. cit.

The aim of an action for damages is not to bring about the annulment of an act or measure but to establish subjective rights to financial compensation for actual loss sustained. The Court held in Atkien-Zuckerfabrik Schöppenstedt v. Council that a claim for damages:

differs from an application for annulment in that its end is not the abolition of a particular measure, but compensation for damages caused by an institution in the performance of its duties⁷⁴.

While an action for damages can and often does result from the illegality of Community behaviour or the lack of it, it can in fact occur without that precondition. The law relating to an action for damages does not require the prior formal declaration of annulment of a Community act or the declaration of failure to act as a prerequisite for the admissibility of a damages action⁷⁵.

Even though a claim for damages and an action for annulment are conceptually different this does not mean that they need be the subject of separate proceedings. For instance, it is possible to make them both the subject of the same proceedings. In such a case the admissibility and the merits of each will be judged separately according to their own different rules.

Article 215(2) does not define the conditions or limits to Community liability. It refers simply to the "non-contractual liability of the Community which has to be determined in accordance with the general principles" common to the laws of the Member States.

74 Case 5/71 [1971] ECR 975 at 983. See also case 43/72 Merkur v. Commission [1973] ECR 1055 at 1069.

75 Conditions for the admissibility of an action for damages are autonomous of any annulment procedure. See generally Case 43/72 Merkur v. Commission ibid.

Four basic conditions have to be established in order to establish liability. They are as follows:

- 4.1. The conduct of the institutions is illegal.
- 4.2. There must be a causal connection between the alleged injury and the conduct with which the institutions are charged.
- 4.3. There must be injury.
- 4.4. The conduct of the institutions must be culpable i.e. the act or omission must constitute an official fault or a misconduct on the part of its author.

4.1. Illegality of the Institutions Conduct

The non-contractual liability of the Community arises from the existence of a wrongful act or omission on the part of the Community institutions or its servants in the performance of their duties. There are basically two main activities associated with the performance of their duties, namely, in their capacity as law makers and in carrying out their administrative duties.

Under the first category, the Court will be required to consider the illegality of the Community measure itself, whereas the second category is concerned mainly with the question of administrative fault.

One of the most important questions to be answered definitively by the Court is whether illegality of a Community measure is a pre-condition for liability. Generally speaking the non-contractual liability of the Community requires that the measure or omission be illegal. In most cases a failure to establish illegality under Article 173 would be sufficient evidence that there had not been a breach of official duty and would lead to the action being dismissed. For example in Kampffmeyer v. Commission the Court held that:

The Commission applied Article 22(2) of Regulation 19 [safeguard measures] in circumstances which did not justify protective measures ... As it was aware of the existence of applications for licences, it caused damage to the interests of importers who had acted in reliance on the information provided in accordance with Community Rules. The Commission's conduct constituted a wrongful act or omission capable of giving rise to liability on the part of the Community⁷⁶.

More recently there have been indications that the Court might under exceptional circumstances rule that Community liability arises irrespective of illegality. Applicants have sought to rely on the German legal concept of Sonderopfer (special sacrifice) and the equivalent French concept of égalité devant les charges publiques (equality of all citizens in sharing public burdens) in order to found a claim for compensation in respect of lawful Community acts. Where a lawful act is involved, the applicant would have to show the following:

- (i) the damage is particular to one or several persons;
- (ii) the loss is abnormally severe; and
- (iii) the source of damage must be shown not to have been made in the interest of public order⁷⁷.

As is the case under Article 173(2), the Court in applying Article 215(2) considers whether the applicant was affected in a special and individual way. It would contravene the logic of the system for the direct challenge by individuals of the legality of Community measures if an individual were allowed an unqualified right to challenge normative measures under the guise of seeking compensation for

⁷⁶ Case 5, 7, 13-24/66 [1967] ECR 245 at 262.

⁷⁷ See Opinion of Advocate-General Verloren van Themaat in Case 26/81 Oleifici Mediterranei S.A. v. EEC [1982] ECR 3057 at 3089-90 and Opinion of Advocate-General Slynn in Case 59/83 S.A. Biovilac NV v. EEC [1984] ECR 4057 at 4082 et seq.

alleged damage resulting from them. As the Court held in Koninklijke Scholten Honig v. Commission and Council:

Even though an action for damages under Article 178 and 215(2) constitutes an independent action, it must nevertheless be assessed having regard to the whole of the system of legal protection of individuals set up by the Treaty. If an individual takes the view that he is injured by a Community legislative measure which he regards as illegal he has an opportunity, when the implementation of the measure is entrusted to national authorities, to contest the validity of the measure at the time of its implementation, before the national court in an action against the national authority. Such a court may, or even must, in pursuance of Article 177, refer to the Court of Justice a question on the validity of the Community measure in question.

The existence of such an action is by itself of such a nature as to ensure the efficient protection of the individuals concerned⁷⁸.

However, where legislative action involving measures of economic policy are concerned, illegality on its own is not sufficient to give rise to liability even though it may give rise to annulment in the context of Article 173 or invalidity in the context of Article 177. Two further criteria have to be fulfilled. There must be a breach of a superior rule of law for the protection of the individual⁷⁹ and the institution in question must have "manifestly and gravely disregarded the limits on the exercise of its powers"⁸⁰.

Community liability is limited by insisting that there has to be a breach of a superior rule for the protection of the individual because in the view of the Commission, if this were not the case:

78 Case 143/77 [1979] ECR 3583 at 3626.

79 e.g. Case 5/71 Atkien-Zuckerfabrik Schöppenstedt v. Council supra at p. 984.

80 Joined Cases 83 & 94/76 and 4, 15, 40/77 Bayerische HNL v. Council and Commission [1978] ECR 1209 at 1224-5.

the institutions would be submerged in a spate of actions entailing considerable interference with their proper working⁸¹.

The Court has equated the idea of breach of a superior rule for the protection of the individual with breach of general principles common to the laws of the Member States. For example, in the CNTA case the general principle concerned was legitimate expectation. It held:

the Commission has violated a superior rule of law, thus rendering the Community liable, by failing to include in Regulation No. 189/72 transitional measures for the protection of confidence which a trader might legitimately have had in the Community rules⁸².

In Ireks-Arkady the Court ruled that there was a breach of the principle of equality in that the provisions of the Regulation provided for Quellmehl and Pre-Glutinised Starch to receive different treatment in respect of production refunds⁸³. Advocate-General Capotorti in the Bayerische HNL Case identified three elements which he considered would be sufficient to make unlawfulness serious to qualify as a breach of a superior rule of law. First, the level of importance of the infringed rule; second the degree of blame to be attached to the author of the measure; and third, the extent of the loss suffered⁸⁴.

In determining whether the institutions have manifestly and gravely disregarded the limits on the exercise of their powers the Court

81 7th General Report of Commission (1973) point 596.

82 Case 74/74 [1975] ECR 533 at 550; in Case 5/71 Atkien Zuckerfabrik Schöppenstedt v. Council supra, it was the principle of non-discrimination.

83 Case 238/78 [1979] ECR 2955 at 2973.

84 Joined cases 83&94/76 and 4,5,40/77 supra at 1232.

takes into account the extent to which the harm is concentrated on a small number of victims and the degree of that harm⁸⁵.

4.2. Causal Connection

The applicant must show that injury was caused by an act or omission on the part of the Community institutions. In other words, injury must result from Community conduct and it must result from that conduct directly, immediately and exclusively⁸⁶. In Kampffmeyer⁸⁷ the act that had been committed by the German Government and expressly approved by the Commission was held by the Court to constitute the causal link between the act of approval and the damage suffered.

4.3. There must be Injury

There must exist an actual and certain damage which is both appreciable and definitive. The damage must have crystallised by the time the claim for compensation is made, since an action under Article 215(2) which concerns only future or potential loss will generally be dismissed as premature⁸⁸. An applicant will generally have to show that he has been affected in a special and individual manner.

The burden of proof rests with the party bringing the action. The applicant must provide satisfactory evidence as to the existence and precise amount of damage to enable the Court to determine the

85 Case 238/78 Ireks-Arkady supra; and Joined Cases 83 & 94/76 & 4, 15, 40/77 Bayerische HNL v. Council and Commission supra.

86 See Smit & Herzog op. cit. Volume 6 p. 95.

87 Case 5,7,13-24/66 supra.

88 See for example, Joined cases 9 & 25/64 Third Ferma Case [1965] ECR 311 at 320.

appropriate compensation. The damage must be certain and specific. It must be quantifiable in that it is capable of being expressed as a specified sum of money.

In deciding on quantum, the Court will allow for direct loss and other additional expenses necessarily and reasonably incurred as a direct consequence of the Community act, for example indemnity payments for failure to honour contracts. As regards loss of profits, the Court is not quite as generous owing to the speculative nature of assessing them⁸⁹.

4.4. Culpability of the Institution's Conduct

Culpability is taken to mean that the illegal act or omission must constitute an official fault or misconduct on the part of its author. For example such conduct may consist of the enactment of an improper Community measure. In this case, liability may arise if it can be shown that the institutions were negligent. Other types of conduct may include grave misjudgment of market relations, or inexcusable forecasting errors⁹⁰.

4.5. Time Limit

An action must be brought within five years from the occurrence of the event.

89 See Case 5,7,13-24/66 Kampffmeyer v. Commission supra;
Case 74/74 CNTA supra.

90 See for example, Joined cases 116 & 124/77 Isoglucose Cases
[1979] ECR 3497.

5. A PRELIMINARY RULING ON THE
VALIDITY OF ACTS OF THE
INSTITUTIONS - ARTICLE 177(1)(b)
EEC TREATY

The Court has the duty to ensure the uniform interpretation and application of Community law in the courts of the Member States. For this purpose, the EEC Treaty confers on all courts the power - Article 177(2) - and on some the duty - Article 177(3) - to refer questions of Community law to the Court for its ruling. By virtue of Article 177(1)(b) the Court has jurisdiction to give a preliminary ruling concerning the validity of acts of the institutions of the Community.

5.1. The Acts whose Validity may be the
Subject of a Preliminary Ruling

Article 177 is broadly drafted and makes no reference to Article 189 which enumerates Community acts which are binding and those which are non-binding. As a result it may be assumed that any act originating with the Community institutions and forming part of the Community legal order comes within the ambit of Article 177⁹¹.

Just because an action for the annulment of a Regulation is held inadmissible by the Court does not mean that the applicant can no longer challenge the validity of that Regulation. In Koninklijke Scholten Honig v. Commission and Council the applicant's action for annulment was held to be inadmissible but they were able to have the Regulation declared invalid under Article 177(1)(b)⁹².

91 Case C-322/88 Grimaldi v. fonds des Maladies Professionnelles Bruxelles, judgment of 13th December 1989 (not yet reported) at paragraph 8 of judgment.

92 Case 143/77 supra.

5.2. The Questions to be Referred

The formulation of the question(s) referred is a matter for the national court alone to decide. The role of the Court is to rule on its validity, not to apply Community law to the facts of the case facing the national court.

5.3. The Courts which may make a Reference

Article 177(2) grants a discretion to courts or tribunals of the Member States to refer a question as laid down in Article 177(1) to the Court on condition that a decision on the question is necessary for the court or tribunal to give judgment. Article 177(2) attributes the right to request a preliminary ruling to any court or tribunal of the Member States. In the Second Rheinmühlen case the Court held that no rule of national law may deprive the national courts of this right⁹³. In BRT v. SABAM the Court further held that this right cannot be fettered by Regulation of the Communities⁹⁴.

5.3.1. What Constitutes a Court or Tribunal

This is answered by reference to Community law. The concept of judicial function is difficult to define but normally a body is regarded as being judicial if it has power to give binding determinations of legal rights and obligations of individuals. One commentator has argued that three criteria have to be fulfilled before a body can be considered a court or tribunal. They are as follows:

93 Case 166/73 [1974] ECR 33 at 38-39.

94 Case 127/73 [1974] ECR 51 at 63.

- (i) the requirement to solve a dispute between the parties
- (ii) existence of various institutional factors
- (iii) the involvement of public authorities⁹⁵.

5.3.2. Necessity

A decision on the question raised before the Court must be "necessary" to enable the national court to give judgment. It is not the reference to the Court which must be necessary but a decision on the question. Furthermore, the Treaty makes it clear that this is a question for the national court to decide.

When is a decision necessary in order to give judgment ? Bebr has noted that this should be understood in the sense of a question being relevant for pending litigation rather than as one being indispensable⁹⁶.

5.4. The Courts which must make a reference

Article 177(3) states that:

Where any such question [in sense of Article 177(1)] is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law that court or tribunal shall bring the matter before the Court of Justice.

The question to be considered is what constitutes a court or tribunal against whose decisions there is no judicial remedy ?

95 W. Alexander and E. Grabandt "National Courts entitled to ask Preliminary Rulings under Article 177 of the EEC Treaty: The case law of the Court of Justice" 19 CMLRev. 413-420.

96 Bebr op. cit.

In an attempt to answer this question, two distinct theories have developed. The first theory, the so-called "abstract theory", is that the only courts within the scope of the provision are those whose decisions are never subject to appeal. Arguments in favour of this theory include considerations of national legal policy from the viewpoint of the costs involved and the prevention of long drawn out proceedings. The second theory, the so-called "concrete" theory, is that the courts or tribunals within the scope of the provision are those against whose decisions there is no judicial remedy. If the courts against whose decision there is no judicial remedy were identical with the highest courts of the Member States an abstract theory presumes that the notion of judicial remedy would be irrelevant. The abstract theory also assumes that only cases brought before the highest courts are of the greatest importance for the interpretation and validity of Community law⁹⁷.

Article 177(3) does not reiterate the qualification that a decision on the question must be necessary. Does this mean that the courts within the scope of Article 177(3) are always compelled to ask for a preliminary ruling even if they do not consider a ruling to be necessary? In CILFIT v. Ministero delle Sanità the Court held that it:

follows from the relationship between the second and third paragraphs of Article 177 that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment⁹⁸.

97 Hartley op. cit. at pp. 261 et seq.

98 Case 283/81 [1982] ECR 3415 at 3429 paragraph 10 of Judgment.

5.5. The Effect of a Ruling as to the
Validity of the Measure under Article 177(1)(b)

At strict law the effect of a ruling of invalidity (under Article 177(1)(b)) is that it is binding only on the court which requested the ruling. This is similar to the effect of a plea of illegality under Article 184. Technically the measure remains in force but because of its invalidity it cannot be applied in the instant case.

There is, however, judicial authority from the Court which now infers that a ruling under Article 177(1)(b) may have general effect. In International Chemical Corporation v. Amministrazione delle Finanze dello Stato the Court held that:

... Although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission Regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give⁹⁹.

The general effect of an Article 177(1)(b) ruling may also stem from the subsequent behaviour of the Community institutions. The institution responsible for the measure may repeal it and replace it with a valid measure. In Providence Agricole de la Champagne v. ONIC the Court held that:

Although the Treaty does not expressly lay down the consequences which flow from a declaration of invalidity within the framework of a reference to the Court for a preliminary ruling, Articles 174 and 176 contain clear rules as to the effects of the annulment of a Regulation within the framework of a direct action. Thus Article 176 provides that the institution whose act has been declared void shall be required to take the necessary measures to comply with the judgment of the Court of Justice. In its judgments of 19 October 1977 in Joined Cases 117/76 and

⁹⁹ Case 66/80 [1981] ECR 1191 at 1216 paragraph 18(a) of Judgment.

16/77 (Ruckdeschel and Hansa-Lagerheus Ströh (Quellmehl) [1977] ECR 1753) and in Joined Cases 124/76 and 20/77 (Moulins et Huileries de Pont-à-Mousson and Providence Agricole de la Champagne (Maize Groats and meal) [1977] ECR 1975) the Court has already referred to that rule within the context of a reference to it for a preliminary ruling¹⁰⁰.

PART 2: "LOCUS STANDI" - SAFEGUARD MEASURES

1. ACTION FOR ANNULMENT : ARTICLE 173

Introduction

Generally speaking protective measures adopted by the Community authorities are in the form of a Regulation. To date, where such measures have been challenged, proceedings have been raised under Article 173. For this reason, the analysis of judicial review of safeguard measures will concentrate largely on Article 173. Unlike Community acts relating to the implementation of competition rules which are now subject to the jurisdiction of the Court of First Instance¹⁰¹, Community acts imposing protective measures and in particular anti-dumping and countervailing duties are solely subject to the jurisdiction of the Court. By virtue of Article 3(3) of the Decision establishing the Court of First Instance¹⁰², it was envisaged that it would have at a later date (the matter is to be reviewed in two years time) the competence to exercise jurisdiction in such matters subject to a right of appeal to the Court on a point of law.

100 Case 4/79 [1980] ECR 2823 at 2853 paragraph 44.

101 Council Decision 88/591 O.J. 1988 L319/1; amended text in O.J. 1989 C215/1.

102 ibid.

The attitude of the Court to the admissibility of actions where safeguard measures are concerned varies according to the parties who seek to have the measures annulled. In these circumstances, the analysis will proceed on the basis of considering separately the position of those interested parties which are most likely to challenge safeguard measures. As stated above, where a natural or legal person wishes to challenge the legality of a Regulation under Article 173(2) they will have to show three things: that the Regulation in question is in essence a Decision, that it concerns them directly and that it concerns them individually.

From what has been stated above, the Court's attitude to the interpretation of Article 173(2) is very restrictive. The Court will only in very exceptional circumstances annul a Community Regulation where it is an individual who challenges the legality of that Regulation. The Court adopts a much more liberal approach to the admissibility of an action under Article 173(2) where safeguard measures are concerned otherwise virtually all those parties most affected by the Regulation in question would have little prospect of challenging the legality of the Regulation. As a general rule of thumb the Court will, in determining whether an interested party has locus standi, consider whether it has been named specifically in the measure challenged or the extent to which it has been involved in the investigation.

1.1. Exporters/Producers

1.1.1. Regulation 2423/88

1.1.1.1. Anti-Dumping Duties

Anti-dumping Regulations are peculiar in that they apply to all products of a certain type from a particular country but which are based on the findings of the prices charged by a small number of

exporters. In these circumstances, a Regulation imposing anti-dumping duties does not fall neatly into the definition of a Regulation or a Decision for that matter, in terms of Article 189.

This peculiarity may have been the reason why Advocate-General Warner in the Japanese Ballbearing cases¹⁰³ was of the opinion that the Regulation imposing the anti-dumping duties was a "hybrid instrument". He referred to this "hybrid instrument" as a kind that the Court has not had to consider before and may seldom have to consider. In other words, for everyone except the four named exporters in the Regulation, it was a measure of general application. However, Quoad each of the exporters it constituted a Decision of direct and individual concern¹⁰⁴.

The Court did not follow the Advocate-General's approach nor did it adopt his idea of a "hybrid instrument". It held that the Regulation imposing definitive duties was of direct and individual concern, not only to the named exporters, but also to those importers specifically named in the operative part of the Regulation which were subsidiaries of the exporters. As there was no need to make a distinction between the producers/exporters on the one hand and the importers on the other, all the applicants had locus standi¹⁰⁵. The reason put forward by the Court for not making the distinction was that the Commission in its investigations applied the special provisions concerning export prices where the exporters and importers were associated¹⁰⁶.

103 Case 113/77 NTN Toyo Bearing Co. Ltd. & Ors. v. Council
[1979] ECR 1185, Advocate-General Warner's opinion at 1212.

104 ibid. at 1246.

105 ibid. at 1204-5.

106 ibid. at 1204, paragraph 9 of judgment.

A much broader approach to the question of whether exporters had locus standi to challenge Regulations imposing anti-dumping duties was adopted by the Court in the First Allied case¹⁰⁷. The Court held that the question of locus standi must be resolved in the light of the system established by the parent Regulation (now Regulation 2423/88) and, more particularly, of the nature of the anti-dumping measures provided for by that Regulation, regard being had to the provisions of the second paragraph of Article 173¹⁰⁸.

It then stated that although Regulations imposing anti-dumping duties, and for that matter countervailing duties, are legislative in character since they apply to all the traders concerned, taken as a whole the provisions may nonetheless be of direct and individual concern to those exporters charged with dumping. Anti-dumping duties can only be imposed on the basis of the findings resulting from investigations concerning the production prices and export prices of undertakings which have been individually identified¹⁰⁹. In these circumstances the Court held that the measures imposing anti-dumping duties are liable to be of direct and individual concern to those producers and exporters who are able to establish that they were identified in the measures adopted by the Community institutions or that they were concerned by the preliminary investigations¹¹⁰.

In concluding that the exporters had locus standi the Court referred to the fact that the Commission had during the oral procedure noted

107 Joined cases 239&275/82 [1984] ECR 1005.

108 ibid. at 1029, paragraph 10 of judgment.

109 ibid. at 1030, paragraph 11 of judgment.

110 ibid. at 1030, paragraph 12 of judgment.

that, on balance, it was in favour of the admissibility of direct actions brought by undertakings from non-Member States¹¹¹.

The decision in the First Allied case should not be seen as amounting to a licence for all exporters to raise an action under Article 173(2). In Sermes S.A. v. Commission¹¹² the Court in summarising its case-law held that it was "generally" true that exporters and producers would be directly and individually concerned on the basis that they were able to establish that they were identified in the measure adopted or that they had been concerned by the preliminary investigations. It is submitted that as a result of this decision identification in the measure in question or involvement in the investigations will be regarded as prima facie evidence that the exporter or producer in question has locus standi. Advocate-General Mischo in Nashua Corporation v. Commission and Council¹¹³ considered that the determining factor is that the exporter or producer must have been charged with dumping on the basis of information about their business activities. Identification or involvement afforded a strong presumption but not proof that this was indeed the case¹¹⁴. The Court did not go as far as the Advocate-General. As far as it was concerned the crucial factor was whether the economic agent in question was concerned by the findings relating to the existence of dumping complained of. The Court, on the basis of the principles enunciated in the First Allied case, held that this was generally true in relation to exporters and producers¹¹⁵.

111 ibid. at 1029, paragraph 9 of judgment.

112 Case 279/86 [1987] ECR 3109 at paragraph 15 of Order.

113 Joined cases 133&150/87 [1990] 2 CMLR 6 at 14.

114 ibid. at 21.

115 ibid. at 42-43.

Temple Lang was of the opinion that a rejection of a request by a potential exporter to be exempted from an anti-dumping duty or the refusal of an offer of an undertaking would be a decision addressed to the undertaking in question, with the result that it would have locus standi under Article 173(2)¹¹⁶. The Court, however, has taken a different view. In a number of the Photocopier cases it held that such a rejection is an intermediate measure whose purpose was to prepare for the final decision and was not therefore a measure which may be challenged before the Court. It is only at the stage of the imposition of definitive duties that traders can, by challenging the Regulation imposing the duties, raise an irregularity associated with the rejection of their proposed undertaking¹¹⁷.

1.1.1.2. Countervailing Duties

Countervailing duties are used to offset subsidies which are found to be causing injury to Community industry. The rules governing the imposition of such duties are similar in most respects to those relating to anti-dumping duties. They are both governed by the same parent Regulation, namely Regulation 2423/88. In these circumstances the principles enunciated in the First Allied case would extend by implication to countervailing duties. This, however, has to be put into its proper context.

116 "Judicial Review of Trade Safeguard Measures in the European Community" in 1985 (ed.) Hawk 'Antitrust and Trade Policy in the United States and the European Community' Fordham University School of Law, at p. 644.

117 See Joined cases 133/87 & 150/87 Nashua Corporation v. Commission and Council supra, paragraph 9 and 10 of judgment; Case 156/87 Gestetner Holdings plc v. Commission and Council [1990] 1 CMLR 813 at paragraphs 8-9 of judgment.

Unlike in the anti-dumping cases where it is the export or production prices of undertakings individually identified that are considered, in anti-subsidy cases it is the activities of governmental or state bodies that are important. It is not an uncommon occurrence in anti-subsidy cases for countervailing duties to be imposed without any finding being made about the exporters. Such a situation would exist if a subsidy was given simply as a payment of so much per tonne exported as no investigation as to the activities of the exporters in question need be carried out¹¹⁸. In this case the exporters would have no locus standi.

In Alusuisse the Court in considering the distinction between a Regulation and a decision held that this distinction:

may be based only on the nature of the measure itself and the legal effect which it produces and not on the procedures for its adoption¹¹⁹.

Alusuisse was concerned with anti-dumping duties and the question of whether independent importers had locus standi. Notwithstanding this, the decision of the Court is applicable to all other safeguard measures. As a consequence of the ruling in Alusuisse most exporters would have difficulty in challenging anti-subsidy Regulations. The question, however, is the extent to which this judgment is law in the light of the Court's rulings in the First Allied, Fediol and Sermes cases¹²⁰.

118 Only when the giving of a subsidy requires an investigation to be carried out will an exporter be able to show that they are directly and individually concerned.

119 Case 307/81 [1982] ECR 3463 at 3473, paragraph 13 of judgment.

120 Joined cases 239 & 275/82 supra; Case 191/82 [1983] ECR 2913; Case 279/86 supra.

In the First Allied case¹²¹ the Court held that an exporter would have locus standi if he could show either that he was individually identified in the measure or that he was involved in the preliminary investigations. In order to fulfil the second criterion, the exporter would have to show that it was concerned to a sufficient extent in the investigation. This is so given the Court's ruling in the Sermes case. Hence the crucial factor in many anti-subsidy cases will be the extent to which an exporter was subject to an investigation by the Commission. The Court's ruling in the Fediol case confirms its interpretation in the First Allied case. The Court held that an interested party may derive locus standi from the procedural rights laid down in the parent Regulation, where those interested parties have exercised them during the investigation¹²².

Notwithstanding the Court's previous ruling in the Alusuisse case, it is now the case that an exporter may have standing to challenge a measure imposing countervailing duties merely because of its involvement in the investigations. This involvement has, however, to be substantial. An exporter in an anti-subsidy action should therefore seek to involve itself as much as possible in the Commission's investigation so that if necessary, they may have the locus standi to challenge the measure.

1.1.2. Regulation 288/82

As stated above, protective measures under Regulation 288/82 are imposed if the Commission concludes that serious injury is being caused to Community industry and that it is in the interests of that industry that protective measures be adopted. These measures usually take the form of quotas which may be applied to imports from

121 Joined cases 239 & 275/82 respectively ibid. at 1030, paragraph 12 of judgment.

122 Case 191/82 supra at 2935.

all countries or in some situations to specific countries. In these circumstances it would be unlikely that the imposition of such measures would be based on the findings of individually identified exporters.

The only circumstances in which an exporter could derive standing to challenge measures adopted under Regulation 288/82 is where it has exercised the procedural rights laid down by the parent Regulation during the investigation. Article 6 of Regulation 288/82 states that the announcement of the opening of an investigation must specify a period within which interested parties make their views known in writing. By virtue of Article 6(2) the Commission is empowered to collect all information it deems necessary and to endeavour to check this information with importers, traders, agents, producers, trade associations and organisations. More importantly, however, Article 6(4) allows the Commission to hear interested natural or legal persons. Such parties, where they have applied in writing, must be heard.

Applying the principles in the First Allied and Fediol cases, an exporter who has exercised his procedural rights during the investigation may have locus standi to challenge measures imposing protective measures. Temple Lang has argued that the Court's judgment in the Piraiiki case¹²³ has given exporters more scope to challenge quantitative restrictions adopted under Regulation 288/82. In this case, which is discussed below, the Court held that where the performance of identifiable contracts were made impossible by the imposition of quantitative restrictions and where the exporters had entered into these contracts they would have locus standi¹²⁴.

123 Case 11/82 [1985] ECR 207.

124 ibid. at 246.

1.1.3. Regulation 2641/84

Regulation 2641/84 deals with situations more akin to anti-subsidy cases in that it attempts to curtail the illicit trade practices of third countries and not individual firms.

The Regulation is based largely on Regulation 2423/88 and for this reason the procedural rules are similar. As discussed above, the types of measures that are likely to be imposed under Regulation 2641/84 namely quantitative restrictions, suspension of tariff concessions, the raising of tariffs, etc. would be general and legislative in nature. In these circumstances exporters would face the same difficulties confronting exporters in anti-subsidy cases. In order to convince the Court that they have sufficient locus standi to challenge the acts imposing protective measures, exporters would have to show that they have had specific findings made about them or that they have been involved in the investigation to a significant degree.

Regulation 2641/84 is unique in that it allows or permits protective measures to be imposed in order to counteract the illicit trade practices in a third country which affect Community exports. This may have the effect of affecting many exporters because such protective measures will have the consequence of limiting imports from that country. As they are not involved in the investigation leading to the adoption of such measures nor are they individually identified in the measure in question, it will usually be the case that they will not have locus standi.

Temple Lang¹²⁵ identifies one possible situation in which exporters would have locus standi. This is where a non-Member State encourages certain undertakings to become parties to a restrictive trade practice or a misuse of monopoly power.

125 op.cit. at 649.

1.2. Complainants

1.2.1. Regulation 2423/88

The position of complainants in the context of trade measures first arose in the Fediol case¹²⁶. Fediol was a trade association. It had lodged a complaint pursuant to Regulation 3017/79 requesting the initiation of anti-subsidy proceedings against the importation of soya bean oil cake from Brazil. The Commission informed Fediol by letter that it did not intend to initiate proceedings. As a result Fediol brought an action under Article 173(2) of the EEC Treaty seeking a declaration that the decision contained in the letter was void.

The Court began as it did in the First Allied case, by stating that the question of admissibility must be assessed in the light of the whole scheme of investigation and protection created by the parent Regulation¹²⁷. The Court proceeded to analyse the provisions of the parent Regulation which related to anti-subsidy cases. It then in some detail concluded that complainants could bring proceedings before the Court alleging that the Commission had disregarded specific rights granted to them under the parent Regulation. It held that:

It appears from a comparison of the provisions governing the successive procedural stages described above that the Regulation recognizes the existence of a legitimate interest on the part of Community producers in the adoption of anti-subsidy measures and that it defines certain specific rights in their favour, namely the right to submit to the Commission all evidence which they consider appropriate, the right to see all information obtained by the Commission subject to certain exceptions, the right to be heard at their request and to have the opportunity of meeting the

126 Case 191/82 supra.

127 ibid. at 2932, paragraph 15 of judgment.

other parties concerned in the same proceeding and finally the right to be informed if the Commission decides not to pursue a complaint. In the case of the proceedings being terminated on the completion of the stage of preliminary investigation provided for in Article 5 that information must comprise at least a statement of the Commission's basic conclusions and a summary of the reasons therefor as is required by Article 9 in the event of the termination of formal investigations¹²⁸.

It noted that whilst the Commission had a duty to establish objectively the facts concerning the existence of subsidisation practices and of the injury caused as a result to Community industry, it had nevertheless a very wide discretion in deciding what measures were necessary taking into account the interests of the Community. It was in the light of these considerations that it was necessary to consider whether complainants have a right to bring an action. It held that:

It seems clear, first, in that respect - and the point is not disputed by the Commission - that complainants must be acknowledged to have a right to bring an action where it is alleged that the Community authorities have disregarded rights which have been recognized specifically in the Regulation, namely the right to lodge a complaint, the right, which is inherent in the aforementioned right, to have that complaint considered by the Commission with proper care and according to the procedure provided for, the right to receive information within the limits set by the Regulation and finally, if the Commission decides not to proceed with the complaint, the right to receive information comprising at the least the explanations guaranteed by Article 9(2) of the Regulation.

Furthermore it must be acknowledged that, in the spirit of the principles which lie behind Articles 164 and 173 of the Treaty, complainants have the right to avail themselves, with regard both to the assessment of the facts and to the adoption of protective measures provided for by the Regulation of a review by the Court appropriate to the nature of the powers reserved to the Community institutions on the subject.

¹²⁸ ibid. at 2934, paragraph 25 of judgment.

It follows that complainants may not be refused the right to put before the Court any matters which would facilitate a review as to whether the Commission has observed the procedural guarantees granted to complainants by Regulation 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidization or has based the reasons for its decision on considerations amounting to a misuse of powers. In that respect, the Court is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned Regulation¹²⁹.

The Court concluded by stating that the parent Regulation acknowledged that undertakings and associations of undertakings injured by subsidisation practices on the part of non Member countries have a legitimate interest in the initiation of protective action by the Community. In these circumstances they have a right of action within the framework of the legal status which the Regulation confers on them¹³⁰.

The question of locus standi of complainants came before the Court again in the Timex case¹³¹ shortly after its decision in Fediol. This was an anti-dumping case. Timex, who, as it happened, was the leading manufacturer of mechanical wrist watches and watch movements in the Community had lodged a complaint with the Commission. The result of the subsequent investigation was a finding that dumping had taken place and that this dumping had caused injury to Community industry. An anti-dumping duty was therefore imposed on watches originating in the Soviet Union. Timex challenged this duty on the grounds that it was insufficient quoad watches and furthermore no duty had been imposed on the movements of such watches. They argued

129 ibid. at 2935-6, paragraphs 28-30 of judgment.

130 ibid. at 2936, paragraph 31 of judgment.

131 Case 264/82 [1985] ECR 849.

that this breached the procedural and substantive rules laid down by the parent Regulation.

Advocate-General Darmon in his opinion for the Court reiterated the principles enunciated in Fediol. He stated that:

Complainants may apply to the Court for a review of the procedural guarantees laid down by that Regulation [Regulation 3017/79] and of the substantive question whether any manifest errors of assessment and misuse of power have been committed. This is a principle derived from the scheme of Regulation 3017/79 and from the general principles of the Treaty. As such, it applies to all measures adopted by the institutions in anti-dumping and anti-subsidy proceedings, and in particular to the regulations imposing duties¹³².

The Advocate-General then proceeded to consider whether the Regulation was in essence a decision and if so whether Timex was directly and individually concerned. He concluded by stating that as the Community's production was practically Timex alone and the procedure was determined exclusively on the basis of the effect on Timex, it was directly and individually concerned. The Court agreed with him. On the question of standing it held that:

It should be pointed out first of all that the complaint under Article 5 of Regulation No. 3017/79 which led to the adoption of Regulation No. 1882/82 was lodged by the British Clock and Watch Manufacturers' Association Limited on behalf of manufacturers of mechanical watches in France and the United Kingdom, including Timex. According to the documents before the Court, that association took action because a complaint which Timex had itself lodged in April 1979 had been rejected by the Commission on the ground that it came from only one Community manufacturer.

The complaint which led to the opening of the investigation procedure therefore owes its origin to the complaints originally made by Timex. Moreover, it is clear from the preamble to Commission Regulation No. 84/82 and the preamble to Council Regulation No. 1882/82 that Timex's views were heard during that procedure.

132 ibid. p. 851 at 853.

It must also be remembered that Timex is the leading manufacturer of mechanical watches and watch movements in the Community and the only remaining manufacturer of those products in the United Kingdom. Furthermore, as is also clear from the preambles to Regulations Nos. 84/82 and 1882/82, the conduct of the investigation procedure was largely determined by Timex's observations and the anti-dumping duty was fixed in the light of the effect of the dumping on Timex. More specifically, the preamble to Regulation 1882/82 makes it clear that the definitive anti-dumping duty was made equal to the dumping margin which was found to exist "taking into account the extent of the injury caused to Timex by the dumped imports". The contested Regulation is therefore based on the applicant's own situation.

It follows that the contested Regulation constitutes a decision which is of direct and individual concern to Timex within the meaning of the second paragraph of Article 173 of the EEC Treaty¹³³.

As in the Fediol case the Court based its judgment quoad complainants on their procedural rights as laid down in the parent Regulation. This will be the situation whether or not injury findings have been made about them. These decisions run contrary to the Court's judgment in Alusuisse where it held that locus standi to challenge is based on the legal nature of the Regulation imposing the duty and the legal effects it produces¹³⁴.

The effect of the Court's rulings is that the number of interested parties who may claim locus standi to challenge Community acts imposing safeguard measures has been extended to cover those parties whose procedural rights as provided for in the parent Regulation have been infringed.

133 ibid. at. 865-6, paragraphs 13-16 of judgment.

134 Case 307/81 supra.

1.2.2. Regulation 288/82

Unlike Regulation 2423/88 the right to complain under Regulation 288/82 is given formally to Member States and not to private persons. For this reason complainants are less likely, if at all, to have locus standi to challenge protective measures.

In certain limited circumstances they may, however, have locus standi by virtue of a number of other procedural rights. Like any other interested party, an individual producer by reason of Article 6(4) of Regulation 288/82 has a right to be heard. Individual producers may have locus standi if they can show that the protective measures adopted are inadequate to them in relation to the findings of "substantial injury" or threat thereof. Apart from these few limited situations, complainants would have no locus standi.

1.2.3. Regulation 2641/84

Regulation 2641/84 endows complainants with much greater procedural rights. This is due to the fact that the Regulation, as far as procedure was concerned, was based on the anti-dumping rules. By virtue of Article 3, private individuals are given a right to complain and a right to be informed if the complaint does not provide sufficient evidence to justify initiating an investigation. Furthermore, Article 6 gives complainants a right to make submissions and to inspect non-confidential information in the possession of the Commission. They also have a right to be heard and to oppose parties having adverse interests. Complainants would therefore as a result of the Court's judgments in Fediol and Timex discussed above have locus standi to challenge protective measures to counteract illicit commercial practices or the institutions' refusal to adopt such measures.

1.3. Independent and Associated Importers

1.3.1. Regulation 2423/88

1.3.1.1. Anti-Dumping Duties

Generally speaking importers are not referred to in Regulations imposing anti-dumping duties. In the normal case, dumping will be determined on the basis of the export prices of non-Community producers. In certain situations, however, the importers are subsidiaries of the exporters and as such the sales between them are not at arms length. In these circumstances the Community institutions may determine dumping by reference to the prices charged to independent importers.

Where the export price is determined by reference to resale prices associated importers as such will have had findings made about them. In such circumstances they will be identified and would therefore have locus standi. This was the situation in the Japanese Ballbearing cases¹³⁵. It would, however, be wrong to hold that the status of association is sufficient for an importer of the product in question to be individually concerned by a Regulation imposing anti-dumping duties. It may be that the export price is determined by reference to the prices paid or payable on exportation. This would mean that no findings would be made about associated importers¹³⁶. In such a case they would have no locus standi. However, now that exporters have locus standi to challenge Regulations imposing anti-dumping duties before the Court as a result of the decision in the First Allied case, there is less importance and less need to show that associated importers have locus standi.

135 Case 113/77 NTN Toyo Bearing Co. Ltd. & Ors. v. Council supra, 1204-5.

136 See Case 279/86 Sermes SA v. Commission supra at paragraph 16 of Order.

The position of independent importers is less straightforward. This was discussed at great length by the Court in the Alusuisse case¹³⁷. Alusuisse was an importer of orthoxylene. It did not manufacture the product itself nor did it belong to a group of undertakings which included a manufacturer. It was basically an independent importer. Alusuisse brought proceedings under Article 173(2) of the EEC Treaty seeking a declaration that the Council and Commission Regulations were void.

Advocate-General Rozès distinguished the position of Alusuisse from the importers in the Japanese Ballbearing cases. She held that unlike the importers in the Japanese Ballbearing cases, Alusuisse was not specifically referred to in the Regulation¹³⁸. Alusuisse had argued that owing to the special nature of the procedure leading to the adoption of anti-dumping regulations, they could not be regarded as measures of general application¹³⁹. The Advocate-General, referring to the previous decisions of the Court, was of the opinion that such a line of argument could not be upheld. In her view, the argument wrongly assimilated the position preparatory to the adoption of the Regulation to the adoption itself. In other words it confused the nature of the investigation with the nature of the measure¹⁴⁰. She further noted that the distinction in the Court's case law between a Regulation and a Decision was founded on the nature and effects of the measure and not on the manner of its adoption¹⁴¹.

137 Case 307/81, supra.

138 ibid. 3474 at 3475-6.

139 ibid. at 3477.

140 ibid.

141 ibid.

The Court emphasised the fact that the Regulations at issue had as their object the imposition of anti-dumping duty on all imports of orthoxylene originating in the United States and Puerto Rico. In these circumstances, such measures as regards independent importers who, in contrast to exporters, were not expressly named in the Regulations, were measures having general application within the meaning of the second paragraph of Article 189 of the Treaty because they applied to objectively determined situations and entailed legal effects for categories of persons regarded generally and in the abstract¹⁴².

The Court agreed with Advocate-General Rozès in holding that the distinction between a Regulation and a Decision could be based only on the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption¹⁴³. In doing so it rejected Alusuisse's argument that the particular features of the procedure leading to the adoption of the anti-dumping Regulations, in particular the participation of the various interested parties in the successive stages of that procedure, led to the conclusion that the measures in question constituted individual administrative acts which could be contested under Article 173(2)¹⁴⁴.

The position of independent importers was also considered by the Court in the First Allied case. The Court noted that Demufert, one of the applicants, was an importer established in one of the Member States and was not referred to in any of the measures which were contested in the applications before the Court¹⁴⁵. It contrasted the position of the importers in the present case with the importers

142 ibid. 3463 at 3472, paragraph 9 of judgment.

143 ibid. at 3473, paragraph 13 of judgment.

144 ibid. at 3473, paragraph 12 of judgment.

145 Joined cases 239 & 275/82 supra at 1031, paragraph 15 of judgment.

in the Japanese Ballbearing cases. It noted that in the former, the existence of dumping was established by reference to the export prices of the American producers and not by reference to the retail prices charged by European importers. In such circumstances the findings relating to the existence of dumping were not of direct concern to Demufert whereas they were of direct concern to the producers and exporters¹⁴⁶. The Court stressed, however, that in so far as the importer was compelled to pay anti-dumping duties it was open for it to bring an action in the national court to challenge the validity of the Regulation¹⁴⁷.

On the other hand, where an independent importer has given a bond or a guarantee for payment of provisional duties, it may have locus standi if the Regulation imposing the definitive duties orders the definitive collection of provisional duties. In such a situation the importers would be part of an identifiable and ascertainable group.

As a result of the Court's ruling in Piraiki¹⁴⁸ an independent importer may in certain limited circumstances have locus standi to challenge a measure imposing anti-dumping duties. It would have to show on the one hand that it had entered into a contract to buy goods which would be subject to a duty and on the other that it would be responsible for the payment of the duty rather than the exporter.

1.3.1.2. Countervailing Duties

It is only in very exceptional circumstances that importers whether associated or independent will have locus standi in anti-subsidy cases. As submitted above, it is not normally the case that the

146 ibid.

147 ibid.

148 Case 11/82, supra.

Community authorities will look at the prices charged by importers to their customers in the Community.

The most likely situation where an importer will have locus standi is where the Regulation orders the definitive collection of the provisional duties or where the importer has entered into a contract before the protective measures were adopted i.e. the situation in the Piraiki case.

1.3.2. Regulation 288/82

Importers whether associated or independent are unlikely to have locus standi to challenge measures imposing protective measures under Regulation 288/82. Where an importer, however, can prove that it fulfils the criteria laid down in Piraiki case¹⁴⁹ it may then have locus standi. Importers on the whole, unlike exporters, are less likely to be affected by quantitative restrictions or be the subject of specific findings.

Piraiki concerned an application by a number of Greek undertakings that a Commission decision authorising France to impose quotas on imports of cotton yarns from Greece was void. The Commission argued that the decision was addressed to the French Republic and the Hellenic Republic and although the applicants were touched by the effects of the protective measures authorised, the decision in question was not of direct or individual concern to them¹⁵⁰. The applicants argued, however, that their situation could be distinguished from that of any other exporter to France of cotton yarn of Greek origin in as much as they had entered into a series of contracts of sales with French customers, to be performed during the period of application of the decision and covering quantities of

149 ibid.

150 ibid. at 241, paragraph 3 of judgment.

cotton yarn in excess of the quotas authorised by the Commission. According to the applicants the Commission was in a position and even under the obligation to identify the traders who, like the applicants, were individually concerned¹⁵¹.

The Court then held:

It must be concluded that the Commission was in a position to obtain sufficiently exact information on the contracts already entered into which were to be performed during the period of application of the decision at issue. It follows that the undertakings which were party to contracts meeting that description must be considered as individually concerned for the purpose of the admissibility of this action, as members of a limited class of traders identified or identifiable by the Commission and by reason of those contracts particularly affected by the decision at issue¹⁵².

Therefore, in circumstances where an importer has entered into a contract before the imposition of protective measures under Regulation 288/82 it may have locus standi to challenge those measures.

1.3.3. Regulation 2641/84

An importer is in a similar position to an importer under an anti-subsidy action. For this reason it is unlikely that an importer would have locus standi except in exceptional cases.

1.4. Original Equipment Manufacturers (OEMs)

Original Equipment Manufacturers (hereinafter referred to as OEMs) may be defined as importers who sell in the Community, under their

¹⁵¹ ibid. at 242-3, paragraphs 12-15 of judgment.

¹⁵² ibid. at 246, paragraph 31 of judgment.

own brand names, products which they neither sell nor produce in the country of origin but which are purchased from exporters of the products to the Community.

The admissibility of an Article 173 action by OEMs has arisen recently in some of the Photocopiers cases¹⁵³. In Nashua Corporation v. Commission and Council¹⁵⁴ the applicant was defined as "the supplier of Nashua brand photocopiers which it sells in the Community and numerous other countries". It was not disputed and was certain that Nashua bought most of its photocopiers from Rioch Co. Limited of Japan which manufactured Nashua brand machines at its production facilities in Japan.

The Council relying on the decision of the Court in Sermes S.A. v. Council¹⁵⁵ which reiterated those categories of economic agent who had locus standi to challenge Community measures imposing anti-dumping duties, considered that the application was

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- 153 See Joined cases 133/87 & 150/87 Nashua Corporation v. Commission and Council and Case 156/87 Gestetner Holdings plc v. Commission and Council, supra.
- 154 Joined cases 133 & 150/87 ibid. at 20-21.
- 155 Case 279/86, supra.

inadmissible¹⁵⁶. It argued that the applicant was neither a producer/exporter nor an associated importer and therefore not individually concerned. The Council was of the view that Nashua if it was to be categorised would be regarded as an independent importer i.e. importers not associated to an exporter or producer. Such economic agents have been held by the Court not to be individually concerned by an anti-dumping regulation¹⁵⁷.

In reaching this conclusion, the Council argued that Nashua had not been singled out by the contested Regulation. This view was based on two grounds. First, the export price was established on the basis of sales to Nashua by Rioch who was a producer and exporter and not on Nashua's resale price. Second, the construction of normal value for sales to OEMs was based not on information from Nashua but from Rioch.

156 The Court summarised the case-law as follows:-
"However, the Court has held that certain provisions of such regulations may nevertheless be of direct and individual concern to those producers and exporters who are charged, on the basis of information derived from their business activities, with practising dumping. That is 'generally' true of producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations (see the judgments of 21 February 1984, Allied Corporation v. Commission, cited above, and of 23 May 1985 in case 53/85, Allied Corporation v. Council, [1985] ECR 1621).
It is also true of those importers who are directly concerned by findings of dumping inasmuch as export prices have been determined by reference to those importers' resale prices and not to the export prices charged by the producers or exporters in question (see the judgments of 29 March 1979 in case 118/77, I.S.O. v. Council, [1979] ECR 1277, and of 21 February 1984, Allied Corporation v. Commission, cited above). Under Article 2 (8) (b) of Regulation 2176/84 export prices may be constructed in that way inter alia where there is an association between exporter and importer". (paragraphs 15 and 16)

157 Case 307/81 Alusuisse Italia v. Commission supra.

In his opinion, Advocate-General Mischo agreed that the Council's application of the principles in the Sermes case was correct. He disagreed, however, with their conclusion, holding that Nashua was directly and individually concerned by the contested Regulation. He was of the opinion that the determining factor in deciding whether the applicant had locus standi was not its status, i.e. whether it was an exporter/producer or associated importer, but the manner in which its actual situation was taken into account¹⁵⁸.

He noted that the anti-dumping duty imposed on Nashua photocopiers did not apply indiscriminately to all OEMs. Rather, Nashua was not only affected by the Regulation on account of its status as an OEM but more importantly in its capacity as an OEM selling products manufactured by Rioch. (Rioch being one of the exporters whose products were dumped and which were subject to a definitive duty). As a result, Nashua's products were also subject to the same anti-dumping duty as Rioch. In such circumstances, it was correct to hold that Nashua was affected by those findings and by the imposition of duties in the same was as Rioch¹⁵⁹.

On the assumption that Rioch was individually concerned by the contested Regulation it would be illogical not to treat Nashua as being in the same position in respect of products sold under its own brand name. It would have been wrong to treat Nashua as if it were Rioch, as the photocopiers imported by Nashua had a distinctive "logo" which characterised them to Nashua products. Advocate-General Mischo was of the opinion that:

Once a product imported under a given brand name is subject, on entry into the Community, to special customs arrangements, the act which established those arrangements is of direct and individual concern to the business whose

158 Joined cases 133/87 & 150/87 Nashua Corporation v. Commission and Council supra, 14 at 21.

159 ibid. at 22.

product bears the distinctive brand name (or which is the holder or owner of that brand name), even if it is not considered to be an exporter for the purpose of the anti-dumping legislation¹⁶⁰.

The brand name was a distinctive badge, he argued, which identified the owner and placed him in a situation which distinguished him from any other person.

He noted further that the application of the contested Regulation, in particular, to Gestetner was a perfect example of the argument that the brand name distinguishes the product and its owner - in particular an OEM - from any other person. The Customs authorities would naturally impose on Gestetner products entering the Member States a general duty of 20 per cent, since its name was not included in the list of exporters in the contested Regulation which were subject to different duties. At the hearing, however, the Council confirmed that Gestetner photocopiers which were manufactured by Mita, should only be subject to a duty of 12.6 per cent. There was nothing in the Regulation to this effect with the result that the customs officials would have to have had the position clarified by the national authorities or the Commission in order to obtain confirmation of that fact. Customs officials in the Member States subsequently received an explanatory memorandum setting out the position. It was, therefore, the case that during customs clearance, Gestetner brand products were distinguished from all other products. It could not be denied that they were directly and more importantly individually concerned in the same way as Mita¹⁶¹.

Further, Nashua had in its submissions contended that the Council had failed to treat it as an exporter of its own products. Rather,

160 ibid. at 23.

161 ibid.; see also: Case 156/87 Gestetner Holdings plc. v. Commission and Council, supra.

the Council had treated it as an importer of the products which although bearing Nashua's brand name were in actual fact Rioch products. The Advocate-General took the view that if the Council were allowed to determine the admissibility of such claims by OEMs by how it perceived the functions and role of a particular OEM, then such a decision would be removed from direct review by the Court. He held that, reiterating the decision of the Court in the Mini Ballbearing cases, the exercise of discretion by the Community authorities was still subject to review by the Court in determining whether procedural rules had been complied with, whether facts on which a decision was based were accurately stated and whether there had been a manifest error of appraisal or misuse of powers¹⁶².

The Advocate-General also relied on a further ground for holding that Nashua was directly and individually concerned by the contested Regulation. As stated above, the refusal to accept an undertaking and the subsequent imposition of definitive duties amounted to a decision of direct and individual concern to the applicant in question. Such circumstances, the Advocate-General contended, existed in the present case thereby conferring on Nashua locus standi¹⁶³.

The Court concurred with the Advocate-General that Nashua had locus standi. In reaching this conclusion the Court's reasoning differed from that of the Advocate-General. It restated the principles enunciated by the Court in the First Allied case and considered that it was necessary to establish whether Nashua was concerned by the findings relating to the existence of dumping complained of¹⁶⁴. It noted that it was by reference to the particular features of

162 ibid. at 24. See for example, Case 240/84 NTN Toyo Bearing Co. Ltd. v. Council [1987] ECR 1809.

163 ibid. at 25.

164 ibid. at 43, paragraphs 14-16 of judgment.

Rioch's sales to OEMs as compared with its costs in sales of the product under its own brand name that the Council in constructing the normal value used a profit margin of 5 per cent. This was lower than the average profit margin which was estimated at 14.6 per cent. Proceeding on the basis of the normal value thus constructed for sales by Rioch to OEMs the Community authorities arrived at a dumping margin lower than that determined for the sales of the products bearing Rioch's own brand name. For these reasons the Court concluded that Nashua was concerned by the findings relating to the existence of dumping complained of and the provisions of the Regulation regarding Rioch's dumping practices were therefore of direct concern to it¹⁶⁵.

In conclusion, the category of persons which have locus standi to challenge Community measures imposing anti-dumping duties has been extended to include OEMs. This, however, does not amount to a licence for all OEMs to challenge such measures. Locus standi will only be conferred on those OEMs who can show that they are concerned by a finding relating to the dumping complained of.

1.5. Trade Associations

In Confédération Nationale des Producteurs de Fruits et Légumes v. Council¹⁶⁶ the Court held that an Association in its capacity as the representative of a category of businessmen was not individually concerned by a measure such as a Regulation which affected the general interests of that category.

The position of Trade Associations with reference to safeguard measures is likely only to arise in relation to anti-dumping and countervailing measures and to illicit commercial practices. The

165 ibid., paragraphs 17-20 of judgment.

166 Cases 16 and 17/62 [1962] ECR 471.

major reason for this is that Trade Associations are specifically mentioned in Regulation 2423/88 and Regulation 2641/84 as having a right to lodge a complaint .

The position of a Trade Association was considered by the Court in Fediol. The Commission observed that on a strict interpretation of Article 173(2) a Trade Association had no right to institute proceedings or to appear in Court. However, taking account of the powers of a procedural nature given by the parent Regulation to Associations lacking legal personality, it would be illogical to refuse such an Association the right to bring an action. It was therefore appropriate to give a broad interpretation of the concept "legal person" within the meaning of Article 173(2) of the EEC Treaty¹⁶⁷.

Advocate-General Rozès noted with regard to Trade Associations that it was not formal legal personality that mattered but whether the Association in question was recognised by the law and given certain powers to fulfil the duties given to it. In this respect she noted that the Anti-dumping Regulation endowed Associations with procedural powers. She proceeded to hold that Associations:-

while not possessing legal personality, operate in the context of one economic sector of the Community; it must therefore be concluded that such associations do have the capacity to institute proceedings in order to protect such procedural interests¹⁶⁸.

167 Case 191/81, supra at 2918.

168 ibid. at 2940.

The Court agreed with the Advocate-General. It held that Associations have "a right of action within the framework of the legal status which the Regulation confers on them"¹⁶⁹.

Under Regulation 288/82 the interests of Trade Associations could only be protected by means of intervention before the Court. This will only come about when the Trade Association can show to the satisfaction of the Court that it has an interest in the result of the case. The right of intervention is discussed below in relation to the position of users and processors.

1.6. Users and Processors

Users and processors who are neither importers nor complainants are unlikely to have locus standi. In most instances their interests can only be protected by intervention in proceedings before the Court.

The rules governing intervention in the Court are laid down in the Court's statute. Article 37 states that:

Member States and institutions of the Community may intervene in cases before the Court.

The same right shall be open to any other person establishing an interest in the result of any case submitted to the Court, save in cases between Member States, between institutions of the Community or between Member States and institutions of the Community.

Submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties¹⁷⁰.

¹⁶⁹ ibid. at 2936, paragraph 31 of judgment.

¹⁷⁰ Protocol on Statute of Court of Justice of the EEC. See also Rules of the Single Court of the Three Communities, OJ 1974 L350/1; as Temple Lang op.cit. states 'submissions should be seen more as conclusions rather than arguments'. See also Rule 93 Rules of Procedure of the Court.

The right of an entity other than a Member State or a Community institution to intervene depends upon that entity being able to establish that it comes within the term "any other person" and it has established an interest in the result of proceedings before the Court.

The case-law of the Court to date tends to suggest that these questions are treated quite liberally. For example, in Chris International Foods the Court was prepared to allow several non-Member States, namely Granada, Dominica, St. Lucia and St. Vincent to intervene. It also allowed the Banana Growers Association to intervene¹⁷¹.

It is difficult to gauge why an intervention is justified due to the fact that the Court's reasons for allowing an intervention are very short. It is, suffice to say, that intervention will usually be permitted where the intervener can show that they have an economic interest in the outcome of the case.

1.7. Non-Member States

As stated above, Member States of the Community have by virtue of Article 173(1) locus standi to challenge any binding legal act whatever its form. The position of a non-Member State vis-à-vis its right to challenge safeguard measures may in some situations be of the utmost importance and in particular in relation to illicit commercial practices and anti-subsidy actions. Non-Member States are specifically referred to in Article 7(1) of Regulation 2423/88 and Article 6(1) of Regulation 2641/84.

171 Joined Cases 91 & 200/82 [1983] ECR 417.

Circumstances may arise where an exporter cannot challenge an act imposing safeguard measures and for this reason it may be important that non-Member States should have the right to intervene on their behalf. As stated above the Court considered the question of the right of non-Member States to intervene in the Chris International Foods case¹⁷². In that case the Court held that non-Member States had a right to intervene. The non-Member States put forward three reasons why they considered they had sufficient interest for intervention¹⁷³. They contended that they were entitled to preferential treatment for their bananas in part of the Community market; they were dependent on bananas for their export earnings and if the application by Chris International Foods succeeded the rights of non-Member States concerned under the Fourth Protocol of the Lomé II Convention would be seriously affected.

The Court held in the light of these arguments that Granada, Dominica, St. Lucia and St. Vincent had shown sufficient interest in the outcome of the case before it¹⁷⁴. In doing so the Court had by implication held that non-Member States constituted "any other person" for the purposes of Article 37 of the Statute of the Court.

Apart from having a right to intervene a more important question is whether it is possible for a non-Member State to be directly and individually concerned by an act imposing safeguard measures¹⁷⁵. Naturally, direct and individual concern relates to something more than "interest" in the context of a right to intervene under Article 37 of the Statute of the Court. It may be that a non-Member State

172 ibid.

173 ibid. at 418-9.

174 ibid. at 419.

175 In some cases involving state trading countries the trader is the state - Raznoimport cases, e.g. Case 120/83R Raznoimport v. Commission [1983] ECR 2573.

which is operating a subsidy or illicit commercial practice is directly and individually concerned by a Community measure designed to counteract such practices. It is perfectly feasible for non-Member States to put forward the arguments detailed in the Chris International Foods case in order to show that they have locus standi under Article 173.

It is unlikely that a non-Member State would have standing under Regulation 288/82 on the ground that it is not a material factor where the product originates. What is important is that the product is being imported into the Community in substantial quantities which are causing serious injury to Community producers and that it is in the interest of the Community to take action. Only in a situation where it specifically relates to a product from the non-Member State in question and only when other factors are in existence could the non-Member State have locus standi.

1.8. Refusal to Accept an Undertaking

As discussed earlier, the Commission has the power under Regulation 2423/88 to accept an undertaking. Its reasons for doing so will be practical and non-legal. Likewise, it will have similar reasons for refusing to accept an undertaking. The Court in a number of the Photocopier cases¹⁷⁶ has discussed the question of whether the rejection of an undertaking constituted a measure having binding legal effects so that it could be challenged before the Court. The Council in its observations argued that a decision by the Commission to refuse an undertaking was merely a stage in the process leading to a further decision and therefore could not be challenged in a separate action. Advocate-General Mischo was of the opinion that

176 See Joined cases 133/87 & 150/87 Nashua Corporation v. Commission and Council, supra; Case 156/87 Gestetner Holdings plc v. Commission and Council, supra.

such a refusal of itself could not be regarded as an act liable to affect an applicant's interests. This could only occur when the Council imposed a definitive duty¹⁷⁷.

The Court agreed with the Advocate-General. It held that the refusal by the Commission of a proposed undertaking could not be considered as a measure having binding legal effects of such a kind as to affect the interests of the applicant as the Commission may revoke its decision or the Council may decide not to impose a duty. Such a rejection is an intermediate measure and is not one capable of being challenged¹⁷⁸. It was clear, held the Court, that as a result of the decisions in the Mini Ballbearing cases¹⁷⁹ it was by challenging the Regulation introducing definitive duties that traders could raise an irregularity associated with the rejection of their proposed undertakings¹⁸⁰.

Locus standi to challenge a decision rejecting an exporter's exemption from a duty or the refusal to accept an undertaking will only be conferred on an exporter if that exporter initiates proceedings to challenge the Regulation imposing the definitive duties.

177 See Advocate-General's opinion in Joined cases 133/87 & 150/87, ibid. at 17.

178 Joined cases 133/87 & 150/87 Nashua Corporation v. Commission and Council supra at paragraphs 9-10 of judgment; Case 156/87 Gestetner Holdings plc. v. Commission and Council supra, at paragraphs 8-9 of judgment.

179 Cases 240/84 NTN Toyo Bearing Co. Ltd. v. Council [1987] ECR 1809, 255/84 Nachi Fujikoshi Corporation v. Council [1987] ECR 1861 and 256/84 Koyo Seiko Co. Ltd. v. Council [1987] ECR 1899, infra.

180 Joined cases 133/87 & 150/87 Nashua Corporation v. Commission and Council supra at paragraph 10 of judgment and Case 156/87 Gestetner Holdings plc. v. Commission and Council supra, at paragraph 8 of judgment.

2. ACTION FOR FAILURE TO ACT : ARTICLE 175

Article 175 allows an interested party to call on the Community institutions to act where they have failed to do so. In actual fact the only interested party that would have a right to raise an action under Article 175 is a complainant. This right will only arise where the institution in question has a duty to adopt an act addressed to the complainant. Inevitably, a complainant's right to raise an action under Article 175 will depend on the procedural rights it has under the Regulation in question.

2.1. Regulation 2423/88

There are at least three occasions in theory when a complainant would consider raising an action under Article 175.

First, a complainant could arguably raise an action when the Commission decides if the complaint in question provides sufficient evidence to justify initiating an investigation. This decision, however, is directed not at the complainant but rather at exporters or foreign governments who are the subject of the complaint. For this reason it does not constitute an act other than a recommendation or opinion and in any case it is not addressed to the complainant.

Second, despite the request in the complaint the Commission fails to communicate a decision to the complainant that it has decided not to initiate anti-dumping or anti-subsidy proceedings. As the applicants argued in Fediol¹⁸¹ they would have raised an action under Article 175 for failure to act if such a decision had not been communicated to them. By either issuing a decision to refuse to

181 Case 191/82 supra at 2923.

initiate proceedings or a decision to initiate them, the interests of the complainant and as such its legal rights are affected in a fundamental way. Without the communication of a formal decision addressed to the complainant, it is barred from exercising its procedural rights under Article 7 of Regulation 2423/88 during the investigation. The Court concluded in Fediol that complainants have a legitimate interest in having safeguard measures adopted and as a result they have to be granted the right to challenge a decision of the Commission to initiate or refuse to initiate an investigation¹⁸².

Lastly, a complainant could arguably raise an action where a decision has been taken by the Commission to terminate the procedure. This decision constitutes an act other than a recommendation or opinion which has to be addressed to all parties known to be concerned. This would include complainants. Failure to do so would mean that they could raise an action under Article 175. As stated above Article 175(3) has to be interpreted to allow any natural or legal person to raise any action against the Commission or Council for failure to perform an act that is of direct and individual concern to it.

To conclude, it is submitted that it is possible in two cases for a complainant to raise an action under Article 175. It can force the Commission to address to it the decision not to open formal anti-dumping or anti-subsidy investigations and second it can demand the Commission to notify it of the termination of anti-dumping and anti-subsidy proceedings.

182 ibid.

2.2. Regulation 288/82

From what has been said in connection with proceedings under Article 173, natural or legal persons as such do not enjoy judicial protection under Regulation 288/82. It is therefore inconceivable that they should derive any right from Article 175.

2.3. Regulation 2641/84

Because Regulation 2641/84, and in particular the provisions relating to procedure, are based largely on Anti-Dumping Rules similar conclusions can be reached with regard to a complainant's standing to challenge under Article 175.

**3. PLEA OF ILLEGALITY :
ARTICLE 184**

As stated above, Article 184 is a shield and not a sword in that it is an ancillary action to other proceedings - normally an action for annulment under Article 173. In order that the plea can be considered, a party will have to show that it has the locus standi to challenge the act imposing the safeguard measures.

Article 184 is aimed at the parent Regulation upon which the act imposing safeguard measures is based. It should be emphasised that a plea of illegality is the only means by which an applicant can challenge these measures as they are true Regulations. They are measures of general application and immune from challenge under Article 173 by natural or legal process. To date there have been no proceedings which have attempted to challenge any of the parent Regulations governing the imposition of safeguard measures.

This state of affairs may change with the adoption of the recent anti-dumping law relating to the dumping of components. The Japanese have intimated that they considered this new Regulation to be illegal in the light of the GATT Rules. As discussed earlier,

the GATT panel set up to consider this law have ruled that it is contrary to the GATT principles. It will be interesting to see the Court's reaction if it is called upon to rule on the legality of that provision.

It is perfectly feasible for an exporter to challenge duties adopted under this parent Regulation in order that they may challenge the validity of the Regulation itself. The effect of a successful application under Article 184 is to have the Regulation in question declared inapplicable in the particular case. The net practical result is that the Community institutions would be forced into amending the legislation.

By raising a plea of illegality, the Court would be forced into considering the direct effect of the provisions of the GATT Code. As regards locus standi, an interested party who has standing to challenge the measures adopted under the parent Regulation will also have standing to challenge the parent Regulation itself. However, if that party's application is declared inadmissible, by its nature, the plea of illegality of the parent Regulation will also fail.

4 . PRELIMINARY RULING ON VALIDITY : ARTICLE 177(1)(b)

It is possible to challenge the validity of safeguard measures indirectly in the national courts under Article 177(1)(b) of the EEC Treaty. In the usual situation, an importer may decide to raise proceedings in the national courts following the collection of anti-dumping duties or countervailing duties by the Customs authorities. Such a duty is normally paid by the importer residing within the Community.

The effect of a ruling on the validity of a measure by the Court under Article 177(1)(b) is to have a measure declared inapplicable in the particular case. However, as a result of the case-law of the Court and in particular its ruling in the ICC case discussed

above¹⁸³, the effect of a ruling under Article 177(1)(b) has the same practical result as the annulment of a measure under Article 173. This method of challenging safeguard measures is less satisfactory than bringing a direct action under Article 173.

In the first place and most importantly, the proceedings are raised against the Customs authorities and not against the proper defendants, the Council and the Commission. Inevitably, this will have serious repercussions with respect to the discovery of documents. Secondly, not all national courts are under an obligation to make an Article 177 reference. Those that are, namely courts from which there is no judicial remedy, do not have to refer if the national court feels that a ruling on the validity of the measure is not necessary in order to decide the case. Furthermore, proceedings in the national court will undoubtedly take a substantial amount of time and expense to follow through.

References under Article 177 are aimed primarily at ensuring that Community law is applied in a uniform manner throughout the Member States. Where a Member State decides the case without referring a question to the Court, the decision will inevitably be less predictable than if a reference had been made. This is due mainly to the fact that the national court will be less familiar with Community law than the Court. The finding by the national court is binding only in that Member State and not in any other. The Court has also recently held that only it can declare a Community measure invalid¹⁸⁴.

Unlike proceedings under Article 173 where a number of interested parties may have standing to challenge safeguard measures, Article

183 See footnote 99 supra.

184 Case 314/85 Firma Foto-Frost v. Hauptzollamt Lübeck-Ost [1988] ECR 4199.

177(1)(b) would in practice really only allow importers the right to raise proceedings since it is from importers that the Customs authorities collect the duties. As the Commission noted in the First Allied case¹⁸⁵ it is impossible for exporters themselves to contest the imposition of anti-dumping duties in the national courts. At the very most, they can intervene alongside importers. It is therefore in their interests to be able to raise an action directly before the Court in order to protect their interests. As stated above, the Court rules on the validity of the Community measure, but it is outwith the ambit of the Court to apply it to the facts or for that matter to make findings of fact. In practical terms, however, the Court's ruling will very often be worded in such a manner that it can be easily applied by the national courts.

5. ACTION FOR DAMAGES : ARTICLE 215(2)

In theory it is possible for an undertaking to bring an action for damages under Article 215(2) before the Court where it can be established that the Community authorities have acted unlawfully in adopting the measure in question. It may only be in limited circumstances that an applicant would consider this course of action. In such circumstances the proper Court would be the national court¹⁸⁶.

The preconditions of an action for damages are difficult to establish, in that the applicant would have to show that the institutions have acted in a reckless manner in adopting the disputed measures. More importantly in practical terms, duties are refunded when the Regulation imposing them has been annulled.

185 Case 275/82, supra.

186 Case 26/74 Roquette Frères v. Commission [1976] ECR 677.

What is uncertain, however, is whether an applicant could successfully bring an Article 215(2) action to recover the interest paid on these duties. This has yet to be resolved by the Court. It would probably be the case that the Court would decline jurisdiction on the basis that the duties were collected by the Customs authorities.

Claims for compensation for damages has been raised only twice to date in the proceedings involving safeguard measures. In Nippon Seiko KK v. Council¹⁸⁷ claims were made by NSK-UK, NSK Germany and NSK-France. The claims were divided into four categories:-

- (a) Damages equal to the amount of the provisional duty actually paid to the Customs authorities on importations effected before it was possible to arrange a bank guarantee. The amounts paid in each country were specified.
- (b) Damages equal to the interest on the money which applicants had been deprived of as result of making these payments.
- (c) Damages equal to cost of the bank guarantees.
- (d) Damages equal to loss of profits resulting from the applicants having to raise their prices for bearings manufactured by NSK-UK.

The Court did not address the question of damages. Advocate-General Warner did¹⁸⁸. He held that the claims under category (a) were inadmissible. It was well established that an action for damages did not lie against a Community institution where the claim was for the restitution of specific sums paid to national authorities. The proper court in which to raise the action was the national court¹⁸⁹. Likewise, he held the claim under category (b) was

187 Case 119/77 [1979] ECR 1303.

188 ibid. at 1272.

189 See case 96/71 Haegeman v. Commission [1972] ECR 1005.

inadmissible for the same reasons. With respect to categories (c) and (d) the Advocate-General was of the opinion that these claims were properly brought before the Court. He considered, however, that the claims did not appear to rest on any general principle of a kind mentioned in Article 215(2). He therefore rejected the applicants' submissions.

In the First Allied case¹⁹⁰ the applicants sought to claim damages under Article 215(2). They contended that there had been a breach of a superior rule for the protection of the individual without specifying which rule. As a result they argued substantial loss of profits were incurred. The Court again did not address the matter. Advocate-General VerLoren van Theemat held that as the measure imposing provisional duties was not unlawful the application for damages must also be dismissed. He considered that it was impossible for a claim to succeed where loss was sustained as a result of a lawfully adopted measure¹⁹¹.

CONCLUSION

The system of judicial remedies in the European Communities, and Article 173 in particular, provide the Court with the power to review the legality of acts of the institutions. The right of an individual to challenge acts of the institutions and, in particular, acts of general application depends largely on whether they have the necessary locus standi to do so.

As discussed above in the first part of the chapter, the preconditions laid down by Article 173(2) are very restrictive. Generally speaking, the Court has not in its jurisprudence adopted a

190 Joined cases 239 & 275/82 [1984] ECR 1005.

191 ibid. at 1048-9.

liberal interpretation of Article 173(2) and in particular with respect to the concepts of "direct and individual" concern. It is submitted that probably the most compelling reason for the Court's attitude is that it regards itself more as an Appellate Court rather than a Court of First Instance. This argument has gained more weight with the creation of a Court of First Instance.

The Court's attitude to an individual's right to challenge safeguard measures is much more liberal. The major reason for this difference in attitude is that a restrictive interpretation would result in virtually all interested parties being unable to challenge the legality of safeguard measures imposed. Generally speaking, where appropriate, exporters, or producers, associated importers, and in limited circumstances OEMs will have standing to challenge safeguard measures. The test to be applied by the Court is whether the economic agent in question is concerned by the findings relating to the existence of dumping complained of. This situation will arise where the economic agent in question can establish that it is identified in the measures adopted or that it is concerned to a significant degree by the preliminary investigations. If this is the case it will have the necessary locus standi to challenge the measure in question.

The Court has extended further the concept of locus standi in relation to safeguard measures. In a number of decisions it was prepared to confer on other interested parties, and complainants in particular, locus standi to challenge the measure in question because they had certain procedural rights under the legislation governing the imposition of the protective measures which had been applied, notwithstanding the fact that those parties would not otherwise have had such locus standi.

Independent importers as a general rule will not have standing to challenge the measure in question, as they will neither be identified in the measure or have specific findings made about them. They will however, be able to challenge the definitive collection of

provisional anti-dumping and countervailing duties. Furthermore, they will have standing to challenge quantitative restrictions where they can establish that they had entered into binding contracts prior to the imposition of the duties.

The Commission and Council have now recognised the fact that private parties should have locus standi to challenge safeguard measures. The major alternative to Article 173 actions is for a natural or legal person to go to his national court in the hope that it will make a reference to the Court for a preliminary ruling on validity under Article 177(1)(b). As discussed above, such an action does not offer the same advantages as direct action before the Court.

CHAPTER 5

THE AWARD OF INTERIM MEASURES
IN CASES INVOLVING
SAFEGUARD MEASURES

INTRODUCTION

By virtue of Article 185 of the EEC Treaty, actions brought before the Court do not have suspensory effect. The Court may if the circumstances so require order that the application of the contested act be suspended. Under Article 186 of EEC Treaty, it may prescribe any necessary interim measures¹.

Generally speaking the cases concerning interim measures are decided by the President of the Court. It is possible, however, for the full Court to decide the question of interim measures following an opinion of the Advocate-General². In the majority of cases an order will be made within one month from the application.

By virtue of Articles 36 of the Statute of the Court and 83 to 89 of the Rules of Procedure, certain conditions have to be fulfilled in an action for interim measures. First, there must be a main procedure before the Court in the context in which an application for interim measures is made³. Article 83(1)(2) of the Rules of Procedure further provides that an application under Article 186 for the

1 See Article 39 ECSC Treaty; Articles 157 and 158 Euratom Treaty.

2 e.g. Case 18/57 Nold v. High Authority [1959] ECR 41; Case 792/79R Camera Care Ltd. v. Commission [1980] ECR 119.

3 Article 83(1) Rules of Procedure.

adoption of interim measures is admissible only if it is made by a party to a case before the Court and relates to that case. In Nashua Corporation v. Commission⁴ the applicant sought suspension of the effects of Council Regulation 535/87 imposing definitive duties. The Commission, the sole defendant, argued that the application for interim measures was inadmissible on the ground that the Council was not a party to the action. It took the view that the application could not be admissible merely because, as the applicant claimed, the Council Regulation imposing definitive duties was the direct consequence of the Commission's decision rejecting the undertaking offered by Nashua. The Court held that:

In this case the decision under challenge in the main proceedings was adopted by the Commission, whereas the Regulation establishing definitive anti-dumping duties, the operation of which the applicant wishes to have suspended by way of an interim measure, is the act of the Council. It follows that the Judge hearing the interlocutory proceedings is not empowered to allow such an application for an interim measure, since to do so would have the effect of suspending an act of a legislative nature, emanating from an institution which is not party to the proceedings⁵.

Second, a prima facie case on the factual and legal grounds has to be established and further an award of interim measures must be a matter of urgency⁶. It follows from a consistent line of decisions of the Court that the urgency required by Article 83(2) of the Rules of Procedure, in regard to an application for interim measures, must be considered in relation to the need to adopt such measures in order to prevent "serious and irreparable" damage from being caused to the

4 Case 133/87R [1987] ECR 2883 at 2886, paragraph 6 of Order.

5 ibid. at 2887, paragraph 8 of the Order.

6 Article 83(2) Rules of Procedure.

party requesting those measures. Third, the interim measures must be provisional⁷. Four, they must not prejudice the decision of the Court on the substance of the main application⁸ and finally, no appeal is possible⁹.

The purpose of interim measures is to preserve the status quo pending a decision on the substance of the case. The Court has consistently held that interim measures may only be granted if they do not prejudice the decision on the substance of the case¹⁰. In the Arbed case the Court explained the objects and limits of interim measures. The Court held that if:

their adoption is prima facie justified in fact and law, if they are urgent in the sense that it is necessary, in order to avoid serious and irreparable damage, that they should be laid down, and should take effect, before the decision of the Court on the substance of the action and if they are provisional in the sense that they do not prejudice the decision on the substance of the case, that is to say that they do not at this stage decide disputed points of law or of fact or neutralise in advance the consequences of a decision to be given subsequently on the substance of the action¹¹.

7 Article 86(3), (4) Rules of Procedure.

8 Article 86(4) Rules of Procedure.

9 Article 86(1) Rules of Procedure.

10 Cases 60 and 190/81R, IBM v. Commission [1981] ECR 1857 at 1862.

11 Case 20/81R [1981] ECR 721 at 731, paragraph 13 of Order.

There have been recently a number of applications for interim orders for the recovery of documents and measures of inquiry¹². Although the Court admitted the applications, it concluded that the applicants had not shown "serious and irreparable" damage and further it held that:

in the absence of exceptional circumstances which must be proved and which do not exist in this case, an application for the adoption of interim measures is not in principle an appropriate procedure for obtaining the production of documents of the kind applied for in this case. Such a measure is similar to a measure of inquiry of the kind which the Court may order under Article 21 of the Statute of the Court of Justice in the context of the procedure dealing with the substance of the case¹³.

1. INTERIM MEASURES AND ANTI-DUMPING ACTIONS

Article 83(2) of the Court's Rules of Procedure provides the conditions governing the award of interim measures. First, there must be a prima facie case. Second, there must be urgency in the sense that the measures are necessary in order to avoid "serious and irreparable" harm before the decision of the Court on the main case. The concept of "serious and irreparable" damage has been further defined by the Court. In Technointorg v. Council¹⁴ it held that in establishing serious and irreparable damage a party must at least adduce evidence showing that the damage suffered by the applicant as a result of the imposition of the anti-dumping duty is special to it¹⁵; and the balance of interests at stake

12 Cases 121/86R Anonimos Eteria Epichiriseon Metalleftikon Viomichanikon Kai Naftiliakon A.E. & ors. v. Council & Commission [1986] ECR 2063; Case 129/86 Hellenic Republic v. Council & Commission [1986] ECR 2071.

13 Case 129/86 ibid. at 2076, paragraph 17 of Order.

14 Case 77/87R [1987] ECR 1793 at 1799, paragraph 17 of Order.

15 See in particular, Case 258/84R, Nippon Seiko v. Council [1984] ECR 4357.

points in its favour in the sense that the grant of the interim measures requested would not cause appreciable injury to the Community industry¹⁶."

These criteria are normally referred to by the Court in cases which involve measures of general application. For this reason it is important in any analysis of interim measures where safeguard measures are concerned.

The Court will usually first consider whether the applicant has established a prima facie case before considering the question of urgency. For example in TEC Co. Ltd. v. Council the Court, having determined that no prima facie case existed, did not discuss whether the other conditions had been fulfilled¹⁷. However, in some cases the Court has declared that as the applicants had not succeeded in proving urgency, it was not necessary to consider whether the factual and legal grounds advanced by them established a prima facie case¹⁸.

1.1. Prima Facie Case

As stated above, the adoption of interim measures cannot be considered by the Court unless the factual and legal circumstances relied upon establish a prima facie case for granting interim

16 See Case 250/85R Brother Industries Ltd. v. Council & Commission [1985] ECR 3459; Case 260/85R TEC v. Council & Commission [1985] ECR 3467; Case 273/85R Silver Seiko Ltd. v. Council & Commission [1985] ECR 3475; Joined Cases 277 and 300/85R Canon Inc. v. Council & Commission [1985] ECR 3491; Case 297/85R Towa Sankiden Corpn. v. Council & Commission [1985] ECR 3483.

17 Case 260/85R TEC v. Council and Commission ibid.

18 See Case 121/86R supra.

measures. In some orders this criterion is not mentioned at all and in others in only a vague way. This seems to be the position in the cases in which interim measures have been sought where anti-dumping regulations are in issue¹⁹. The overriding principle for the Court seems to be that the applicant must satisfy it that there is a serious question to be tried²⁰.

With respect to cases involving safeguard measures, the Court is willing to accept as a minimum requirement that the applicant shows to its satisfaction that there are sufficiently serious doubts about the legality of the challenged measures. In Raznoimport v. Commission²¹ the Court was of the view that the applicant had established a prima facie case. It expressed serious doubts about the way in which the Commission adopted a constructed value as a basis of reference when prices were apparently determined by market mechanisms and secondly, in calculating the constructed value on the basis of production costs in a non-member country²². It also raised doubts in respect of the circumstances in which the Commission fixed the rate of provisional duty at 7 per cent²³.

In the majority of cases the applicant will use the same arguments for the application of interim measures as for the main case, in order to establish to the Court's satisfaction that the case is well founded. In Nippon Seiko v. Commission the Court noted that, as

19 See for example Case 304/86R Enital S.p.A. v. Council and Commission [1987] ECR 267.

20 In Case 792/79R Camera Care Limited v. Commission supra, Advocate-General Warner pointed to the fact that the applicant must have "at least an arguable case, in the main proceedings".

21 Case 120/83R [1983] ECR 2573.

22 ibid. at 2578-9.

23 ibid. at 2579.

regards the factors establishing a prima facie case, the applicant expressly referred to its main application which set out the numerous grounds of annulment²⁴.

The case of TEC Co. Ltd. v. Council²⁵ is an example of a decision where the Court decided a prima facie case had not been established. In its submission the applicant alleged that it was discriminated against, as compared with Nakajima All, which was the only Japanese producer of electronic typewriters on whom no provisional or definitive anti-dumping duty was imposed. Before the hearing the Commission did in fact impose a provisional duty on the imports of electronic typewriters manufactured by Nakajima All. It was held by the Court that the imposition of this duty, although only provisional, would have substantially the same economic effect as a definitive duty. For this reason it concluded that there was no longer any difference in treatment between TEC and Nakajima All at the date of the order. This argument had no longer any purpose and therefore the applicant had not established a prima facie case for interim measures.

1.2. Urgency

Once an applicant has established a prima facie case, the Court must also assess the urgency of the interim measures. In particular, the applicant must satisfy the Court that the interim measures requested are necessary for the purposes of avoiding "serious and irreparable" damage to itself. This is a question of fact to be decided in every case. It must be shown to the satisfaction of the Court that the damage suffered by the applicant is special to it²⁶. Furthermore, the applicant must adduce

24 Case 258/84R supra.

25 Case 260/85R supra.

26 Case 258/84R Nippon Seiko v. Council supra at 4362; Case 77/87R Technointorg v. Council supra at 1973.

evidence that the balance of the interests at stake weighs in its favour, in the sense that the grant of the interim measures requested would not cause appreciable injury to the Community industry²⁷.

1.2.1. The Damage Suffered must be Special to the Applicant

In analysing this criterion, a distinction has to be drawn between interim measures aimed at suspending provisional anti-dumping duties; suspending definitive anti-dumping duties; and suspending the definitive collection of provisional anti-dumping duties.

1.2.1.1. Provisional Duties

In Raznoimport v. Commission²⁸ the applicant sought the suspension of an anti-dumping Regulation imposing a provisional duty. It contended that the damage to it consisted of the risk that the patterns of trade established by it may be disrupted as a result of the obligation during the validity of the provisional duty to provide security at the time of entry of the imported nickel.

The problem facing Raznoimport was that the duty was only provisional. It did not need to be paid until it was made definitive. All that required to be done was to provide security which would be reimbursed if the applicant was successful in the main application. In considering whether the damage suffered by the applicant was special to it, the Court pointed to the fact that it must have regard to the specific features of the procedure in question. It held that:

It must be emphasised that, under the procedure established by Regulation (EEC) No. 3017/79, the Council will shortly have to decide both whether to impose a definitive duty and whether to collect definitively the provisional duty.

27 e.g. Case 250/85R Brother Industries v. Council supra.

28 Case 120/83R supra.

Although that does not in itself exclude the possibility of suspending the operation of the contested measures, the Court must, however, in proceedings for the adoption of interim measures, take account of the specific features of the procedure in question and of the powers which the Council will have to exercise within the prescribed period, after it has been given full information, in particular in the light of what has emerged during these proceedings for the adoption of interim measures²⁹.

Because it was a provisional duty, the Court ruled that the Commission was under an obligation not only to continue its investigation but to monitor from day to day any change in prices on the market of the product which was subject to the provisional duty, in order to determine whether it was necessary to maintain that duty or the rate thereof. The Court noted that:-

in view of the characteristic features of the market of the product in question, the risk of any lasting disruption of the patterns of trade as a result of the maintenance of the provisional duty is small. It has not been established that the applicant will be unable to avoid such damage by adopting measures consistent with the obligation to cooperate which is incumbent upon it in order to mitigate the alleged damage³⁰.

The Court concluded by stating that the damage facing the applicant was limited to the burden constituted by the provision of security for the payment of provisional duties. This cost was estimated at 1-2 per cent of the amount of the provisional duty. The Court in this respect held that this:

disadvantage cannot constitute serious and irreparable damage such as would permit the suspension of a decision adopted in the context of a complex economic situation. Any damage which may occur can, if appropriate, be made good in the context of the action for compensation brought by the applicant³¹.

29 ibid. at 2579, paragraph 12 of Order.

30 ibid. at 2580, paragraph 14 of Order.

31 ibid., paragraph 15 of Order.

In essence, the damage which the applicant claimed to have suffered is of a kind which may generally occur whenever a provisional duty is imposed.

The Court was again faced with an application in Technointorg v. Commission for the suspension of a Regulation imposing provisional anti-dumping duties³². It began by stating that, as the contested Regulation in the main action was itself a provisional measure forming part of the procedure laid down by Regulation 2176/84, the application for interim measures must be examined in the light of the procedure laid down in that Regulation³³. The Court then proceeded to examine Articles 11 and 12 of the aforesaid Regulation which governed the imposition of provisional duties³⁴ and held that:

The procedure laid down by the Regulation therefore implies that the Council will shortly have to decide both whether a definitive duty is to be imposed and whether the provisional duty is to be definitively collected. It must therefore be stated that to grant the applicant's request that the payment of the provisional duty should be suspended until the Court has given judgment on the main application, on condition that it provides a guarantee equivalent to the amount of the duty, would be tantamount to depriving the Council of the power conferred upon it by the aforesaid Article 12 to decide whether the provisional duty should be definitively collected and to depriving that decision of any practical effect³⁵.

The Court came to the view that the damage suffered by the applicant was limited to the cost of providing a guarantee for a period of four months. It held that this could not constitute serious and

32 Case 294/86R [1986] ECR 3979.

33 ibid. at 3986, paragraph 21 of Order.

34 See Chapter 3, Section 7.3.3. of anti-dumping rules, supra.

35 Case 294/86R supra at 3987, paragraph 25 of Order.

irreparable damage. In this respect it referred to its decision in Raznoimport.

In Enital v. Council and Commission the Commission imposed provisional anti-dumping duties following a review by it of the price undertakings. The applicant sought to have the effect of this Regulation suspended. It claimed inter alia that the Community institutions' decision to fix the date of entry for the coming into force of the contested measures at their date of publication amounted in fact to giving them retroactive effect, and that it caused them serious and irreparable damage because it had already determined its commercial policy on the basis of price undertakings already accepted³⁶. The Court held that, by virtue of Article 191, the Treaty permitted the institutions adopting the Regulation to lay down therein the date on which it was to enter into force³⁷. The Court further held:

That provisional anti-dumping duties should enter into force immediately would appear to follow from the provisional and protective nature of such duties which, in the terms of Article 11 of Council Regulation No. 2176/84, are imposed in order to prevent injury being caused to the Community during the anti-dumping proceeding. It does not appear likely to cause serious and irreparable damage to the applicant³⁸.

The applicant had therefore failed to show to the satisfaction of the Court that it would suffer serious and irreparable damage.

It is submitted that, having regard to recent case-law of the Court, if the application for interim measures involves the suspension of a Regulation imposing provisional duties, the Court is unlikely to grant them. This is even more so the case where the damage allegedly suffered by the applicant is limited to the cost of

36 Case 304/86R supra, at 271, paragraph 14 of Order.

37 ibid. at 272, paragraph 16 of Order.

38 ibid. at 272-3, paragraph 16 of Order.

providing a guarantee or security for the duration of the validity of the provisional duties.

1.2.1.2. Definitive Duties

In Nippon Seiko v. Council³⁹ the applicants sought to have a Regulation imposing definitive anti-dumping duties suspended until the main application was heard with the result that only a security for later payment would be required.

The applicant contended that it was suffering serious and irreparable damage on the ground that it was losing substantial sums by way of interest on the duty. This interest could not be recouped on the grounds that there was no specific Community legislation providing for the payment of interest on the repayment of anti-dumping duties⁴⁰. The Council on the other hand argued that this damage could not be regarded as serious. The effect of a definitive anti-dumping duty was to bring about an increase in prices. This would not occur if the definitive duties were suspended. The Court concluded that the Council and the Commission had demonstrated that the:

adoption of the interim measures applied for would cause substantial harm to the European Economic Community, in that merely to require the lodging of a security as proposed by the applicant would have considerably less protective effect than the levying of the anti-dumping duty itself. Such a

39 Case 258/84R supra.

40 It has been suggested that Court might have the power under Article 176 or Article 215(2) to order the payment of interest when duties under a Regulation which has been annulled are refunded. If this is the case then an important argument for the suspension of duties is deprived of its basis. See Temple Lang "Judicial Review of Trade Safeguard Measures in the European Community" in (ed.) B. Hawk 'Antitrust and Trade Policy in the United States and the European Community', Fordham University School of Law at 669.

step would not take the interests of the Community's own industry sufficiently into account and would be apt to frustrate the purpose of the Regulation itself. Furthermore the damage allegedly suffered by the applicant is not special to it but, on the contrary, is likely to arise in every case where anti-dumping duties are imposed. There is therefore no special feature of this case which would justify the interim measures requested⁴¹.

In the Electronic Typewriter Cases⁴² the Court noted that the parties had taken opposing views and submitted different figures on the level of prices and market shares of the European industry and its Japanese competitors. It held that:

In interim proceedings it is impossible for the President of the Court, without prejudging the substance of the case, to accept figures submitted by one party in preference to those submitted by the other, unless, as is not the case here, there are other factors weighing in favour of one party's view⁴³.

The Court also noted that it had a similar dilemma when determining whether the export price and normal value were compared at the same level of trade. In these circumstances and on the basis of the principle that, in case of doubt an applicant must prove that his allegations are well founded, the Court concluded that they had not adduced sufficient evidence establishing that they would suffer serious and irreparable damage.

In Technointorg v. Council⁴⁴ the applicant sought to have the definitive duties suspended pending the Court's judgment in the main proceedings, on condition that it continued to provide security for

41 Case 258/84R supra at 4361-2, paragraphs 19-20 of Order.

42 supra, footnote 16.

43 e.g. Case 273/85R Silver Seiko Ltd. v. Council & Commission [1985] ECR 3475 at paragraph 17 of Order.

44 Case 77/87R [1987] ECR 1793.

the performance of its obligation in the amount it was required to pay under Council Regulation 29/87.

As stated above, the applicant had already sought to have the provisional anti-dumping duties suspended on condition that it provided a security. The Court dismissed that application on two grounds. First, to grant the applicant's request to suspend the provisional duties until the main application had been determined would have been tantamount to depriving the Council of the power conferred on it by Article 12 of Regulation 2176/84. Second, the President also came to the conclusion that the damage suffered by the applicant was limited to the cost of providing security for a period of four months, and that such a disadvantage could not constitute serious and irreparable damage to it⁴⁵. In the present case the applicant, in demonstrating the urgency of the application, sought to describe the effects which were inherent in the imposition of anti-dumping duties, namely a rise in the price of its products and a diminution of its market share.

The Court concluded that the applicant had not shown that the damage suffered by it as a result of the imposition of the anti-dumping duty was special to it. It held that:

It is in the very nature of anti-dumping duties that they should result in an increase in the price of the product in question because their purpose is to counterbalance the dumping margin which has been established and to protect the Community industry against the injury caused by dumping⁴⁶.

The Court concluded by stating that:

The damage which [the applicant] claims to suffer is of a kind which may generally occur whenever a definitive anti-dumping duty is imposed⁴⁷.

45 Case 294/86R Technointorg v. Commission [1986] ECR 3979.

46 Case 77/87R supra at 1799 at paragraph 16 of Order.

47 ibid. at 1800 paragraph 19 of Order.

It is submitted that definitive anti-dumping duties are unlikely to be suspended by the Court as an interim measure, even if future payment in the shape of bank guarantees are offered, given the recent pronouncements of the Court.

1.2.1.3. Definitive Collection of Provisional Duties

In the very first dumping case to come before the Court, a number of Japanese manufacturers of ballbearings lodged applications to have Article 3 of Council Regulation 1778/77, ordering the definitive collection of provisional duties, suspended⁴⁸.

In NTN Toyo Bearing Co. Ltd. v. Council the applicants were prepared to maintain bank guarantees in force and for this reason did not see why it was necessary to insist on the immediate implementation of Article 3 of Regulation 1778/77. They argued that the immediate payment of the sums demanded would lead to additional financing costs, with the result that they could not be sure of recovering interest on the sum paid in the event of being successful in the main action⁴⁹. The Court held that:

It has not been possible to establish conclusively within the context of the present proceedings whether, in the event of NTN's being successful in the main action this expenditure would be wholly recouped. Having regard to the probable duration of the procedure in the main action, charges at the rate quoted by the applicant cannot be regarded as negligible⁵⁰.

48 Case 113/77R NTN Toyo Bearing Co. Ltd. v. Council [1977] ECR 1721. See also Case 121/77R Nachi Fujikoshi v. Council [1977] ECR 2107.

49 Case 113/77R ibid. at 1723.

50 ibid. at 1725, paragraphs 5-6 of Order.

For these reasons it was prepared to order the suspension of the obligation to pay the provisional duties, on condition that the bank guarantees were maintained.

1.2.2. The Balance of Interests

In the most recent anti-dumping cases involving interim measures, the Court has balanced the harm that would be caused to the applicant if the interim measures applied for are refused against that to the defendant if they are allowed.

In Nippon Seiko v. Council⁵¹ the applicant sought the suspension of definitive duties on the ground that the loss of interest on the duty would constitute irreparable damage, even though the duties would be refunded if the applicant was successful in the main application. The Council argued that the provision of a security would not adequately protect the interests of the Community industry. It argued that the purpose of an anti-dumping duty is to increase the price of the imported products to eliminate the effects of dumping. This purpose could not be achieved by means only of a security⁵². On the question of balancing the interests involved, the Court held that:

The Council and Commission have been able to demonstrate that the adoption of the interim measures applied for would cause substantial harm to the European Economic Community, in that merely to require the lodging of security as proposed by the applicant would have considerably less protective effect than the levying of the anti-dumping duty itself. Such a step would not take the interests of the Community's own industry sufficiently into account and would be apt to frustrate the purpose of the Regulation itself⁵³.

51 Case 258/84R [1984] ECR 4357.

52 ibid. at 4359-60.

53 ibid. at 4361, paragraph 19 of Order.

In the Electronic Typewriter cases⁵⁴ the Community authorities argued that the damage suffered by Community industry as a result of undercutting by the applicants in the prices of their electronic typewriters was considerable, and that suspension of the definitive duties would undoubtedly result in the destruction of a part of the Community industry. The Court held that, in the absence of reliable and uncontested evidence to the contrary, the adoption of the interim measures applied for would cause appreciable damage to European industry⁵⁵.

Finally, in Technointorg v. Council⁵⁶ the Court stressed that, in proving "serious and irreparable damage", the applicant must adduce evidence showing not only that the damage suffered is special to it but also that the balance of interests points in their favour. The applicant had adduced no such evidence. The Court stated, however, that:

The Council and Commission, on the other hand, have shown that the adoption of the interim measure requested would cause appreciable injury to the interests of the European Economic Community. The mere requirement of a security, for which the applicant is arguing, would have considerably less protective effect than the collection of the anti-dumping duty itself, and hence such a measure would not take sufficient account of the interests of the Community industry and would be liable to nullify the effect intended by the imposition of a definitive anti-dumping duty⁵⁷.

54 supra, at footnote 16.

55 e.g. Case 278/85R Silver Seiko Ltd. v. Council & Commission supra at 3841, paragraph 18 of Order.

56 Case 77/87R supra at paragraph 17 of Order.

57 ibid. at 1799/1800 paragraph 18 of Order.

2. INTERIM MEASURES AND OTHER SAFEGUARD MEASURES

The principles expounded by the Court in the anti-dumping cases where there has been an application to have those duties suspended would apply equally to applications to have countervailing duties or measures under Regulations 288/82 and 2641/84 suspended. This will undoubtedly depend on whether the applicants have the requisite locus standi to challenge these duties or measures. The applicants must also adduce sufficient evidence to satisfy the Court that there is a prima facie case for the granting of interim measures, and that those measures are necessary and urgent, balancing the interests concerned in order to avoid "serious and irreparable" damage being caused to the applicant. It should be emphasised, however, that the Court may be slow to suspend the operation of quantitative restrictions for to do so would leave Community industry unprotected and would also prejudice the ultimate result of the main application before it.

3. CONCLUSION

On the application of a natural or legal person who is seeking to have a Community measure annulled, the Court may by virtue of Articles 185 and 186 prescribe any necessary interim measures it considers appropriate in the case, in order to preserve the status quo pending the decision on the substance of the case. In order to obtain an order for interim measures it is necessary for an undertaking to show that it has fulfilled the following pre-conditions:-

- (1) a prima facie case; and
- (2) that the measures requested are urgent in the sense that there is a "serious and irreparable" damage being caused to the applicant. "Serious and irreparable" damage has been further defined by the Court in that the applicant must show that:-

- (a) the damage suffered by it is special to it; and
- (b) the balance of interests weigh in its favour in the sense that the granting of the interim measures requested would not cause appreciable injury to the Community industry concerned.

The case-law of the Court with respect to safeguard measures has been concerned with suspension of Regulations imposing anti-dumping duties. However, the principles expounded by the Court in these cases would be equally applicable to applications for interim measures involving the other safeguard measures.

To date there have been very few successful cases. The case-law can be divided into three potential categories where an applicant would wish to have the effects of a Regulation imposing anti-dumping duties suspended. First, it may wish to have the effects of a Regulation imposing provisional anti-dumping duties suspended. The cases however, indicate that an applicant would be unsuccessful in attempting to have the Regulation suspended. Second, it may wish to have the effects of a Regulation imposing definitive anti-dumping duties suspended. Again, the applicant would fair little better even if it was prepared to offer bank guarantees as security pending the outcome of the main application. Finally, an applicant would be successful if it sought to have the effects of a Regulation ordering the definitive collection of provisional anti-dumping duties suspended.

CHAPTER 6

SUBSTANTIVE ASPECTS OF
JUDICIAL REVIEW

**PART 1 : THE GROUNDS OF
ILLEGALITY : GENERAL**

INTRODUCTION

Article 173 enumerates four grounds of illegality. They are:-

- 1 Lack of competence;
- 2 Infringement of an essential procedural requirement;
- 3 Infringement of the Treaty or any rule of law relating to its application; and
- 4 Misuse of powers.

These same four grounds are recognised under all three Treaties¹. Some commentators² have grouped them into two main categories of illegality. The first category being formal illegality which encompasses lack of competence and infringement of an essential procedural requirement; the second category being material illegality which encompasses infringement of the Treaty or any rule of law relating to its application and misuse of powers.

1 Article 38 ECSC and Article 146 Euratom. Under the former acts of the Council and European Parliament may only be contested on two grounds i.e. lack of competence or infringement of an essential procedural requirement.

2 e.g. Bebr, Development of Judicial Control of the European Communities (1981) at p. 85.

Historically, the grounds of illegality are derived from French administrative law - the equivalent French terms being incompétence, vice de forme, violation de la loi, and détournement de pouvoir. The grounds can be defined separately but invariably these definitions overlap with the result that one set of facts may fall into more than one category. It will normally be the case that an illegality falling into either category 1, 2 or 4 will also constitute an infringement of the Treaty or any rule of law relating to its application. It does not follow, however, that the converse will be true.

1. LACK OF COMPETENCE

This concept covers the situation where the Institution in question did not have the power to do what it purported to do. The case of Meroni v. High Authority³ is an example. The Court however treated it as an infringement of the Treaty. Under Article 58 of the ECSC Treaty delegation of powers in respect of financial arrangements had to be precisely defined. The Court found that the High Authority had delegated powers to a private body giving it a "degree of latitude which implies a wide margin of discretion"⁴. Such a delegation the Court held could not be regarded as being compatible with the requirements of the Treaty.

3 Case 9/56 [1957-58] ECR 133.

4 ibid. at 154.

2. INFRINGEMENT OF AN ESSENTIAL PROCEDURAL REQUIREMENT

Infringement of an essential procedural requirement can take many forms and will often constitute a breach of a general principle such as the right to be heard. Reference to a few decisions of the Court will give the reader some idea of the sort of illegality which is caught under this category. For example, in Roquette Frères v. Council⁵ a Council Regulation was annulled by the Court because the European Parliament had not been consulted.

Infringement of an essential procedural requirement will often come about as a result of a failure on the part of the Community authorities to provide an adequate statement of reasons as to why a particular decision was taken. This is also infringement of the Treaty (Article 190). In Commission v. Council⁶ the Commission challenged two Council Regulations which under the Generalised System of Preferences (GSP) granted favourable tariffs to developing countries. The Commission complained that the Council failed to specify the provisions of the Treaty on which the Regulations were based as required by Article 190 of the EEC Treaty. The Court held that it was essential in such a case to do so and that the resultant failure infringed the requirement in Article 190 to state the reasons on which the Regulations are based.

As stated above, breach of general principles with respect to the protection of an individual's right of defence fall into this category. For example in Transocean Marine Paint Association v. Commission⁷ the Court held that:-

5 Case 138/79 [1980] ECR 3333.

6 Case 45/86 [1987] ECR 1493.

7 Case 17/74 [1974] ECR 1063.

a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known⁸.

In this case conditions were imposed on the grant of exemptions to undertakings under Article 85(3) without those undertakings having been heard. The Court stated that an undertaking must be clearly informed in good time of the conditions which the Commission intends to be subject to the exemption and it must have the opportunity to submit its observations to the Commission.

3. INFRINGEMENT OF THE TREATY OR OF RULES OF LAW RELATING TO ITS APPLICATION

This is by far the most important ground of illegality under Article 173. It has been held to include breach of the general principles common to the laws of the Member States which have been recognised by the Court. The most important of these are considered briefly below.

3.1. Fundamental Human Rights

In the Internationale Handelsgesellschaft case the Court held that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice"⁹. Such rights put constraints upon the legislative and executive action of the Institutions when they are applying or are obliged to apply Community rights and obligations.

8 ibid. p. 1080, paragraph 15 of Judgment.

9 Case 11/70 [1970] ECR 1125 at 1134, paragraph 4 of Judgment.

3.2. The Principle of Legal Certainty

This principle provides that the application of the law to a specific situation should be predictable¹⁰. Certain other principles will naturally follow on from this. A legal right once required should not be withdrawn and more importantly a case should be judged in the light of the law as it was at the time the event took place¹¹.

The Court has also recognised the principle that a person is entitled to act and carry on his business in the reasonable expectation that the law as it exists will continue to apply¹².

3.3. The Principle of Proportionality

This principle is aimed at ensuring that the means used in a given situation are not disproportionate to the end to be achieved¹³.

3.4. The Principle of Non-Discrimination

In Ruckdeschel¹⁴ the Court held that the prohibition of discrimination "is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is

10 e.g. Case 78/74 Deuka [1975] ECR 421; Cases 66, 127&128/77; Salumi [1980] ECR 1237.

11 See Case 12/71 Günther Henck v. Hauptzollamt Emmerich [1971] ECR 743.

12 Case 112/77 Töpfer v. Commission [1978] ECR 1019.

13 Case 9/73 Carl Schlülter v. Hauptzollamt Lörrach [1973] ECR 1135.

14 Cases 117/76 & 16/77 [1977] ECR 1753.

objectively justified"¹⁵. When the difference in treatment is objectively justified no discrimination arises¹⁶.

3.5. Evaluation of Economic Facts and Circumstances

If the question is one which concerns the validity of Acts of the Commission in the economic sphere the Court will not as a general rule evaluate the Commission's findings or interfere with its discretion except within limited spheres. The Court has held that it will limit its review to examining whether those findings contain a manifest error or a misuse of powers or clearly exceeds the bounds of their discretion¹⁷.

4. MISUSE OF POWERS

This ground of illegality relates to those situations where the Community authorities had the power to do what they did but used that power for wrongful purposes¹⁸. This ground of illegality is often alleged but rarely proved. An example of a case involving a misuse of powers is Giuffrida v. Council¹⁹. This case concerned the internal competition for the post of principal administrator in the Council's Directorate for Regional Policy. The Court was advised that the competition had been held for the sole purpose of remedying

15 ibid. at 1769, paragraph 7 of Judgment.

16 Case 88/78 Hauptzollamt Hamburg-Jonas v. Hermann Kendermann [1978] ECR 2477.

17 Case 29/77 Roquette Frères v. Administration des Douanes [1977] ECR 1835.

18 See Joined Cases 3 and 4/64 Chambre Syndicale de la Sidérurgie Française v. High Authority [1965] ECR 441 at 454/5.

19 Case 105/75 [1976] ECR 1395 at 1043.

the anomalous administrative status of a specific official and of appointing that same official to the post declared vacant. This was contrary to recruitment procedure as well as internal competition procedure. The Court held that this constituted a misuse of powers.

PART 2 : SAFEGUARD MEASURES

INTRODUCTION

Almost all the proceedings which have come before the Court to date concerning safeguard measures involve the Community's anti-dumping laws. In these circumstances, the analysis of the Court's review of safeguard measures will concentrate on these laws and in particular on the application by the Court of the general principles referred to above and the extent to which it is prepared to review the exercise of the Commission's discretion where this involves highly complex economic facts and circumstances.

It will very often be the case that the Court will not consider all the submissions put forward by the applicants but instead will decide the case on one ground alone. For these reasons the following analysis will include an examination of the Advocate-General's opinion where relevant. Generally speaking the Advocate-General will consider all the submissions of the parties in reaching his decision.

1. LACK OF COMPETENCE

In the Japanese Ballbearing cases, the very first set of anti-dumping cases to come before the Court²⁰, a number of the applicants²¹ relied on inter alia this ground of illegality in their submissions.

After an investigation, the Commission adopted Regulation 261/77 imposing a provisional duty of 20 per cent on ballbearings and tapered roller bearings originating in Japan. On the same date as the Commission accepted price undertakings from the applicants the Council adopted Regulation 1778/77 imposing a suspended definitive duty of 15 per cent as a sanction for their observance. The applicants sought to have this Regulation annulled.

The lack of competence argument was based on the premise that the Commission did not have the necessary power to issue Regulation 261/77 imposing provisional duties given that the power to do so in Article 15 of the parent Regulation, i.e. Regulation 459/68 (now Regulation 2423/88), was ultra vires²². The applicants were in actual fact pleading the illegality of the present Regulation namely Regulation 459/68. The Council disagreed with this on the basis that the economic objective to be achieved, by the adoption of provisional duties, was to allow the necessary decisions to be made within a short period of time and for this reason the Commission should be allowed to attain this objective. Further, the imposition

20 Case 113/77 NTN Toyo Bearing Co. Ltd. v. Council [1979] ECR 1185; Case 118/77 Import Standard Office (I.S.O.) v. Council [1979] ECR 1277; Case 119/77 Nippon Seiko KK & Ors. v. Council [1979] ECR 1303; Case 120/77 Koyo Seiko Co. Ltd. & Ors. v. Council and Commission [1979] ECR 1337; Case 121/77 Nachi Fujikoshi Corpn. & Ors. v. Council [1979] ECR 1363.

21 Case 113/77 ibid.; Case 121/77 ibid.

22 ibid. at 1196 and 1371 respectively.

of provisional measures by the Commission was in conformity with the separation of powers laid down in the Treaty²³. These submissions were considered neither by the Court nor Advocate-General Warner.

Lack of competence was also relied upon by the applicants in the Continentale Produkten Gesellschaft case²⁴ which involved proceedings in respect of the refund procedure under Article 15 of Regulation 2176/84.

The applicants sought to show that the Commission had no power to decide whether they were entitled to refunds as this was a matter for the national authorities by virtue of Article 15 of Regulation 3017/79. The procedure had commenced under the old legislation, namely Regulation 3017/79, but during proceedings a new Regulation - Regulation 2176/84 - had entered into force.

The Commission argued that the new Regulation - Regulation 2176/84 - applied to proceedings already initiated but not resolved by virtue of Article 19(2) of said Regulation²⁵. It referred to the decision of the Court in the case of Westzucker v. Einfuhr- und Vorratsstelle Zucker²⁶ as an authority for the proposition that new legislation applied to situations which arose under earlier legislation but which as yet had not been resolved.

Advocate-General Darmon in his opinion²⁷ held that the Commission had obtained its powers from the general provisions in Article 15 of Regulation 2176/84. Further, a change in the procedural rules

23 ibid. at 1372-3.

24 Case 312/84 [1987] ECR 841.

25 ibid. at 845.

26 Case 1/73 [1973] ECR 723 at 729.

27 Case 312/84 supra at 856.

relating to the decision on the application was merely a matter of form. The Court agreed with the Advocate-General. It held that:

in general provisions amending an administrative procedure and appointing the competent authorities are applicable to pending proceedings and the persons concerned may not claim to have a "vested right" to have their case dealt with by the authorities upon whom competence was conferred by the previous provisions²⁸.

Given that the role and functions of the institutions are now well established under the various safeguard measures, this ground of illegality is likely only to arise when and if new legislation comes into existence, as seen by the decision of the Court in the Continentrale Produkten Gesellschaft case above.

2. INFRINGEMENT OF ESSENTIAL PROCEDURAL REQUIREMENTS

In all the cases that have come before the Court involving a review of the anti-dumping Regulations, the applicants have alleged in one way or another that there has been an infringement of an essential procedural requirement. This usually takes the form of an allegation by the applicants that they have had no opportunity to see all the information relevant to the defence of their interests or that the Regulation in question or part of it has not been sufficiently reasoned.

²⁸ ibid. at p. 865, paragraph 4 of Judgment.

2.1. Defence of Interests and Confidentiality

2.1.1. Defence of Interests

In the first Japanese Ballbearing cases²⁹ some of the applicants alleged that there had been an infringement of an essential procedural requirement on the basis that inter alia the Commission had failed to give them the opportunity to see all the information which was relevant to the defence of their interests³⁰. The Council argued that there was no obligation on the part of the Commission to produce all the evidence on which it had acted or how it had used that material. The applicants they contended were only entitled to be appraised of the factual material.

The Court having considered the case on other grounds did not consider whether the institutions had indeed infringed an essential procedural requirement. Advocate-General Warner, in his opinion³¹ did consider the matter in greater detail. He began by enunciating the following fundamental principle of Community law that:

before any individual measure or decision is taken, of such a nature as directly to affect the interests of a particular person, that person has a right to be heard by the responsible authority; and it is part and parcel of that principle that, in order to enable him effectively to exercise that right, the person concerned is entitled to be informed of the facts and considerations on the basis of which the authority is minded to act. That principle, which is enshrined in many a Judgment of this Court, and which applies regardless of whether there is a specific legislative text requiring its application, was reasserted

29 supra at footnote 20.

30 See e.g. Case 121/77 Nachi Fujikoshi Corpn. v. Council [1979] ECR 1363 at p. 1371.

31 Case 113/77 & Ors. supra p. 1212 et seq.

by the Court only yesterday in case 85/76 Hoffmann-La Roche & Co. AG v. Commission³².

The Advocate-General stated that the Commission's duty was to tell the applicants, as clearly and as fully as the circumstances permitted, what its case against them was³³. He considered, however, that the right to be heard was subject to the general proviso that it must be compatible with the requirements of good administration. This did not mean that the Commission were not obliged to explain to the applicants in a satisfactory manner why so restrictive an interpretation of the exporter's rights was necessitated by practical considerations³⁴. He agreed that regard should be had to the provisions relating to confidential information but did not see that this prevented each of the applicants making representations on the question of their own alleged dumping³⁵. The Advocate-General concluded that there had been an infringement of an essential procedural requirement within the meaning of that phrase in Article 173 of the Treaty.

In the Second Allied case³⁶ the applicants complained that they were not informed of the main facts and considerations on the basis of which it was intended to recommend to the Council the imposition of definitive duties and the definitive collection of the amounts secured by means of a provisional duty. They alleged that an exporter should be allowed the opportunity to question the Commission's interpretation of the information provided, even if that information comes mainly from the exporter in question³⁷. The

32 ibid. at 1261.

33 ibid. at 1265.

34 ibid. at 1262-3.

35 ibid. at 1263.

36 Case 53/83 [1985] ECR 1621.

37 ibid. at 1645.

Council contended that two of the three applicants did not request information. Furthermore Allied was informed of the essential factors taken into account and in particular the method of determining normal value, as indeed were the other applicants. The rights of defence afforded to applicants in competition matters they argued could not be transposed to the anti-dumping field since the Community authorities have no power to require the production of information³⁸. Information could only be provided in reply to a request, the submission of which was subject to precise rules and time limits.

Advocate-General VerLoren van Themaat held that in his opinion it was sufficient that the information was provided to the applicants in order to allow them to present argument on the decisive points at issue. The applicants right of defence had not therefore been infringed³⁹.

The rights of defence argument was also relied upon by the applicants in Technointorg v. Commission and Council⁴⁰. The Commission had based its findings on the information available in view of the fact that the exporters had failed to co-operate with their investigation. The applicants denied that they had refused to co-operate with the Commission stating that it had failed to request information or even indicate the usefulness of providing such information, with the result that their rights of defence had been infringed by not having a fair hearing⁴¹.

38 ibid.

39 ibid. at 1637.

40 Joined cases 294/86 and 77/87 [1988] ECR 6077.

41 ibid. at 6082.

The Council in reply contended that the Commission was perfectly entitled to base their findings on the information available especially when the exporters had failed to complete the questionnaire sent to them. They pointed to the fact that the Commission did not have the power to carry out compulsory inspections of the exporters premises outside the Community. For this reason there was a need for full information and full co-operation especially since the Commission had to consider whether undertakings offered were acceptable⁴².

The Court concurred with Advocate-General Slynn who upheld the Council's submission that the Commission were entitled to proceed on the basis of the information available.

In conclusion, a number of propositions can be gleaned from the jurisprudence of the Court to date. It is submitted that there is a duty on the Community authorities to inform the applicants as clearly and as fully, what the case against them is. In so doing it is sufficient for the Community authorities to provide enough information in order to enable the applicant to present an argument on the decisive points at issue. It is a fundamental principle of Community law that a person is entitled to a fair hearing. This right to be heard, however, must be compatible with the requirements of good administration. This, it should be emphasised, does not mean that the Community authorities are freed from providing sufficient explanation as to why such a restrictive interpretation of an applicant's rights of defence are required by practical considerations. Finally, an applicant's right of defence will not have been infringed where that applicant refuses to co-operate with the Commission's investigation.

42 ibid. at 6083.

2.1.2. Confidential Information

The right to examine all information in order to defend one's interests and the right to business confidentiality require to be reconciled. These two conflicting objectives while giving rise to an uncertain legal position have major implications when it comes to the question of judicial review.

Interested parties have under each of the safeguard measures the right to have information treated as confidential if certain conditions are satisfied⁴³ and the corresponding right to information in order to defend their interests⁴⁴. Article 8(1)(a) of Regulation 2423/88 provides that neither the Council, Commission nor the Member States shall reveal any confidential information with regard to an anti-dumping or anti-subsidy investigation without the permission from the party submitting such information.

"Confidentiality" covers only information whose "disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information"⁴⁵. To have information treated as confidential it must be requested, justified and accompanied by a "non-confidential summary of the information or a statement of the reasons why the information is not susceptible of such summary"⁴⁶. If the information is not justified as confidential and the supplier does not want it disclosed it can be disregarded but cannot be disclosed⁴⁷. Likewise if a non-confidential summary can be made and the supplier refuses, the information can be disregarded.

43 See generally, Chapter 3 Section 7.2.1. Anti-Dumping Rules.

44 Section 2.1.1. supra.

45 Article 8(3) Regulation 2423/88.

46 Article 8(2)(b) Regulation 2423/88.

47 Article 8(4) Regulation 2423/88.

Regulation 2423/88 allows disclosure of the following information:

- general information
- the reasons on which decisions are based in terms of the Regulation
- the evidence relied on by the Community institutions to the extent that this is required in order to explain those reasons to the Court.

The Court first considered the question of confidentiality in Celanese Chemical Company Inc. v. Council and Commission⁴⁸. The applicant sought to claim confidentiality in relation to five categories of information which it regarded as forming part of its business secrets and which concerned sales prices; the structure of production costs; the identity of certain customers; the quantities sold; and market shares. They referred to the fact that as the undertakings concerned were outwith the jurisdiction of the Community authorities they could only be expected to co-operate on condition that guarantees were given with respect to confidential information where their business secrets were concerned.

The Court held that:

The request for confidential treatment put forward by the applicant is accepted. Protection of the business secrets of undertakings under investigation in anti-dumping proceedings must take account of the special nature of such investigations⁴⁹.

The Court also stated that, in the event of the Council and Commission refusing to apply confidential treatment to the documents to be examined, the applicant must have the chance to withdraw

48 Case 236/81 [1982] ECR 1183.

49 ibid. at 1186, paragraph 9 of Judgment.

them⁵⁰. Finally, the Court held that it reserved the right to decide the use to which it makes of the confidential information where it conflicts with its duty to state reasons for its judgment or that imposed upon the Advocate-General to deliver his opinion in public. If such an event does arise the Court can exclude from its file any such document or part thereof. In so doing, however, the Court will take into account, when deciding the case, the exclusion of such material⁵¹.

The Court's most important pronouncement on the question of confidentiality was its decision in Timex Corporation v. Council and Commission⁵². Timex argued that the Commission refused to supply it with information gathered from Hong Kong undertakings which had been selected as reference undertakings for the determination of constructing the normal value. Such information it argued was relevant in terms of Article 7(4)(a) of Regulation 3017/79 to the defence of its interests⁵³. The Community authorities in reply contended that Article 7(4)(a) related only to the parties to the investigation and in this respect the Hong Kong undertakings were not⁵⁴.

Secondly, Timex alleged that the Commission had failed to supply samples of watch dials and cases. The Community authorities argued that Article 7(4)(c) only required them to supply information and not samples. It further alleged in this respect such information was

50 ibid. at 1186-7, paragraph 11 of Judgment.

51 ibid. at 1187, paragraph 13 of Judgment.

52 Case 264/82 [1985] ECR 849.

53 ibid. at 855.

54 ibid.

not given with the result that it was impossible for it to obtain useful samples⁵⁵.

Thirdly, Timex claimed that the Commission merely sent it a list of the items made and assembled in Hong Kong without prices. Article 8 of Regulation 3017/79, they argued, could not be invoked on the grounds that the protection of business confidentiality should be limited to what was strictly necessary. This was not the case here since the information from the Hong Kong authorities could have been disclosed to it in other ways without disclosing confidential information⁵⁶. In reply to this submission the Community authorities argued that in order to secure the co-operation of undertakings in non-member countries it was necessary to respect business confidentiality or their sources of information would dry up. Whilst Article 8 attempted to reconcile the requirements of information and business confidentiality it required nevertheless strict observance of such confidentiality. They considered that the alternatives proposed by Timex were impracticable given that the prices of the reference undertakings were similar⁵⁷.

The Court concluded that the Community authorities' interpretation of Article 7(4)(a) of Regulation 3017/79 was too restrictive. It held that:

the aim of Article 7(4)(a) of Regulation No. 3017/79 is to ensure that the traders or manufacturers concerned may inspect the information gathered by the Commission during the investigation so that they may effectively put forward their points of view. However, the protection of rights guaranteed by that provision must where necessary be reconciled with the principle of confidentiality, which is given general recognition in Article 214 of the EEC Treaty, and which, as far as the procedure under Regulation

55 ibid.

56 ibid. at 855-856.

57 ibid. at 856.

No. 3017/79 concerned, specifically laid down in Article 8 of that Regulation⁵⁸.

The Court held further that:

The expression 'any party to the investigation' in Article 7(4)(a) of Regulation No. 3017/79 must be interpreted as meaning not only the parties which are the subject of the investigation but also the parties whose information has been used, as in this case, to calculate the normal value of the relevant products, since such information is just as relevant to the defence of the complainants' interests as the information supplied by the undertakings carrying out the dumping⁵⁹.

With reference to the second argument the Court was of the view that the Commission had a duty either to make samples available to the applicant or, failing that, to provide the information requested to enable the applicant to identify the items in question⁶⁰.

Advocate-General Darmon in his opinion qualified the Community authorities' argument that respecting business confidentiality was necessary in order to secure the co-operation of undertakings in non-member countries when he held that:

Nobody denies that the voluntary cooperation of undertakings in non-member countries is indispensable for the conduct of an investigation since their consent is needed in order to obtain the information sought. Nevertheless, in securing such cooperation, the rules governing the right to be heard according to all the parties must be respected, otherwise the Regulation would not have required them to request confidential treatment beforehand⁶¹.

The Court concluded that there had been a breach of an essential procedural requirement rejecting the Community authorities'

58 ibid. at 868-9, paragraph 24 of Judgment.

59 ibid. at 869, paragraph 25 of Judgment.

60 ibid. at 869, paragraph 27 of Judgment, emphasis added.

61 ibid. at 857.

contention that the information concerning the prices of the items assembled in Hong Kong were confidential. It held that:-

The Community institutions are bound by Article 214 of the EEC Treaty to respect the principle of confidential treatment of information about undertakings, particularly about undertakings in non-member countries which have expressed their readiness to cooperate with the Commission, even if no express request for such treatment is received under Article 8 of Regulation No. 3017/79. That obligation, however, must be interpreted in such a way that the rights provided by Article 7(4)(a) of that Regulation are not deprived of their substance.

It follows that in the present case the Commission ought to have made every effort, as far as was compatible with the obligation not to disclose business secrets, to provide the applicant with information relevant to the defence of its interests, choosing, if necessary on its own initiative, the appropriate means of providing such information. Mere disclosure of the items referred to in the calculation of the normal value without any figures does not satisfy those imperative requirements. That conclusion is all the more warranted in view of the fact that the normal value was determined on the basis of the constructed value of the like product, within the meaning of Article 2(5)(b) of Regulation No. 3017/79, so that Timex was entirely dependent for the defence of its interests on the factors on which the Commission based its calculation⁶².

This meant that Article 1 of the Regulation in question was void. The applicant sought not to have it declared void but to have a higher duty substituted. The Court allowed the provision to be maintained in terms of Article 174(2) of the EEC Treaty until the Community authorities adopted the necessary measure needed to comply with the judgment.

Article 13(3) of Regulation 2423/88 states that the amount of the duty to be imposed should not exceed the dumping margin and therefore should be less if such lesser duty would be adequate to remove

62 ibid. at 870-1, paragraphs 29-30 of Judgment.

injury. In the Second Allied case⁶³ the Court held that an exporter or producer knows that he can reduce the duty if he can prove to the satisfaction of the Court that the injury caused is less than the margin of dumping. It will be the case, however, that its access to such information is more often than not subject to Article 8 of Regulation 2423/88 allowing confidential treatment of such information if requested.

In concluding, it is submitted that the principle of confidential treatment of information about undertakings and in particular undertakings in non-member countries which have co-operated with the Community authorities, must be respected. However, this principle must always be reconciled with the right of an interested party to examine all information relevant to the defence of their interests. As discussed above, the Court suggested in Timex that more information should be given though the duty of disclosure does not reach the standard required in competition cases⁶⁴. It may be that in order to ensure that the defence of an applicant's interests are fully protected a system of disclosing information to lawyers under a form of confidentiality bond like the system that exists in the United States, may be required.

2.2. The Statement of Reasons

In almost all the anti-dumping proceedings brought before the Court the applicants have argued that the measure imposing either provisional or definitive duties had not been sufficiently reasoned

⁶³ Case 53/85, supra.

⁶⁴ Case 264/82 supra at 870, paragraph 30 of Judgment.

in one way or another. In the Mini Ballbearing cases⁶⁵ the Court in rejecting the applicants submissions that the measure in question was not sufficiently reasoned reiterated a principle it had consistently followed and in particular had stated in Nicolet Instrument v. Hauptzollamt Frankfurt am Main⁶⁶ that:

The statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory function⁶⁷.

In Gestetner Holdings plc v. Council & Commission⁶⁸ the applicant contended that by simply referring to its traditional practice of not accepting undertakings from importers the Commission had failed to comply with the requirements of Article 190. The Court reiterated the above principle and held that the requirements of Article 190 had been satisfied. The practice of not accepting undertakings offered by importers was based on Article 10 of Regulation 2176/84 and Article 7 of the GATT Anti-Dumping Code. Since the photocopiers were purchased for importation, the reasons for justifying the refusal for undertakings offered by importers were applicable⁶⁹.

65 Case 240/84 NTN Toyo Bearing Co. Ltd. & Ors. v. Council [1987] ECR 1809; Case 255/84 Nachi Fujikoshi Corp. v. Council [1987] ECR 1861; Case 256/84 Koyo Seiko Co. Ltd. v. Council [1987] ECR 1899; Case 258/84 Nippon Seiko KK v. Council [1987] ECR 1923; Case 260/84 Minebea Co. Ltd. v. Council [1987] ECR 1975.

66 Case 203/85 [1986] ECR 2049.

67 See for example Case 240/84 supra at 1857, paragraph 31 of Judgment; Case 256/84 supra at 1919, paragraph 29 of Judgment and Case 258/84 supra at 1966, paragraph 28 of Judgment.

68 Case 156/87 [1990] 1 CMLR 820.

69 ibid. at 851-852.

In determining whether there are sufficient reasons, the Court will invariably take into account the nature of the measure in question, the power exercised, and the extent to which the applicants have co-operated with the Community authorities. In the First Allied case⁷⁰ the Commission imposed a provisional duty on imports of certain chemical fertilizers originating in the United States upon the withdrawal of price undertakings by the applicants. The duty was based on information available when the undertakings were withdrawn.

The applicants alleged that the Commission had infringed an essential procedural requirement in that the duty to state reasons on which the measure was based was not discharged by the fact that it was taken as a matter of urgency. It was, they argued, necessary to state the reasons on which the condition of urgency itself was based. The statement of reasons must be sufficient, consistent, relevant and must be such as to allow the Court to exercise its power of review⁷¹.

The Commission replied by stating that the measure in question was based on Article 10(6) of Regulation 3017/79 and therefore it was permitted to apply the provisional measures on the basis of the information available to it. The statement of reasons, it argued, had to be consistent with the nature of the measure in question and the power exercised. In fact, argued the Commission, it could refer to the reasons stated in the earlier measures⁷².

The Court did not expressly deal with the question of whether there had been an infringement of an essential procedural requirement

70 Case 239 and 275/82 [1984] ECR 1005.

71 ibid. at 1017.

72 ibid. at 1019.

preferring to base its decision on other grounds. By holding, however, that the Commission was correct in proceeding on the basis of information available to it when the price undertakings were given, it could be argued that the Court agreed albeit impliedly with the Commission that its statement of reasons were sufficient⁷³.

It is submitted that the Court in determining whether the statement of reasons given are adequate will take into consideration the attitude of the applicants and their willingness to co-operate during the investigation.

In the Second Allied case⁷⁴ the applicants sought to have the Regulations imposing definitive duties annulled on the ground that inter alia insufficient reasons were given for the method of determining normal value⁷⁵. The Commission argued that the choice of method for determining normal value was chosen as a result of the applicants' failure to co-operate as a result of which they could not claim that they did not know the reasons⁷⁶.

The Advocate-General in his opinion suggested that the statement of reasons was not adequate but considered that a more adequate statement of reasons would not have led to a different result⁷⁷.

The Court held that:

If a firm does not cooperate in an anti-dumping investigation carried out by the Commission and the information available does not enable it to establish the normal value on one of the bases mentioned in Article 2 of Regulation No. 3017/79, the Commission is entitled to take

73 ibid. at 1031-3.

74 Case 53/83, supra.

75 ibid. at 1645.

76 ibid.

77 ibid. at 1628.

as a basis the prices which the firm undertakes to observe, which may be considered to be closest to economic reality, unless the Commission possesses information indicating that those prices no longer correspond to economic reality⁷⁸.

The Court has also recognised that the duty to provide sufficient reasons must be balanced with the duty not to disclose confidential information. In Technointorg v. Commission and Council⁷⁹ the applicants alleged that Article 190 of the EEC Treaty had been infringed in that there were insufficient reasons given as to why Community interest should prevail and why a duty of 33 per cent was required to remove injury⁸⁰. The Council contended that the statement of reasons as to the rate of duty to be imposed was sufficient. They argued that a more detailed explanation would have resulted in their having to disclose confidential information regarding individual Community producers' profitability⁸¹.

The Advocate-General held and the Court concurred that the measure was sufficiently reasoned to comply with Article 190. They therefore did not have to consider whether a more detailed explanation would result in disclosing confidential information.

In conclusion it is submitted that the Court will be satisfied that Article 190 has been complied with if the statement of reasons provided by the Community authorities discloses in a clear and unequivocal manner the reasoning followed by them so as to enable the affected parties to defend their interests and the Court to exercise its supervisory jurisdiction. In deciding whether there is sufficient reasoning the Court will take into account the nature of the measure in question, the power exercised and the extent to which

78 ibid. at 1658, paragraph 13 of Judgment.

79 Joined cases 294/86 and 77/87, supra.

80 ibid. at 6084-6.

81 ibid. at 6086.

the applicant has co-operated with the Community authorities. Further the duty to provide sufficient reasons will have to be reconciled with the duty not to disclose confidential information.

3. INFRINGEMENT OF THE TREATY OR RULES RELATING TO ITS APPLICATION

This is by far the most important ground relied on by interested parties challenging Community acts imposing protective measures. As stated above the Court has included within this category breaches of general principles common to the laws of the Member States. The first part of this Section will concentrate on the extent to which the Court takes into account these general principles in reviewing Community safeguard measures. An analysis of the extent to which provisions of International Agreements such as the GATT can be invoked by interested parties will also be considered.

Invariably, the adoption of safeguard measures are associated with investigations of a very complex and technical nature. For this reason the Community authorities, in exercising their powers, are endowed with a wide discretion. The second part of this Section will concentrate on the extent to which the Court is prepared to review the exercise of such discretion.

3.1. General Principles

3.1.1. Non-Discrimination

As stated above, the principle of non-discrimination is part of an overall principle of equality, i.e. similar situations are not to be treated differently. The applicants have in a number of anti-dumping cases to date attempted to rely on the principle. It usually arises as the result of the Commission treating one exporter differently from another either by imposing a duty or imposing a lower duty.

A number of the applicants in the first Japanese Ballbearing cases⁸² alleged that this principle had been infringed. In particular, in Nippon Seiko KK v. Council and Commission⁸³ the applicants argued that a provisional duty of 20 per cent was imposed on products manufactured by themselves and NTN Toyo Bearing Company Limited whereas only a rate of 10 per cent was imposed on products manufactured by Koyo and Nachi.

The Regulation imposing definitive duties required the definitive collection of provisional duties to the extent that they did not exceed the rate of duty fixed in the definitive Regulation. As a result of the difference in the provisional duties imposed this meant collection at a rate of 15 per cent for NTN Toyo Bearing Company Limited and Nippon Seiko KK on the one hand, and at a rate of 10 per cent for Koyo and Nachi on the other. The applicants contended that this was inter alia contrary to a general principle of Community law namely, the principle of non-discrimination⁸⁴. The Council in reply argued that the more lenient treatment of Koyo and Nachi was as a result of their good fortune on the basis that they could not order collection of provisional duties on their products at a rate of more than 10 per cent.

The Court did not consider these submissions, deciding the case on other grounds. Advocate-General Warner was of the opinion, however, that no discrimination had taken place. He noted that the principle meant different treatment of persons in like situations. He concluded that the situation of Koyo and Nachi differed from that of Nippon Seiko KK and NTN Toyo Bearing Company Limited. It was clear, he argued, that the Council would have collected provisional duties

82 supra at footnote 20.

83 See Case 119/77 supra; see also Case 113/77 NTN Toyo Bearing Co. Ltd. supra.

84 Case 119/77 ibid. at 1316.

at a rate of 15 per cent on the products of Koyo and Nachi if it had been possible to do so⁸⁵.

In Technointorg v. Council and Commission⁸⁶ the applicants alleged that the Community authorities had breached the general principle of non-discrimination by refusing to accept the undertakings offered by them while at the same time accepting those from the Yugoslav and East German exporters. The Council in reply contended that the undertakings were defective. They argued that the price increases were insufficient to eliminate injury. Further, full price increases were not due to take place until 1989/90 when the applicant's new factory was to go into production.

The Court held that:

the fact that the Commission refused to accept undertakings offered by Technointorg although it did accept undertakings offered by the exporters from the German Democratic Republic and Yugoslavia does not constitute arbitrary discrimination. As is stated in Recital 34 of the provisional regulation, the undertakings offered by those exporters had the effect of raising prices by an amount sufficient to eliminate the injury, and it was possible to ensure that those undertakings were actually adhered to⁸⁷.

The Court, having noted the reasons put forward by the Commission for refusing the undertakings agreed with the Council that the undertakings were inadequate and the conditions necessary to enable the Commission to verify whether they were adhered to were not satisfied.

In deciding whether the Community authorities have treated an exporter or other affected party in a discriminatory manner quoad the

85 ibid. at 1268-9.

86 Joined cases 294/86 and 77/87, supra.

87 ibid. at 6118, paragraph 49 of Judgment.

other parties under investigation the Court will take into account the degree of discretion accorded to them. In Silver Seiko v. Council⁸⁸ normal value for the applicants was established on the basis of domestic prices as there were sufficient sales on the domestic market. Silver Seiko argued that they had been discriminated as against those undertakings which had insufficient sales on the domestic market. For those undertakings, the lowest profit margin, i.e. that established for Canon Inc. was used in constructing a normal value.

The Court rejected this argument and held that:

the situation of Silver Seiko for which a real profit margin was established, cannot be regarded as identical to that of TEC and Sharp, with respect to which, in the absence of real information, a degree of discretion had necessarily to be accorded to the institutions⁸⁹.

In two of the Electronic Typewriter cases - TEC v. Council⁹⁰ and Sharp v. Council⁹¹ - the applicants alleged that the Community authorities had breached the principle of non-discrimination by failing to impose a provisional duty on Nakajima All & Co. Ltd. In TEC v. Council, they contended that in calculating the normal value applicable to their products, the profit margin used was discriminatory since it was much higher than that established for Nakajima whose circumstances in Tec's opinion were wholly comparable to its own⁹². The Council in reply argued that Nakajima was different from the other undertakings subject to the investigations. It argued that it was basically a factory operation making a limited

88 Joined cases 273/85 and 107/86 [1988] ECR 5927.

89 ibid. at 5976, paragraph 18 of Judgment.

90 Joined cases 260/85 and 106/86 [1988] ECR 5855.

91 Case 301/85 [1988] ECR 5813.

92 Joined cases 260/85 and 106/86 supra at 5863.

number of products which were sold to a limited number of customers⁹³.

In his opinion⁹⁴ Advocate-General Slynn agreed with the Council in concluding that there was no discrimination between the applicants and Nakajima. He held that Nakajima was in essence a factory without a conventional sales force or sales structure. It would be unreasonable to apply the same profit margin for a company with different characteristics⁹⁵.

More importantly, in its judgment the Court held that:

discrimination in favour of Nakajima could not, even if it were established, lead to the annulment of the Regulation imposing a definitive anti-dumping duty on TEC, which was adopted on the basis of findings correctly made in the course of the anti-dumping investigation and in accordance with the rules laid down by Regulation No. 2176/84⁹⁶.

The principle cannot be invoked where the Community authorities are not responsible for the difference in treatment of persons in like situations. In Nashua Corporation v. Council & Commission⁹⁷ the applicant claimed that the Council had infringed the principle prohibiting discrimination by applying anti-dumping duties at a standard rate to all imports of plain paper photocopiers. This resulted in it paying a higher duty in absolute terms than a related manufacturer of a Japanese subsidiary. The Court held that the difference resulted not from the imposition of anti-dumping duties

93 ibid. at 5865.

94 ibid. at 5884 et seq.

95 ibid. at 5893.

96 ibid. at 5918, paragraph 18 of Judgment. The Court reached a similar conclusion in Case 301/85 Sharp v. Council supra.

97 Cases 133 and 150/87 [1990] 2 CMLR 6.

but from the exporter's sales policy of selling at lower prices to its subsidiaries in the Community than the price it sold to Nashua⁹⁸.

The principle of non-discrimination means that persons in like or identical situations should not be treated differently. This is a matter to be decided on facts of each case. In determining whether there has been a breach of the principle, the Court will take into account the discretion accorded to the Community authorities. Most importantly, the Court has indicated that different treatment may not necessarily lead to an annulment of a Regulation imposing definitive anti-dumping duties where these duties have been imposed as a result of findings correctly made.

3.1.2. Legal Certainty

The principle of legal certainty is aimed at ensuring that the law to be applied to a given situation is predictable. There are a number of other principles which flow from this, in particular that a person should be able to act in the reasonable expectation that the law as it exists will continue to apply.

In the first Japanese Ballbearing cases⁹⁹ one of the applicants, Import Standards Office¹⁰⁰, sought to argue that the Community authorities by definitively collecting provisional duties had violated the principle of legal certainty of undertakings. The collection of provisional duties was only competent where definitive duties had been imposed. If undertakings had been accepted as they

98 ibid. at 47, paragraphs 40-41 of Judgment.

99 supra at footnote 20.

100 Case 118/77 Import Standard Office (I.S.O.) v. Council [1979] ECR 1277.

were in the present case then such collection should have been abandoned.

The Court, without making reference to whether the principle had been breached or not, held that there was no need to order the collection of provisional duties if the undertakings were acceptable, as they were in the present case¹⁰¹.

In the Mini Ballbearing cases¹⁰², some of the applicants¹⁰³ contested the method by which the Commission had calculated the dumping margin. In determining the dumping margin, normal value was established on the weighted average method and export price on the transaction-by-transaction method. This latter method was preferred where export prices varied both above and below normal value, since use of weighted averages would result in a finding that no dumping was occurring at all¹⁰⁴. The applicants argued that, by using the transaction-by-transaction method to establish export price, the Community authorities had breached the principle of legitimate expectation, commercial certainty and sound administration in that they had used the weighted average method on previous occasions¹⁰⁵.

In answering the applicants' submission, the Court held that Article 2(13)(b) of Regulation 3017/79 provided that the transaction-by-transaction method was just one of the methods which could be used by the Community authorities in calculating the dumping margin in

101 ibid. at 1298-9, paragraphs 49-55 of Judgment.

102 supra at footnote 65.

103 Case 256/84 Koyo Seiko Co. Ltd. v. Council supra; Case 258/84 Nippon Seiko KK v. Council, supra.

104 See Chapter 3, Section 1.6. Anti-Dumping Rules supra.

105 See the applicants' submissions in Case 256/84 supra at 1906-1909 and Case 258/84 supra at 1935-1941.

situations where prices vary as they did in the present case¹⁰⁶. It concurred with Advocate-General Mancini that the charges raised by the applicants had been answered by its previous decision in the case of Faust v. Commission¹⁰⁷. It held that:

where the institutions enjoy a margin of discretion in the choice of means needed to achieve their policies, traders cannot claim to have a legitimate expectation that the means originally chosen will be maintained, since these may be altered by the institutions in the exercise of their powers¹⁰⁸.

In Brother Industries Ltd. v. Council¹⁰⁹ the applicants argued that the lack of detailed rules regarding the calculation of the dumping margin prevented traders, even diligent and prudent ones, from taking the appropriate action to avoid the imposition of an anti-dumping duty. The Court held that:

... the rules laid down by Regulation 2176/84 leave a measure of discretion to the Community institutions, in particular the Commission in an anti-dumping investigation, as regards fixing a provisional duty and proposing a definitive duty to the Council, and the fact that the Commission exercises that discretion without explaining in detail and in advance the criteria which it intends to apply in every specific situation does not constitute a breach of the principle of legal certainty¹¹⁰.

106 Case 256/84 ibid. at 1917, paragraph 19 of Judgment; Case 258/84 ibid. at 1967, paragraph 33 of Judgment.

107 Case 52/81 [1982] ECR 3745.

108 Case 256/84 supra 1917, at paragraph 20 of Judgment; Case 258/84 supra at 1967, paragraph 34 of Judgment.

109 Cases 56 and 250/85 [1988] ECR 5683 at 5698.

110 ibid. 5725 at paragraph 29 of Judgment.

In two of the Electronic Typewriter cases the applicants¹¹¹ argued that the Community authorities had breached the principle on the ground that the normal value as constructed was unpredictable and arbitrary. This they alleged was due to the inclusion of an excessive profit margin and the inclusion of selling expenses of sales companies on the domestic market. Both TEC and Sharp had insufficient sales on the domestic market with the result that normal value was constructed in terms of Article 2(3)(b)(ii) of Regulation 2176/84. The profit margin used was based on the lowest margin calculated for those undertakings which had sufficient domestic sales, i.e. Canon Inc.

TEC, in particular, argued that this was arbitrary and unpredictable. It was arbitrary because it was impossible for the applicants to gauge the profit margins of one company from those of another. It was unpredictable in that they could not ascertain the profit margins realised by another company. This meant that it was impossible to know how to set prices in order to avoid dumping¹¹². The Council replied by stating that it was legitimate for the Community authorities to have regard to the profit margins realised by the other manufacturers. It was not contrary to the principle of legal certainty they contended, in that the objective of this principle had to be reconciled with the requirements of the anti-dumping procedure. It was a fact of life that the exporter would not have access to all the information, in particular that which was confidential¹¹³. This was in line with the law as laid down in the GATT rules and Community legislation¹¹⁴. Further, the legislation allowed for cases in which an undertaking could not calculate the dumping margin

111 Case 260/85 and 106/86 TEC v. Council supra; Case 301/85 Sharp v. Council supra.

112 Case 260/85 and 106/86 ibid. at 5862.

113 ibid. at 5863-5865.

114 Case 301/85 Sharp v. Council supra at 5819.

beforehand (i.e. non-market economies). Lastly, the methods prescribed in Article 2(3) of Regulation 2176/84 depended on circumstances which an undertaking could not have foreseen¹¹⁵.

Advocate-General Slynn rejected the submissions that legal certainty had been violated. The profit figures he argued related only to sales on the domestic market which exceeded 5 per cent volume of exports to the Community. This threshold was introduced to safeguard legal certainty¹¹⁶. He also refuted the argument put forward by TEC based on unpredictability, in that it was always possible for an exporter to raise his prices and request a review¹¹⁷. The principle of legal certainty, he argued, had to be balanced with the principle of equal treatment. To use a hypothetical margin for those companies who had no sales and a real margin for those that had would result in inequality. Further, there was no provision in the Regulation which stated that the Commission must continue to use a hypothetical margin when normal profit had been established¹¹⁸.

The Court in concurring with the Advocate-General held that a certain degree of unforeseeability did not constitute an infringement of the principle of legal certainty where, as in the present case, it was not possible to take real prices as a basis in calculating the normal value¹¹⁹.

115 ibid. at 5820.

116 e.g. case 260/85 and 106/86 TEC v. Council supra 5884 at 5889.

117 ibid. at 5890.

118 ibid.

119 ibid. at 5917, paragraph 15 of Judgment.

TEC again relied on the principle of legal certainty in arguing that it was wrong in constructing normal value to include in the cost of production selling expenses of TEC Electronics Company Limited, the sales subsidiary of TEC Limited. It contested that such practice was not consistent with the previous practice of the Community authorities. Further, it was arbitrary in that it included in the cost of production expenses of a company which had never sold electronic typewriters¹²⁰.

The Court held that:-

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 in that way activities that, in other cases, are carried 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 entity¹²¹.

It agreed with the Advocate-General who held that irrespective of the corporate structure of an undertaking, Article 2(3)(b)(ii) of Regulation 2176/84 permitted the Community authorities to look beyond the purely formal division and assess production cost on a reasonable basis including selling expenses of the whole operation no differently from the way they would if dealing with a single corporation¹²². Neither the Advocate-General nor the Court

120 See submissions Case 260/85 and 106/86 TEC v. Council ibid. at 5984-5899.

121 ibid. at 5919, paragraphs 28-29 of Judgment.

122 ibid. at 5897.

considered it necessary to determine whether the principle of legal certainty had been breached.

It is submitted that the Community authorities enjoy a large measure of discretion in ensuring that their policies are effective and as such traders cannot legitimately expect that the practice originally adhered to will continue. This has allowed the Community authorities to change their practice to cover situations not governed by the legislation in existence at the time. A failure by the authorities to explain in detail and in advance the criteria applied in a given situation will not constitute a breach of legal certainty.

3.1.3. The Principle of Proportionality

The principle of proportionality is aimed at ensuring that the means used must be proportionate to the end to be achieved in a given situation. Article 13(3) of Regulation 2423/88 is an example of this principle. It provides that "the amount of such duties (definitive) shall not exceed the dumping margin provisionally estimated or finally established ... it should be less if such lesser duty would be adequate to remove the injury". In other words, a lower duty should be imposed if such a duty would be sufficient to eradicate the injury to Community industry.

This provision was considered at length by Advocate-General VerLoren van Themaat in the Second Allied case¹²³. The applicants in their submissions argued that the interests of the Community could not simply be equated with the interests of certain producers and completely ignore the interests of consumers. Further, the

123 Case 53/88 supra.

interests of the Community did not justify the definitive duties imposed¹²⁴.

Advocate-General VerLoren van Themaat pointed out that the Council had a wide discretion in defining what amounted to the "interests of the Community". He, however, took objection to the reasoning of the Community authorities which he considered did not justify the imposition of duties equivalent to the dumping margin. The Council gave the following as its reasons for imposing the duty it did:

The results of its [the Commission] investigation [i.e. into the dumping margin] provided as accurate a basis for the determination of the level of dumping as possible and that lower levels would constitute a bonus for Allied Corporation's withdrawal from its undertaking and subsequent non-cooperation and the withdrawal from their undertakings by Kaiser and Transcontinental¹²⁵.

He contended that the withdrawal from an undertaking should not on its own affect the care and objectivity with which the fresh investigation should be carried out. Likewise, the refusal to co-operate could not in itself justify the above passage¹²⁶.

As far as the Advocate-General was concerned, this was the only passage in the Regulation which could be regarded as an explanation for the non-application of the last sentence of Article 13(3) of Regulation 3017/79. It was, he noted, of decisive importance that the Community authorities did not state any reasons regarding the

124 ibid. at 1650-52.

125 See paragraph 24 of Regulation 101/83, OJ 1983 L15/1.

126 Case 53/88 supra at p. 1635.

extent of injury found¹²⁷. The Advocate-General concluded that the anti-dumping duty imposed on the applicants should not result in a higher level of import prices than those which applied to their American competitors at the time when the Regulation was adopted. A considerably lower level than the one imposed would have been sufficient to remove the injury caused by the dumping¹²⁸.

The Court in concurring with the Advocate-General's opinion began by reiterating the general rule that the Council when adopting an anti-dumping Regulation the Council is required to ascertain the amount of duty which is necessary in order to remove the injury. The Court noted that the Council in the preamble to Regulation 101/83 did not deal with this issue. It held that:

In the preamble to Regulation No. 101/83, the Council deals in detail with the question whether the injury was caused by imports from the United States or by sales on the French market by producers established in other Member States. It does not however discuss the question of the amount of duties necessary in order to remove the injury; its only reference in that connection is to the Commission's view that lower levels would constitute a bonus for Allied Corporation's withdrawal from its undertaking and subsequent non-cooperation and the withdrawal from their undertakings by Kaiser and Transcontinental. That consideration is not relevant to the application of Article 13(3) of the Regulation. Examination of the case has not disclosed any other factors indicating that the Council took into account that article in fixing the amount of the anti-dumping duties. It must therefore be concluded that the regulation was adopted in disregard of Article 13 and that it must therefore be declared void¹²⁹.

127 ibid. at 1635.

128 ibid. at 1656.

129 ibid. at 1659 paragraph 19 of Judgment.

In the NTN Toyo Bearing Co. Ltd. v. Council the applicant¹³⁰ like those in the Allied case above argued that in fixing the rate of duty the Community authorities did not comply with Article 13(3) of Regulation 2176/84. In so doing they had contravened the principle of proportionality by virtue of the fact that the duty imposed should be proportionate to the injury suffered.

Advocate-General Mancini referred to the Court's judgment in the Allied case and noted in particular that when the Council adopts an anti-dumping Regulation "it is required to ascertain whether the amount of the duties is necessary in order to remove the injury"¹³¹. He then referred to the preamble of the contested Regulation, concluding that in the light of the explanations the rates of duty fully met the objectives pursued by the legislature¹³².

The Court concluded that the principle of proportionality had not been infringed. It referred, in particular, to the fact that the Community authorities had established that the overall sales of small bearings produced by the Community industry decreased by 13.3 per cent between 1979-83 and the market share fell from 72 to 60.9 per cent. Further, substantial damage was caused to Community industry both financially and with respect to employment¹³³. In such

130 Case 240/84 supra.

131 Case 240/84 ibid. at 1847.

132 ibid.

133 ibid. at 1858, paragraphs 37-38 of Judgment.

circumstances the imposition of anti-dumping duties could not be regarded as contrary to the principle.

In Nachi Fujikoshi v. Council¹³⁴ the applicants alleged that the Community authorities by not accepting the undertakings offered had breached the principle of proportionality. The Court concluded however that the Community authorities' refusal was within their discretion and that applicant had not established that their reasons for rejecting the undertakings exceeded this discretion.

The principle of proportionality if breached by the Community authorities will automatically lead to the measure or parts thereof in question to be declared void. The principle it is submitted unlike other general principles is one which cannot be qualified or limited in any respect.

3.2. The Effect of International Agreements in Community Law

The Community safeguard measures are based on provisions of the General Agreement on Tariffs and Trade ('the GATT') or on the GATT codes negotiated at the Tokyo Round of Multilateral Trade negotiations. This invariably raises the question - to what extent can an interested party challenge a Community safeguard measure on the ground that it was incompatible with the Community's Treaty obligations ?

In answering this question the Court will have to consider the status and effect of International agreements in question from two basic standpoints:

¹³⁴ Case 255/84 supra at 1893-4, paragraphs 37-43 of Judgment.

- (1) whether the agreement binds the Community; and
- (2) whether it is capable of conferring rights on individuals which they can invoke in the national courts, i.e. can such provisions be directly effective. Clearly, if an interested party could rely on a directly effective provision in the national courts then it could rely on such a provision in proceedings brought before the Court under Article 173 of EEC Treaty.

The GATT and in particular its anti-dumping code is the most important International agreement as far as safeguard measures are concerned. It is an example of an International agreement entered into by the Member States and third parties before the creation of the European Communities. Under International law such agreements have to be respected. This is reflected in Article 41 of the Vienna Convention on the Law of Treaties¹³⁵ and also in Article 234 of the EEC Treaty. Article 234(1) states that the rights for third parties arising from the Member States' pre-existing International agreements and obligations for the Member States are not affected by the EEC Treaty¹³⁶.

The Court has stated that its jurisdiction extends to considering all those grounds capable of invalidating those measures. For this reason it is obliged to examine whether their validity may be affected by reason of the fact that they are contrary to a rule of International law¹³⁷.

135 8 Int. Leg. Materials (1969), 679.

136 See also Case 10/61 Commission v. Italian Republic [1962] ECR 11.

137 Case 21-24/72 International Fruit Co. [1972] ECR 1219 at 1226; see also Case 9/73 Schülter v. Hauptzollamt Lörrach [1973] ECR 1135 at 1157.

More particularly, in the SPA case¹³⁸ the Court was called upon to deal precisely with its jurisdiction in relation to GATT. The Italian Supreme Court of Cassation, when making its reference to the Court questioned whether the latter had the jurisdiction to interpret GATT in cases other than those where the interpretation or the legality of the Community measure were at issue. In answer to this question the Court held that:

it is important that the provisions of GATT should, like the provisions of all other agreements binding the Community, receive uniform application throughout the Community. Any difference in the interpretation and application of provisions binding the Community as regards non-member countries would not only jeopardize the unity of the commercial policy, which according to Article 113 of the Treaty must be based on uniform principles, but also create distortions in trade within the Community, as a result of differences in the manner in which the agreements in force between the Community and non-member countries were applied in the various Member States¹³⁹.

In order for the validity of a Community measure to be set aside because it is contrary to Community law the Community has to be bound by the particular rule of International law.

The Community is effectively the successor to the rights and obligations of its Member States under GATT by virtue of the fact that it has exclusive competence in the area of external trade and commercial matters. In the International Fruit Co. case the Court held that:

The Community has assumed the functions inherent in the tariff and trade policy, progressively during the transitional period and in their entirety on the expiry of that period, by virtue of Articles 111 and 113 of the Treaty.

138 Joined cases 267-269/81 [1983] ECR 801.

139 ibid. at 828, paragraph 14 of Judgment.

By conferring those powers on the Community, the Member States showed their wish to bind it by obligations entered into under the General Agreement. It therefore appears that, in so far as under the EEC Treaty the Community has assumed the powers previously exercised by the Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community¹⁴⁰.

It would be fair to say that in recognising that an International agreement is part of Community law, the Court does so to protect the uniform application of that law as much as, if not more than, to enforce the relevant provisions of that International agreement.

Given that the Court recognises that the Community is bound by GATT, the next question which arises is the extent to which the provisions of GATT are "directly effective"¹⁴¹. In other words, for an individual to challenge the validity of a Community measure on the basis that it is contrary to a provision of the GATT, the latter provision must be capable of conferring rights on the individual which he can enforce in the national court. To be directly effective a provision must be clear and precise and must be unconditional, i.e. leave no discretion on the authorities by whom they are to be applied¹⁴².

It is not clear the extent to which the Court has transposed these criteria into its jurisprudence on the direct effect of International agreements. Generally speaking the Court's reasoning relies heavily on the special features of the International agreement in question in establishing whether the provision is directly effective.

140 Case 21-24/72 supra at 1227, paragraphs 14, 15 & 18 of Judgment.

141 See generally Bourgeois "The effect of International Agreements in EEC Law: Are the Dice Cast" 82 Mich. L. Rev.1250; Pescatore "The Doctrine of Direct Effect: An Infant Disease of Community Law" 1983 ELRev. 155.

142 See for example Case 26/62 Van Gend en Loos [1963] ECR 1.

In the Kupferberg case the Court was faced with the question of whether a provision of the Free Trade agreement between the Community and Portugal was directly effective¹⁴³. The Court held that the provision in question did confer rights on individuals which they could invoke in the national courts. Its reasoning was as follows:

The governments which have submitted observations to the Court do not deny the Community nature of the provisions of agreements concluded by the Community. They contend, however, that the generally recognized criteria for determining the effects of provisions of a purely Community origin may not be applied to provisions of a free-trade agreement concluded by the Community with a non-member country.

In that respect the governments base their arguments in particular on the distribution of powers in regard to the external relations of the Community, the principle of reciprocity governing the application of free-trade agreements, the institutional framework established by such agreements in order to settle differences between the contracting parties and safeguard clauses allowing the parties to derogate from the agreements.

It is true that the effects within the Community of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question. In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.

According to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining

143 Case 104/82 [1982] ECR 3641.

that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means. Subject to that reservation the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.

As the governments have emphasized, the free-trade agreements provide for joint committees responsible for the administration of the agreements and for their proper implementation. To that end they may make recommendations and, in the cases expressly provided for by the agreement in question, take decisions.

The mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement. The fact that a court of one of the parties applies to a specific case before it a provision of the agreement involving an unconditional and precise obligation and therefore not requiring any prior intervention on the part of the joint committee does not adversely affect the powers that the agreement confers on that committee.

As regards the safeguard clauses which enable the parties to derogate from certain provisions of the agreement it should be observed that they apply only in specific circumstances and as a general rule after consideration within the joint committee in the presence of both parties. Apart from specific situations which may involve their application, the existence of such clauses, which, moreover, do not affect the provisions prohibiting tax discrimination, is not sufficient in itself to affect the direct applicability which may attach to certain stipulations in the agreement.

It follows from all the foregoing considerations that neither the nature nor the structure of the Agreement concluded with Portugal may prevent a trader from relying on the provisions of the said Agreement before a court in the Community.

Nevertheless the question whether such a stipulation is unconditional and sufficiently precise to have direct effect must be considered in the context of the Agreement of which it forms part. In order to reply to the question on the direct effect of the first paragraph of Article 21 of the Agreement between the Community and Portugal it is necessary to analyse the provision in the light of both the object and purpose of the Agreement and of its context.

The purpose of the Agreement is to create a system of free trade in which rules restricting commerce are eliminated in respect of virtually all trade in products originating in the territory of the parties, in particular by abolishing customs duties and charges having equivalent effect and eliminating quantitative restrictions and measures having equivalent effect.

Seen in that context the first paragraph of Article 21 of the Agreement seeks to prevent the liberalization of the trade in goods through the abolition of customs duties and charges having equivalent effect and quantitative restrictions and measures having equivalent effect from being rendered nugatory by fiscal practices of the Contracting Parties. That would be so if the product imported of one party were taxed more heavily than the similar domestic products which it encounters on the market of the other party.

It appears from the foregoing that the first paragraph of Article 21 of the Agreement imposes on the Contracting Parties an unconditional rule against discrimination in matters of taxation, which is dependent only on a finding that the products affected by a particular system of taxation are of like nature, and the limits of which are the direct consequence of the purpose of the Agreement. As such this provision may be applied by a court and thus produce direct effects throughout the Community¹⁴⁴.

The Court recognised that it was not sufficient to exclude the direct effect of certain provisions on the basis that there existed a special institutional framework for consultations and negotiations nor the possibility that the contracting parties could derogate from the Agreement by virtue of the safeguard clauses contained therein.

The decision in Kupferberg did not result in the Court having a change of attitude towards the direct effect of GATT provisions, which will be discussed below. There are a number of reasons why this may be the case. First, the Free Trade Agreement with Portugal was a Bilateral Treaty whereas the GATT is a multilateral Agreement though it should be noted that the Court's decision in Bresciani

144 ibid. at 3663-3665, paragraphs 15-26 of Judgment.

discussed below concerned a multilateral agreement, namely the Yaoundé Convention (now Lomé Convention). The decision therefore, by one party, to regard certain of its provisions as directly effective has a greater chance of resulting in its efficacy in general than would be the case of an agreement like the GATT. Second and most important, the aim of the Free Trade Agreement with Portugal was to create a free trade area which goes beyond the scheme and objectives of the GATT.

Apart from the decision in Kupferberg the Court has in several other cases held provisions of Association agreements to be directly effective¹⁴⁵. Such agreements create a close relationship between the Community and the non-Member States involved.

In Bresciani the Court was confronted with the question of whether Article 2(1) of the Yaoundé Convention (now replaced by the Lomé Conventions) conferred rights upon individuals which they could invoke in the national courts. The Court held that it was directly effective, on the basis that Article 2(1) of the Convention expressly referred to Article 13 of the EEC Treaty. As such the Community had undertaken the same obligations towards the Associated States as the Member States had with respect to one another¹⁴⁶.

In Pabst & Richarz which concerned a provision of the Association Agreement with Greece the Court stated:

That provision [Article 53(1)], the wording of which is similar to that of Article 95 of the Treaty, fulfils, within the framework of the Association between the Community and Greece, the same function as Article 95 ...It accordingly follows from the wording of Article 53(1) cited above, and from the objective and the nature of the Association Agreement of which it forms part that that provision

145 Case 87/75 Bresciani [1976] ECR 129; Case 17/81 Pabst & Richarz [1982] ECR 1331.

146 Case 87/75 ibid. at 141-2, paragraph 25 of Judgment.

precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece. It contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure¹⁴⁷.

The Court was first confronted with the question of whether a provision of GATT was directly effective in the International Fruit Company case¹⁴⁸ and in particular Article XI thereof. The Court held that in order to establish whether provisions of the GATT had direct effect it was necessary to consider the spirit, the general scheme and the terms of the General Agreement¹⁴⁹. It concluded that Article XI was not capable of conferring on the citizens of the Community rights which they could invoke before the national courts. Its reasons for reaching this conclusion were as follows:

This Agreement [GATT] which, according to its preamble, is based on the principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterised by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between contracting parties¹⁵⁰.

Advocate-General Myras in his opinion reached the same conclusion. He held that:

Article XI contains exceptions and derogations which in practice have been shown to leave States and, mutatis mutandis, the Community a discretion such as excludes individuals from the principle established by that Article subjective rights capable of being profitably invoked before a Court¹⁵¹.

147 Case 17/81 *supra* at 1350, paragraphs 26-27 of Judgment.

148 Case 21-24/72 supra.

149 ibid. at 1227, paragraph 20 of Judgment.

150 ibid. at 1227, paragraph 21 of Judgment.

151 ibid. at 1239.

A year later the Court again had to determine whether another provision of the GATT - Article II(1) - was directly effective¹⁵². It stated that this had to be answered in the light of the meaning, structure and wording of the General Agreement¹⁵³. By applying its reasoning in the International Fruit Company Case the Court concluded that Article II(1) did not confer rights on individuals which they could invoke in the national courts.

In a number of cases referred to the Court by the Italian Cour de Cassation¹⁵⁴, it confirmed its reasoning in the International Fruit Company case in holding that Article V of GATT did not confer rights on individuals which they could enforce in the national courts. It did, however, emphasise "the Community's obligation to ensure that the provisions of the GATT are observed in its relations with non-Member States which are parties to GATT"¹⁵⁵. This was reiterated by the Court in the Second Fediol case¹⁵⁶ when it concluded that the concept of a subsidy in Article 3 of Regulation 2176/84 presupposed the grant of an economic advantage through a charge on the public account. It held that:

The concept of a subsidy thus understood is not incompatible with the Community's obligations under international law, in particular under GATT and agreements concluded in the framework thereof¹⁵⁷.

152 Case 9/73 Schülter v. Hauptzollamt Lörrach supra.

153 ibid. at 1157, paragraph 29 of Judgment.

154 Case 266/81 SIOT [1983] ECR 731; Case 267-9/81 SpA (SPI and SAMI) [1983] ECR 801; Joined cases 290 and 291/81 Singer & Geigy [1983] ECR 847.

155 Case 266/81 SIOT, ibid at 780, paragraphs 27 and 28 of Judgment.

156 Case 188/85 Fediol v. Commission [1988] ECR 4193.

157 ibid at 4226, paragraph 13 of Judgment.

The Court in the Third Fediol case¹⁵⁸ has gone one step further and has held that for the purposes of the New Commercial Policy Instrument - Regulation 2641/84 - individuals can rely directly on the provisions of the GATT. It held that:

... le règlement No. 2641/84 confère aux opérateurs intéressés le droit de se prévaloir des dispositions du GATT dans la plainte qu'ils déposent devant la Commission, afin d'établir le caractère illicite des pratiques commerciales par lesquelles ils s'estiment lésés, ces mêmes opérateurs ont le droit de saisir la Cour en vue de soumettre à son contrôle la légalité de la décision de la Commission appliquant ces dispositions¹⁵⁹.

In considering the merits of the case the Court went even further. It was prepared to give its own interpretation on the GATT provisions invoked by the applicant rather than restricting its review to question whether the Commission's interpretation of the GATT provisions was within its discretion¹⁶⁰. Such a development is to be welcomed and even more so given that the Court was prepared to interpret the GATT provisions itself.

The decision re-opens the issue of whether the Commission's practices and interpretation of the Anti-Dumping Regulation (Regulation 2423/88) are also in accordance with the GATT and the GATT Anti-Dumping Code. It is arguable, however, that the Court would distinguish its decision in the Third Fediol case if it was required to rule on the direct effect of the GATT provisions so far as the Anti-Dumping Rules are concerned. In the Third Fediol case the Court noted that the GATT rules formed part of the rules of Public International law of which specific mention is made in Article 2(1)

158 Affaire 70/87 [1989] REC 1781 (English text not yet available).

159 ibid. at 1831 paragraph 22 of Judgment (English text not yet available).

160 ibid. at 1831 paragraph 22 of Judgment.

of Regulation 2641/84. The Regulation, however, does not set out which of the GATT rules may be relied upon by an individual who is attempting to establish that there is an illicit commercial practice. The Anti-Dumping Rules, on the other hand, more or less incorporate the rules laid down in GATT and the Anti-Dumping Code¹⁶¹. As a corollary to the above, reference is often made to the Preamble of the basic Anti-Dumping Regulation where it states that:

the Community is required to take account of their interpretation [the rules] by the Community's major trading partners as reflected in legislation or established practice.

The Court has held, however, that the Community is not obliged to follow the practice of one of its trading partners, even a major partner (United States), in interpreting an element in the determination of anti-dumping duties¹⁶².

The recognition by the Court that the Community is bound by Treaties like the GATT is more often aimed at protecting the uniform application of Community law than enforcing International law. However, it does not follow that just because an International agreement is part of Community law that it is therefore enforceable by individuals.

What is important, as a result of the Court's jurisprudence in the GATT and Free Trade Association cases, is that a clause in an agreement which bears a close relationship to the Community and irrespective of whether it has been applied in a reciprocal manner by the other party is enforceable by an individual, if such a provision

161 See generally Rabe & Schütte "EC Anti Dumping Law: current issues in the light of the jurisdiction of the Court" 26 CMLRev. 644.

162 Case 56 and 250/85 Brother Industries Ltd. v. Council supra.

is precise and unconditional. The Court's decision in the Third Fediol case is a source of encouragement to interested parties affected by Community acts imposing safeguard measures. It is reassuring to know that the Court is prepared to recognise the direct effect of GATT provisions albeit only in relation to the New Commercial Policy Instrument to date.

4. THE EVALUATION OF ECONOMIC FACTS AND CIRCUMSTANCES - THE EXTENT TO WHICH THE COURT WILL REVIEW THE EXERCISE OF THE COMMUNITY AUTHORITIES' DISCRETION

The imposition of safeguard measures involves investigations of a highly technical and complex nature. Naturally, the legislation which permits the Community authorities to impose such measures confers on them a wide discretion in exercising the powers with which they are endowed.

Advocate-General Roemer in Germany v. Commission¹⁶³ was of the opinion that the exercise of powers which confers a wide discretion should be subject to judicial review by the Court to ensure effective control. The crucial factor is the extent to which the Court may exercise such review. As early as its decision in Consten & Grundig the Court stated its position with respect to its review of the Community authorities' discretion. It held that:

the exercise of the Commission's powers necessarily implies complex evaluation of economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of relevance of the facts and of the legal consequences which the Commission deduces therefrom¹⁶⁴.

163 Case 34/62 [1963] ECR 149 at 152.

164 Case 56 and 58/64 [1966] ECR 299 at 347.

The Court's objective is to examine only the relevance and accuracy of the facts and the legal consequences which according to the Commission flow from them. However, in situations where the facts are complex, it is much more difficult to avoid an evaluation of the findings of the Community authorities.

In such situations the Court will not seek to substitute its own evaluation of the facts for that of the competent institution. Rather it will attempt to examine whether the evaluation of the findings of that institution contains a patent error or constitutes a misuse of powers. Inevitably the Court is placed in the dilemma of respecting the legitimate limits of the institution's discretion which is indispensable to the operation of the Community on the one hand while on the other protecting the interests of the applicant and respecting the rule of law.

The Court has on numerous occasions in its jurisprudence regarding anti-dumping laws made reference to the extent to which it is prepared to review the exercise of the discretion given to the Community authorities under these laws. In Fediol the Court stated the following general rule when it held that:

complainants may not be refused the right to put before the Court any matters which would facilitate a review as to whether the Commission has observed the procedural guarantees to complainants by Regulation No. 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidization or has based the reasons for its decision on considerations amounting to a misuse of powers. In that respect, the Court is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned regulation¹⁶⁵.

165 Case 191/82 [1983] ECR 2913 at 2935-6, paragraph 30 of Judgment.

The Court reiterated this principle in the Mini Ballbearing cases referring to its judgment in the Remia case¹⁶⁶. It noted that the choice between the different methods of calculating the dumping margin in Article 2(13)(b) of Regulation 3017/79 required an appraisal of complex economic situations. In so doing it held that it must:

limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of reasons for the decision is adequate, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers¹⁶⁷.

An analysis of the Court's pronouncements regarding the exercise of discretion by the Community authorities can best be understood by considering the areas in which this discretion arises. They are as follows:-

- 4.1. The calculation of dumping
- 4.2. The determination of injury
- 4.3. The determination of Community interests
- 4.4. The calculation of duties and the refusal to accept undertakings
- 4.5. Evaluation.

4.1. The Calculation of Dumping

In the Continentale Produkten case¹⁶⁸ the applicants had brought an action before the Court, to annul a decision by the Commission

166 Case 42/84 [1985] ECR 2545.

167 See for example Case 240/84 NTN Toyo Bearing Co. Ltd. & Ors. v. Council supra at 1854, paragraph 19 of Judgment.

168 Case 312/84 supra.

refusing refund duties under Article 16 of Regulation 2176/84, on the basis that they had not adduced sufficient evidence for their claims. The applicants in their submissions contended that the actual normal values for their Turkish suppliers were lower than those originally established by Regulation 789/82 on the basis of which definitive duties were imposed. Normal value was constructed as there were insufficient sales on the domestic market. The Commission contended that the refundable amount was merely the difference between the duty collected and the "normal values" as determined definitively in Regulation 789/82. The applicants maintained, however, that the sums to be reimbursed should be calculated on the basis of their suppliers' actual individual "normal values".

Advocate-General Darmon concluded, and the Court concurred, that Article 16 could not permit the method of calculating the normal value to be changed by substituting real prices for constructed value¹⁶⁹. This also applied to the export price. Article 16, he argued, enabled an applicant to have the normal value etc. recalculated if and only if special factors applied.

More importantly, the Advocate-General recognised that the Community authorities had in this area a wide discretion. He noted that the control exercised by the Court was limited to manifest error of assessment and misuse of powers. In this respect he referred to the Fediol decision. He concluded that no misuse of powers had been alleged. As regards manifest error which the applicant had to prove, no such error had been established¹⁷⁰.

169 ibid. at 860-1.

170 ibid. at 861.

In Technointorg v. Council & Commission¹⁷¹ the Court was of the view that the Community authorities had a discretion in determining how normal value was to be established in terms of Article 2(5) of Regulation 2176/84. Article 2(5) was used to calculate normal value as the USSR was a non-market economy. The purpose of Article 2(5) was to avoid having to attempt to take account of prices and costs in such economies as they did not reflect market forces. The Commission chose Yugoslavia as the analogue country and established normal value on the basis of domestic prices on the Yugoslav market. The applicants were unhappy with Yugoslavia being chosen. They argued that due to differences in income levels and manufacturing processes in the two countries, normal value should have been constructed. The Council was of the view that normal value in Yugoslavia should only have been constructed if there were circumstances which made it unreasonable to use domestic prices, otherwise they were entitled to use these latter prices.

The Court held that:

it is unnecessary to have recourse to the constructed value unless it would be unreasonable in the circumstances to use the domestic price. That value must be calculated in such a way that the results obtained are as close as possible to the normal value based on the domestic price. In that regard the institutions have a discretion and Technointorg has not established that, by choosing to base the normal value in this case on the prices on the Yugoslav market, they have used it erroneously¹⁷².

In constructing normal value, Article 2(3)(b)(ii) of Regulation 2423/88 permits the Community authorities to include an amount for a reasonable profit margin. What is reasonable is not defined in the

171 Case 294/86 and 77/87 supra.

172 ibid. at 6113, paragraph 30 of Judgment.

Regulation thereby endowing the Commission with a discretion as to what this amount should be.

In TEC v. Council¹⁷³ the Commission in an attempt to arrive at a constructed normal value as close as possible to that which would have been established if there had been domestic sales, took into account profit margins actually realised for sales of electronic typewriters on the domestic market. This amounted to 47.92 per cent. The applicants contended that this was contrary to existing practice which never before resulted in a profit margin exceeding 10 per cent and was also incompatible with the rule in Article 2(3)(b)(ii) of Regulation 2176/84 that the profit should not exceed that realised on sales of products in the same general category.

In his opinion Advocate-General Slynn relied on the Court's judgment in Nippon Seiko¹⁷⁴ where the Court had held that where the Community authorities were required to appraise complex economic situations the Court was limited in its review of such appraisal to verifying whether the relevant procedural rules had been complied with, whether the facts had been accurately stated and whether there had been a manifest error of appraisal or misuse of powers. He noted that the purpose of the constructed normal value was to act as a substitute for the domestic selling price where there were no domestic sales or where these did not permit a proper comparison. He concluded that Article 2(3)(b)(ii) did not require that the profit had to be realised by the same company but only that it should be realised by sales of goods of the same general category i.e. electronic typewriters. This was, therefore, within the

173 Case 260/85 and 106/86 supra.

174 Case 258/84 supra at 1964, paragraph 21 of Judgment.

Commission's power of appraisal¹⁷⁵. The Court duly concurred with the Advocate-General's opinion. It held that:-

there is nothing in Article 2(3)(b)(ii) of Regulation No. 2176/84 to preclude the view that the profit margin adopted by the institutions could, in the context of their power of appraisal, be regarded as a reasonable margin¹⁷⁶.

In all the Electronic Typewriter cases, where there were sufficient domestic sales, the products were sold through a sales subsidiary. The Community authorities held that these were not independent from the parent company but that they formed one economic entity. In calculating normal value they therefore disregarded the sales price from the parent company to the sales company as these did not represent arm's length prices.

In Canon v. Council¹⁷⁷ the applicants argued that these transfer prices i.e. those from the parent to the sales company, were fair and reliable and therefore could have been used as the basis for calculating normal value. Failing that, normal value should have been constructed on the basis of prices to third countries.

Advocate-General Slynn held that the Community authorities had a discretion which they could exercise and did so by disregarding the transfer prices from Canon Inc. to its subsidiary Canon Sales Ltd. for the purposes of constructing normal value, on the basis that they were associated. In this respect Canon had failed to show that the discretion was exceeded or improperly used. Article 2(3)(a) of Regulation 2176/84, he argued included in its scope the price charged

175 ibid. at 5889.

176 ibid. at 5916-7, paragraph 13 of Judgment.

177 Case 277 and 300/85 [1988] ECR 5731.

by its sales company to its customers. The prices charged by Canon Sales Ltd. to its customers were plainly 'in the ordinary course of trade' within the meaning of Article 2(3)(a), and the Community authorities were entitled to use them for the purpose of establishing normal value as they did¹⁷⁸.

As to those models which were not sold on the domestic market or in insufficient quantities, the Community authorities had a discretion on the reading of Article 2(3)(b) to choose between either constructing the normal value or using third country export prices. The applicant had not shown that this discretion was wrongly applied¹⁷⁹ whereas the Council had explained the reasons for the Community authorities' choice in the definitive duty regulation. The Court concurred with the Advocate-General. It held that:-

Article 2(3)(b) does not indicate that use of the price for exportation to a third country is to take precedence over construction of the normal value. The institutions therefore enjoy a margin of discretion in that respect and Canon has not shown that that discretion has been abused¹⁸⁰.

Once the normal value and the export price have been established, the Community authorities will then calculate the dumping margin. Prior to Regulation 2423/88, where prices varied Article 2(13)(b) and (c) allowed the Community authorities to assess the export price by either establishing it on the basis of the transaction-by-transaction method or by reference to weighted average prices.

178 ibid. at 5774.

179 ibid. at 5775.

180 ibid. at 5800, paragraph 17 of Judgment.

In the Mini Ballbearing cases¹⁸¹ the charge was concerned with whether in determining the dumping margin, the normal value and export price must be assessed by the use of the same method or by different methods when domestic prices and export prices fluctuated appreciably. The normal value was assessed by reference to the weighted average price for all transactions on the domestic market and reduced to a single figure. The export price on the other hand was assessed by reference to the transaction-by-transaction method. This method sought to exclude exports whose prices were in excess of the normal value, otherwise prices in excess of normal value and prices below normal value could be offset against one another thereby mathematically cancelling out any dumping margin, whilst leaving intact the effects of injury to Community industry.

The applicants contended that the method of calculation involved a manifest error of fact and law. They argued that Article 2(13) of Regulation 2176/84 allowed for a choice to be made between the different methods but did not allow them to be combined. Its effect was to leave out of account the large number of export sales made at non-dumping prices and to establish the existence of dumping even where export prices did not differ on average from internal consumption on the Japanese market.

Advocate-General Mancini concluded that this was an area in which the Community authorities had been entrusted with the task of appraising complex economic matters involving choices of a technical nature, and as such the Court's powers of review would be limited to determining whether that power of appraisal had been subject to manifest error or

181 See footnote 65 supra.

misuse of powers¹⁸². He noted that there was no obligation on the Community authorities to use only one of the criteria in Article 2(13)(b), which he concluded was designed to prevent economic injury resulting from selective dumping practices being concealed by carefully orchestrated manipulation of higher and lower prices¹⁸³.

The Court agreed with the Advocate-General. It held that:

The fact that the methods of calculation [for normal value and export price] which may be used are independent is confirmed by provisions of Article 2(13)(b) and (c) of Regulation No. 3017/79, which merely state the various possibilities for calculating the dumping margin without imposing any requirement that the methods chosen for calculating the normal value and export price should be similar or identical¹⁸⁴.

The Court also concurred with the Advocate-General in concluding that the choice between the different methods of calculation specified in Article 2(13) required an appraisal of complex economic issues and, as such, its review was limited to ensuring that the procedural rules had been complied with, the facts accurately stated and whether there had been a manifest error of appraisal or misuse of powers. The Court was of the opinion that the applicants argument was almost tantamount to alleging that the Community authorities had made a manifestly incorrect appraisal of the facts in adopting a method of assessing the dumping margin which took into account only a proportion of the transactions on the export market¹⁸⁵.

182 See Case 240/84 NTN Toyo Bearing Co. Ltd. v. Council supra, 1833 at 1844.

183 ibid.

184 See Case 240/84 supra at 1853, paragraph 14 of Judgment.

185 See Case 255/84 Nachi Fujikashi v. Council supra at 1890, paragraph 22 of Judgment.

It was of the view that such a line of argument could not be accepted. It held that:

the transaction-by-transaction method used by the Commission, like the weighted average method, takes account of all sales and quantities sold for export and involves establishment or weighted average of export prices. This method differs from weighted average method inasmuch as prices above the normal value are artificially reduced to the level of normal value and then included in the calculation of the weighted average of all the prices charged on the export market¹⁸⁶.

The Court concluded that the Commission did not commit any manifest error in its appraisal of the facts by applying the transaction-by-transaction method to calculate the dumping margin. It agreed with the Advocate-General that this was the only method applicable of dealing with certain manoeuvres in which dumping was disguised by charging different prices. It noted that the application of the weighted average method in such a situation would not meet the purpose of the anti-dumping proceedings, since that method would mask sales at dumping prices by those at what were known as "negative" dumping prices and would thus in no way eliminate the injury suffered by the Community industry concerned¹⁸⁷.

4.2. The Determination of Injury

Generally speaking, the information regarding injury caused to Community industry will be provided by the complainant industry. As a result, this information will for the most part be subject to the rules relating to confidential information in terms of Article 8 of Regulation 2423/88. This was noted by Advocate-General Warner in the First Japanese Ballbearing cases. He stated that the findings of injury and of its cause were necessarily based in large part on

186 ibid., paragraph 23 of Judgment.

187 Case 240/84 NTN Toyo Bearing Co. Ltd. v. Council supra at 1855, paragraphs 23/24 of Judgment.

the confidential information supplied by the European industry which the Commission was precluded from disclosing. The findings of injury like the determination of dumping was, according to the Advocate-General, based on the assessment by institutions of complex economic facts not readily open to judicial review. He implied that judicial review would be limited to determining whether that assessment was actuated by improper motives or on the basis of manifest error¹⁸⁸.

In such circumstances the Community authorities will have a wide discretion in determining whether injury has been caused to Community industry as a result of dumping. This was borne out by the decision in the First Allied case¹⁸⁹. The applicants challenged a Commission Regulation imposing a provisional duty after undertakings had been withdrawn. They contended that this had been adopted on the basis of incorrect information. In particular, the Commission had failed to take into account three new facts namely, a decision of the French Government on production and marketing of fertiliser, rise in value of the dollar and decline in imports of nitrogen fertiliser into the Community, which would have had a bearing on the assessment of injury to Community industry.

The Court concluded that the arguments put forward by the applicants were not of such a nature as to constitute proof that the Commission committed a number of manifest errors in its assessment of whether injury was caused to the European fertiliser industry as a result of dumping. In particular, with regard to those arguments regarding the rise in the value of the dollar and decline in imports, the Court held that:

188 See footnote 20 supra.

189 Case 239 and 275/82 supra.

although it is true that the volume of imports of nitrogen solution fertilizer originating in the United States into the Community fell in 1981-2, imports of that product increased substantially in the first quarter of 1982, in spite of the increase in the value of the dollar. It follows that this factor has not had the effect of compensating for injury caused to European producers¹⁹⁰.

By virtue of Article 4(5) of Regulation 2423/88 the Community authorities, in considering whether injury has been caused to Community industry, may exclude those producers who are related to the exporter or importer or who are themselves importers of the allegedly dumped or subsidised product. The Court has recently held that it is for the Community authorities in the exercise of this discretion to determine by reference to all the relevant facts whether such producers should be excluded¹⁹¹. It further held that they will not exceed this discretion where they include producers that have imported certain models of the allegedly dumped product in order to present a full range of models to their customers, which was rendered impossible by the depressed prices imposed by the Japanese imports¹⁹². The Community authorities will also not have exceeded their discretion if they decide not to exclude a producer which had imported the dumped product if the volume of those imports were minimal in relation to the producer's entire range of products and even if they had caused injury to the other Community producers¹⁹³.

4.3. The Determination of Community Interests

Community legislation, unlike the GATT rules or the anti-dumping laws of the Community's trading partners, permits the Community

190 ibid. at 1035, paragraph 29 of Judgment.

191 Case 156/87 Gestetner Holdings plc. v. Commission and Council supra.

192 ibid. at 847/8, paragraphs 47-49 of Judgment.

193 ibid. at 849-850, paragraphs 56-61 of Judgment.

authorities when imposing anti-dumping duties to take into account Community interests. The term "interests of the Community" has not been defined and it is therefore inevitable that the Community authorities enjoy in this respect a very wide discretion. Naturally, they have, when the matter has been queried by exporters, claimed that this is an area not subject to review by the Court.

In Fediol¹⁹⁴ the applicant sought to have annulled the refusal of the Commission to initiate anti-subsidy proceedings in respect of soya imports from Brazil. The case was concerned generally with the question of "Community interests" in relation to the initiation of proceedings.

The Commission did not deny that the failure to institute an anti-subsidy proceeding may affect the applicant's interests. However, the interests must be significant in that there must be a "distinct" change in the applicant's legal position. It argued that there could be no such effect in this case because protective measures were, according to their nature in law, "measures belonging exclusively in the area of commercial policy ... adopted essentially in the general economic interest". For this reason, an anti-subsidy proceeding was not intended principally to protect individuals. Furthermore, in view of the discretion vested in the Commission, the applicant could not be acknowledged to have a right to require the initiation of an investigation¹⁹⁵.

The applicant was of the view that the Commission's arguments were aimed at obtaining judicial recognition of a discretionary power free from control by the Court, in relation to the initiation of a compensatory proceeding. It considered that the existence of a

194 Case 191/82 supra.

195 ibid. at 2946-7.

discretionary power free from review by the Court in this respect could not be deduced from the concept of Community interest¹⁹⁶.

The Advocate-General agreed with the applicant that it was entitled to a proper exercise of discretion free from misuse of power or a patent disregard of Community law¹⁹⁷. She was of the opinion that even if the Commission had a discretion with regard to the initiation of proceedings, this was not free from review. In the present case the refusal to initiate proceedings, she noted did not relate to the interests of the Community but rather was concerned with whether there was sufficient evidence¹⁹⁸.

The Court held that:

whilst it is true that the Commission, when exercising the powers assigned to it in Regulation No. 3017/79, is under a duty to establish objectively the facts concerning the existence of subsidization practices and of injury caused thereby to Community undertakings, it is no less true that it has a wide discretion to decide, in terms of the interests of the Community, any measures needed to deal with the situation which it has established¹⁹⁹.

In the light of these considerations the Court had to determine whether the applicant had the right to bring an action. It detailed at length the complainant's procedural rights under the Regulation and held that:

the complainants may not be refused the right to put before the Court any matters which would facilitate a review as to whether the Commission has observed the procedural guarantees granted to the complainants by Regulation No. 3017/79 and whether or not it has committed manifest errors in its assessments of the facts, has omitted to take into

196 ibid. at 2927

197 ibid. at 2947

198 ibid. at 2948-9.

199 ibid. at 2934-5, paragraph 26 of Judgment.

consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidization or has based the reasons for its decision on considerations amounting to misuse of powers. In that respect the Court is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned Regulation²⁰⁰.

This corresponds with the Court's understanding of its limits in the review of the Community authorities' discretion when matters of a complex and economic nature are at issue. Ultimately, the Court's review will extend to ensuring that the interested parties procedural rights under the legislation are guaranteed.

The First Allied case²⁰¹ was concerned more particularly with the question of discretion in relation to the "interests of the Community" in imposing provisional duties where an undertaking had been removed. The Commission argued that the term "interests of the Community" was imprecise and therefore was not amenable to judicial review. The Advocate-General agreed that the Commission enjoyed a wide discretion in deciding whether to impose provisional duties under Article 10 of Regulation 3017/79. This discretion the Advocate-General noted became even wider where an undertaking had been removed under Article 10(6). He concluded and the Court concurred by holding that the authorities were under no obligation to attach any decisive significance to the new facts submitted by the applicants²⁰².

200 ibid. at 2935, paragraph 30 of Judgment.

201 Case 239 and 275/82 supra.

202 ibid. at 1048.

In the Second Allied case²⁰³ the Court had to consider those entities in the Community whose interests would be affected by the imposition of duties. The applicants contended that the interests of the Community should be interpreted as those of the Community as a whole, and not as the particular interest of certain Community producers. In particular it argued that the interests of consumers were not examined²⁰⁴. In reply the Council noted that an analysis of the interests of the Community involved a wide discretion in assessing political and economic circumstances, and the weighing up of various factors internal and external to the Community. The interests of consumers and, in particular, their long term interests were taken into account. Given such a discretion, the Court must limit its review to determining whether a manifest error or a misuse of power had been committed²⁰⁵.

The Court decided in favour of the applicants on the basis that Article 13(3) of Regulation 3017/79 had been breached²⁰⁶. It, however, did not make reference to the extent to which the Court would review the exercise of discretion on the part of the Community authorities with respect to the interests of those entities which would be affected by the imposition of duties. It stated that it did not relieve the Community authorities of their obligation to state the reasons why, in their view, intervention was necessary²⁰⁷.

The discretion afforded to the Community authorities by the term "interests of the Community" is sufficiently wide to permit them to

203 Case 53/83 supra.

204 ibid. at 1651.

205 ibid. at 1652.

206 Supra at footnote 122.

207 ibid. at 1634.

depart from previous practice. In Canon v. Council²⁰⁸ the applicants argued that in assessing injury to Community industry, the authorities took no account of whether the European producers were efficient. In previous cases it had calculated the level of duty needed to remedy injury by reference not to all producers but in relation to the most efficient. However, in the present case, it had departed from this practice by basing its injury finding on the average between the efficient and the inefficient producers.

Advocate-General Slynn rejected this argument. He argued that, where there was injury caused by dumping, the Regulation stated that duties could be imposed if it was in the interests of the Community. He noted that the concept was not defined with the result that this gave the Community authorities a wide discretion. Given this, the authorities were not bound to follow previous practice²⁰⁹. The Court made no reference to the extent of the authorities' discretion but held nevertheless that:

the fact that a Community producer is facing difficulties attributable in part to causes other than the dumping is not a reason for depriving that producer of all protection against the injury caused by the dumping²¹⁰.

4.4. Calculation of Duties and Refusal to Accept Undertakings

4.4.1. Calculation of Duties

In Nashua Corporation v. Council & Commission the applicant was of the view that the same method used for calculating the dumping margin should be used to calculate the anti-dumping duty to be imposed. The Court held that:-

208 Case 277 and 300/85 supra.

209 ibid. at 5790-5791.

210 ibid. at 5809, paragraph 63 of Judgment.

For the calculation of the anti-dumping duty, Article 13(3) of Regulation 2176/84 merely requires the institutions not to exceed either the dumping margin established or the extent of the injury, if a lower duty than the dumping margin would be adequate to remove the injury. The institutions thus enjoy a wide discretion in choosing the method for calculating the duty and are not obliged to adopt for that purpose the same method as that used for determining the dumping margin²¹¹.

4.4.2. Refusal to Accept Undertakings

The Community authorities when terminating proceedings, may accept price undertakings rather than impose duties. The reasons for adopting such a course of action are self-explanatory. They allow a controversial situation to be settled amicably, they save time and, above all, are flexible. The acceptance of price undertakings are, however, completely at the discretion of the Commission. Of all the categories discussed to date, this undoubtedly is the one category where the Court will be slow to review the exercise of that discretion.

In the Mini Ballbearing cases some of the applicants²¹² complained that the Community authorities failed to take into account the undertakings offered. Advocate-General Mancini noted that the Commission was required in the exercise of the powers conferred upon it by Regulation 3017/79 to establish in an objective manner whether there was evidence of dumping practiced by undertakings from outside the Community. The Court, however, had held in Fediol that it was no less true that the Commission had a very wide discretion to select in terms of the interests of the Community the most appropriate

211 Cases 133 and 150/87 supra at 46, paragraph 36 of Judgment.

212 Case 240/84 NTN Toyo Bearing Co. Ltd. v. Council, Case 256/84 Koyo Seiko Co. Ltd. v. Council, Case 258/84 Nippon Seiko K.K. v. Council and Case 260/84 Minebea Co. Ltd. v. Council supra.

measures for dealing with the situation which it had established²¹³. In these circumstances, he concluded that it was for the Commission alone to consider whether a price undertaking would have been sufficient to safeguard the Community's economic interests. The Court noted that there was no provision in Regulation 3017/79 which compelled the Community authorities to accept price undertakings offered²¹⁴. It was clear from Article 10 of Regulation 3017/79 that it was for the Community authorities in the exercise of their discretionary power to determine whether such undertakings were acceptable²¹⁵.

In Technointorg v. Commission and Council²¹⁶ the applicants had also offered price undertakings which the Commission refused on the basis that these were unacceptable. The Court followed its decision in the Mini Ballbearing cases by holding that no provision of Regulation 2176/84 compelled the Community authorities to accept price undertakings. On the contrary, it followed on from Article 10 of Regulation 2176/84 that it was for the Community authorities to assess whether undertakings offered were acceptable²¹⁷. The Court concluded that, by refusing to accept the undertakings offered by Technointorg, the Commission had not exceeded the limits of its discretion²¹⁸.

213 ibid. at 1846-7.

214 See Case 258/84 supra at 1971, paragraph 51 of Judgment; Case 260/84 supra at 2011, paragraph 48 of Judgment.

215 Case 260/84 ibid.

216 Case 294/86 and 77/87 supra.

217 ibid. at 6117, paragraph 45 of Judgment.

218 ibid. paragraph 48 of Judgment.

The above decisions related to undertakings offered by exporters. More recently, in Nashua Corporation v. Commission and Council²¹⁹ the Court had to consider the refusal by the Commission to accept an undertaking from the applicant, an original equipment manufacturer (OEM). Because the products under consideration were purchased for importation into the Community Nashua was regarded as an importer. The Court noted that the practice of the Community authorities in not accepting undertakings from importers was based not only on Article 10 of Regulation 2176/84 but also on Article 7 of the GATT Anti-Dumping Code.

The Court held that the Community authorities had not exceeded their discretion in refusing to accept the undertakings offered. This was justified on two grounds:

First, acceptance of the undertaking offered by an importer would have the effect of encouraging him to continue to obtain supplies from outside the Community at dumped prices. Secondly, other importers would have to receive the same treatment and this, on account of the large number of companies involved, would make it extremely difficult to monitor compliance with the undertakings²²⁰.

4.5. Evaluation

Inevitably, as more and more undertakings from third countries which manufacture "high-tech" consumer goods are investigated for dumping, the Court is drawn into the dilemma of determining the extent of its review on the exercise of the powers which confer a margin of discretion on the Community authorities.

The Court has from the inception of the European Economic Community held that the exercise of powers by the Community authorities which confer on them a wide discretion should be subject to its review. As the findings of the Community authorities are of a highly complex

219 Cases 133 and 150/87 supra.

220 ibid. at 48, paragraph 46 of Judgment.

and technical nature in anti-dumping cases, the Court has adopted the general principle that its review is limited to verifying whether the relevant procedural rules have been complied with, whether the reasons for the decision are adequate, whether the facts on which the choice is made are accurate and most importantly whether there has been a manifest error of appraisal or a misuse of powers. The onus of proving the latter lies fairly and squarely on the shoulders of the applicant. To date, this has proved to be an insurmountable hurdle to discharge.

The Court has held that the Community authorities have not exceeded the margin of discretion by attempting to construct a normal value which is as close as possible to that which would have been established if there had been sufficient sales in the ordinary course of trade on the domestic market. Likewise, it has approved the inclusion of a profit margin in the constructed normal value which reflected profits realised by the sales of the products in the same general category. Where a sales company operates as a sales department of a parent company, the Court has condoned the practice of the Community authorities to include their selling expenses when constructing normal value.

When domestic and export prices vary appreciably, the Court has approved the practice of the Community authorities to assess export prices on a transaction-by-transaction basis in order to avoid negative dumping. It has held that the choice of method used to establish the dumping margin does not have to be the same in assessing normal value and export price.

Due to the fact that the majority of information on which the Community authorities base their findings of injury is confidential, the Court is reluctant to review these findings. It appears to be the case that the Court considers that the protection of Community industry is paramount. It has held that the Community authorities had not exceeded their discretion by not excluding Community producers when considering the effects of the dumped products on

Community industry, where those producers had imported the dumped product. This will be the case where the Community authorities show that this was done to enable a producer to complete its range of models or where the imports were minimal even though this caused injury to the other Community producers.

It has also held that the term "interests of the Community" confers on the Community authorities a sufficiently wide discretion to enable them to decide what are the appropriate measures required to deal with a given situation. This discretion will be even wider when an applicant has violated a price undertaking. However, the Court will exercise its review in the exercise of that discretion where the procedural rights of an interested party are at issue.

Finally, with respect to the acceptance or refusal of an undertaking, the Court has noted that generally speaking these are subject to more practical considerations. For these reasons, it is submitted that the Court will be less likely, if at all, to review the exercise of the Commission powers in this respect.

5. MISUSE OF POWERS

This ground of illegality because of the difficulties in proving it has rarely been relied upon by an applicant in the cases that have come before the Court.

In Nippon Seiko KK v. Council²²¹ the applicants alleged that the Council by imposing definitive duties as a sanction to compel compliance with the price undertakings given had misused their powers²²². Without making an express reference as to whether the

221 Case 119/77 supra.

222 ibid. at 1317.

Council had misused its power the Court held that by virtue of the anti-dumping Regulation it was unlawful for one and the same anti-dumping procedure to be terminated on the one hand by the Commission's acceptance of a price undertaking and on the other by imposition by the Council of a definitive anti-dumping duty²²³.

In Import Standard Office v. Council²²⁴ the applicants argued that the order to definitively collect the provisional duties constituted a misuse of powers because its real purpose was to pave the way for the adoption by the Council of definitive duties²²⁵.

Advocate-General Warner was of the opinion that this argument was misconceived, first because there was no evidence that this was the Council's real purpose, and second because the point was founded on an erroneous premise. He noted that there was nothing in the basic Regulation which precluded the Council from ordering the definitive collective of the provisional duties. He concluded that it was open for the Council, while assenting to the acceptance of the undertaking, to decide the fate of the provisional duty²²⁶.

In Brother Industries Ltd. v. Council²²⁷, the applicants argued that the margin of profit (71.18 per cent) included in the normal value of the three Brother models for which normal value was constructed was excessively high and was wrongly determined. They contended that this constituted inter alia a misuse of powers²²⁸. Advocate-General Slynn whilst agreeing that the selling, general and

223 ibid. at 1329.

224 Case 118/77 supra.

225 ibid. at 1289.

226 ibid. at 1250.

227 Case 56 and 250/85 supra.

228 ibid. 5693.

administrative expenses were miscalculated, held the applicant had adduced no proof of any misuse of powers and he accordingly rejected the allegation²²⁹.

229 ibid. 5674-5.

CONCLUSION

The system of judicial remedies in the European Community and Article 173 in particular provide the Court with the power to review the legality of acts of the Community authorities. It is undoubtedly the case that the Community authorities enjoy a large measure of discretion in the exercise of their powers under the legislation governing safeguard measures. In this respect it is important that the Community authorities which apply the law are also bound by it. For this very reason the Court has stated that it has the power to review the exercise of the powers which confer a margin of discretion on the Community authorities, albeit in a limited manner. By so doing the Court is able to exercise an element of control over them and so ensure that the rule of law is observed.

The right of a natural or legal person to challenge an act of the institutions and in particular acts of general application depends on whether they have the necessary locus standi to do so. The Court has adopted a distinct and separate approach to the admissibility of actions involving safeguard measures. Its reason for doing so was to allow interested parties, who would otherwise not have had the opportunity, to challenge the legality of Community acts imposing safeguard measures.

The test applied by the Court to determine whether an applicant has sufficient locus standi is whether the economic agent in question was concerned by the findings relating to the existence of dumping complained of. Generally speaking, exporters or producers, associated importers and in limited circumstances original equipment manufacturers (OEMs) will have the requisite locus standi since they can normally establish that they were identified in the measure adopted or that they were concerned by the preliminary investigations. The Court has, however, extended the scope of locus

standi where safeguard measures are involved. In a number of decisions it was prepared to confer on other interested parties, notably complainants, locus standi because they had certain procedural rights which were guaranteed by the legislation in question. This was all the more important given that those parties would otherwise not have had locus standi.

Independent importers as a general rule will not have locus standi as they will neither be identified in the measure nor have specific findings made about them. They will be required to challenge the collection of anti-dumping duties in the national courts. They may, however, have locus standi in two limited situations; where they are challenging a measure permitting the definitive collection of provisional duties and where they can establish that they had entered into binding contracts prior to the adoption of quantitative restrictions.

The Commission and the Council have recognised the fact that private parties should have locus standi, and rightly so given that the Community authorities should be the proper defendants in any action challenging Community acts imposing safeguard measures. The alternative is an action by the importers who bear the duties in the Member States and ultimately a ruling by the Court in terms of Article 177(1)(b) of the EEC Treaty. It is now probably the case that in anti-dumping proceedings the locus standi of those categories of persons who might seek to challenge a measure imposing duties has been finally clarified.

Prior to the final judgment of the Court parties often attempt to obtain an award of interim measures. Certain conditions have to be fulfilled before the Court will make such an award. An applicant will have to establish a prima facie case and must show to the satisfaction of the Court that the measures are urgent. They will be urgent if "serious and irreparable" damage is being caused to the

applicant and that the balance of interests point in their favour in the sense that the grant of interim measures would not cause appreciable injury to Community industry.

To date there have been few successful cases. What is not in doubt is that an applicant would not be successful in having the effects of a Regulation imposing either provisional or definitive anti-dumping duties suspended even if bank guarantees were offered pending the outcome of the main application. It is submitted that these general propositions would be equally applicable to an application for interim measures involving other safeguard measures.

The grounds of illegality in Article 173 upon which the Court will review the merits of a case involving safeguard measures are lack of competence, misuse of powers, infringement of an essential procedural requirement and an infringement of the Treaty or a rule relating to its application. An applicant will not usually allege lack of competence or misuse of powers as it would require to discharge a heavy onus of proof in respect of each of these grounds of illegality. It is more often the case that an applicant will rely on allegations relating to a breach of an essential procedural requirement or an infringement of the Treaty or a rule relating to its application.

A breach of an essential procedural requirement as a ground of illegality is aimed at ensuring that an applicant's rights of defence are protected and that it is made fully aware of the reasons why the particular decision was taken. The Court has stated that it will ensure that an applicant's right to a defence of his interests is protected. It is submitted that the Community authorities are under a duty to ensure that an applicant is clearly and fully informed of the case against it. This duty will be discharged according to the Court where the Community authorities provide the applicant with sufficient information to allow it to present a case. The right to

examine all the information has to be balanced with the duty not to disclose confidential information. The Court has held that in balancing these two principles an applicant's defence of its interests must not be deprived of its substance. It is important that an interested party has sufficient information in which to defend its interests. At the same time the confidentiality rules should be respected otherwise undertakings fearing that their business secrets may be disclosed will not co-operate. It is difficult to envisage under the present rules how further information could be disclosed other than by some form of confidentiality bond between lawyers like the system that exists in the United States.

In defending its interests an applicant is entitled to a fair hearing, though the Court has held that this right must be compatible with the requirements of good administration. This does not mean, however, that the Community authorities are exempted from providing a sufficient explanation as to why such a restrictive interpretation of an applicant's rights of defence are required by practical considerations.

The Community authorities are also under an obligation to provide a statement of reasons for their decision in such a manner that it discloses in a clear and unequivocal way the reasons for the particular decision so as to enable the applicant to defend its rights and allow the Court to exercise its supervisory jurisdiction. This obligation like the obligation to provide information has to be reconciled with the duty not to disclose confidential information. The Court will take into account the nature of the measure in question, the power exercised and the extent to which the applicant has co-operated with the authorities in deciding whether the statement of reasons are sufficient. It is fair to say that the Commission and the Council Regulations are now more detailed and for the most part sufficiently reasoned as a result of the Court's case law and new legislation. This is to be welcomed and encouraged.

The more transparent the Community acts imposing safeguard measures are the less likely affected parties will object on the grounds of insufficient reasoning.

By far the most important ground of illegality is that relating to an infringement of the Treaty or a rule relating to its application. In exercising its power of review under this ground the Court has had to consider the application of the general principles common to the laws of the Member States which are now an important part of its jurisprudence.

The applicants have on a number of occasions invoked the principle of non-discrimination. This principle is aimed at ensuring persons in like or identical situations are treated equally. This is a question of fact to be decided on the facts of each case. It is submitted, however, that even if an applicant can show that there has been discrimination where the duties have been imposed as a result of findings correctly made the Court will not necessarily annul the measure in question.

The Community authorities have more recently departed from previous practice in certain areas and in particular in the calculation of dumping. Where they have done so the applicants have alleged that the principle of legal certainty has been breached in that the Community authorities practice was unpredictable and arbitrary. The Court has condoned this practice. It has ruled that traders cannot claim to have a legitimate expectation that the means originally chosen will be maintained since these may be altered by the Community authorities in the exercise of their powers. Furthermore the Court has held that the failure by the Community authorities to explain or provide in advance the criteria which they intend to apply in a given case when imposing a provisional or definitive duty does not constitute a breach of the principle of legal certainty. The present practice of the Community authorities in relation to the

anti-dumping rules was codified and is now part of Regulation 2423/88.

Where the Community authorities have breached the principle of proportionality, i.e. the means used in a given situation must be proportionate to the end to be achieved, the Court will annul the measure in question or the offending part of it. In particular, when a provision in the legislation allows for a lesser duty to be applied and if such a lesser duty is sufficient in the circumstances to remove the injury, failure to do so will mean that the measure in question or parts thereof will be annulled. Such a principle is important given that the aim of the safeguard measure is to remove the injury to Community industry but not such that the exporter in question is discriminated against vis-à-vis other exporters.

Occasionally, an applicant may allege that the powers exercised by the Community authorities were not in conformity with the GATT rules. This invariably raises the question of whether provisions of international agreements, and in particular the GATT, are directly effective. The Court has emphasised that there is an obligation on the Community to ensure that the provisions of the GATT are observed in relations with non-Member States which are parties to the GATT. Until recently the Court has not been prepared to hold that the provisions of the GATT are directly effective. In the Third Fediol case it was held that the GATT provisions are directly effective in relation to the New Commercial Policy Instrument. This decision is to be welcomed and it is hoped that the Court will extend its reasoning to cases involving the Anti-Dumping Rules.

Because investigations associated with safeguard measures are of a highly complex and technical nature the Community authorities are endowed with a wide margin of discretion in the exercise of their powers. The Court has from the inception of the European Economic Community held that the exercise of powers by the Community authorities which confer on them a wide discretion should be subject

to its review. It has, in relation to safeguard measures, adopted the general principle that its review is limited to verifying whether the relevant procedural rules have been complied with, whether the reasons for the decision are adequate, whether the facts on which the choice is made are accurate and most importantly whether there has been a manifest error of appraisal or misuse of powers.

The Court has held that the Community authorities did not exceed their powers when they constructed a normal value which was as close as possible to that which would have been established if there had been sufficient sales on the domestic market. Likewise it has approved the inclusion of a profit margin in the constructed normal value which reflected the profit realised by the sales of the product in the same general category on the domestic market. Where a sales company operates as a sales department of a parent company the Court has condoned the practice of the Community authorities to include the sales company's selling expenses when constructing normal value.

In constructing the dumping margin the Court has approved the practice of assessing the export price when these vary by the transaction-by-transaction method in order to avoid negative dumping. The authorities in determining the dumping margin do not have to use the same method in assessing normal value and export price. The choice of method is within the authorities' discretion and, by choosing a method corresponding to a particular situation, this discretion had not been exceeded.

The Court considers the protection of Community industry as paramount. Where a complainant industry has imported the dumped product the Community authorities may exclude such producers. In a recent number of cases the Community authorities did not exclude such Community producers because either the producer imported the dumped product in order to complete its range of models or these imports were minimal even though they caused injury to the other Community producers.

It has also held that the term "interests of the Community" confers on the Community authorities a sufficiently wide discretion to enable them to decide what measures are appropriate to deal with a given situation. This discretion will be even wider when an applicant has violated a price undertaking. The Court will, however, exercise its review in the exercise of that discretion where the procedural rights of an interested party are in issue. The decision to accept or refuse an undertaking is one subject to practical considerations. For this reason the Court will be less likely, if at all, to review the exercise of the Commission's powers in this respect.

Whilst the above practices are now codified in Regulation 2423/88 the case law of the Court gives some indication of ^{its reasoning} ~~how it reacts to those~~ ~~situations~~ when it is required to review the exercise of discretion by the Community authorities.

Owing to economic and political pressures and more importantly to the size of the task and the length of time involved the Court is unwilling to evaluate the factual assessment upon which the Community authorities have imposed safeguard measures. The review of this assessment, it is submitted, could be given greater consideration if the Court of First Instance were given the jurisdiction to review anti-dumping and other safeguard measures. Perhaps the Council of Ministers, when they review the matter in a year's time, will come to a similar conclusion.

Appendix 1

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No. 2423/88
of 11 July 1988
on protection against dumped or subsidized imports from
countries not members of the European Economic Community¹

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the Regulations establishing the common organization of agricultural markets and the Regulations adopted under Article 235 of the Treaty applicable to goods manufactured from agricultural products, and in particular the provisions of those Regulations which allow for derogation from the general principle that protective measures at frontiers may be replaced solely by the measures provided for in those Regulations,

Having regard to the proposal from the Commission,

Whereas by Regulation (EEC) No. 2176/84², as amended by Regulation (EEC) No. 1761/87³, the Council adopted common rules for protection against dumped or subsidized imports from countries which are not members of the European Economic Community;

Whereas these rules were adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as 'GATT'), from the Agreement on Implementation of Article VI of the GATT (1979 Anti-Dumping Code) and from the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Code on Subsidies and Countervailing Duties);

Whereas in applying these rules it is essential, in order to maintain the balance of rights and obligations which these Agreements sought to establish, that the Community take account of their interpretation

1 O.J. No. L 209, 11.7.1988, p. 1.

2 O.J. No. L 201, 30.7.1984, p. 1.

3 O.J. No. L 167, 26.6.1987, p. 9.

by the Community's major trading partners, as reflected in legislation or established practice;

Whereas it is desirable that the rules for determining normal value should be presented clearly and in sufficient detail; whereas it should be specifically provided that where sales on the domestic market of the country of export or origin do not for any reason form a proper basis for determining the existence of dumping, recourse may be had to a constructed normal value; whereas it is appropriate to give examples of situations which may be considered as not representing the ordinary course of trade, in particular where a product is sold at prices which are less than the costs of production, or where transactions take place between parties which are associated or which have a compensatory arrangement; where it is appropriate to list the possible methods of determining normal value in such circumstances;

Whereas it is expedient to define the export price and to enumerate the necessary adjustments to be made in those cases where reconstruction of this price from the first open-market price is deemed appropriate;

Whereas, for the purpose of ensuring a fair comparison between export price and normal value, it is advisable to establish guidelines for determining the adjustments to be made in respect of differences in physical characteristics, in quantities, in conditions and terms of sale and to draw attention to the fact that the burden of proof falls on any person claiming such adjustments;

Whereas the term 'dumping margin' should be clearly defined and the Community's established practice for methods of calculation where prices or margins vary codified;

Whereas it seems advisable to lay down in adequate detail the manner in which the amount of any subsidy is to be determined;

Whereas it seems appropriate to set out certain factors which may be relevant for the determination of injury;

Whereas it is necessary to lay down the procedures for anyone acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports to lodge a complaint; whereas it seems appropriate to make it clear that in the case of withdrawal of a complaint, proceedings may, but need not necessarily, be terminated;

Whereas there should be cooperation between the Member States and the Commission, both as regards information about the existence of dumping or subsidization and injury resulting therefrom, and as regards the subsequent examination of the matter at Community level; whereas, to this end, consultations should take place within an advisory committee;

Whereas it is appropriate to lay down clearly the rules of procedure to be followed during the investigation, in particular the rights and obligations of the Community authorities and the parties involved, and the conditions under which interested parties may have access to information and may ask to be informed of the essential facts and considerations on the basis of which it is intended to recommend definitive measures;

Whereas it is desirable to state explicitly that the investigation of dumping or subsidization should normally cover a period of not less than six months immediately prior to the initiation of the proceeding and that final determinations must be based on the facts established in respect of the investigation period;

Whereas to avoid confusion, the use of the terms 'investigation' and 'proceeding' in this Regulation should be clarified;

Whereas it is necessary to require that when information is to be considered as being confidential, a request to this effect must be made by the supplier, and to make clear that confidential information which could be summarized but of which no non-confidential summary has been submitted may be disregarded;

Whereas, in order to avoid undue delays and for administrative convenience, it is advisable to introduce time limits within which undertakings may be offered;

Whereas, it is necessary to lay down more explicit rules concerning the procedure to be followed after withdrawal or violation of undertakings;

Whereas it is necessary that the Community's decision-making process permit rapid and efficient action, in particular through measures taken by the Commission, as for instance the imposition of provisional duties;

Whereas, in order to discourage dumping, it is appropriate to provide, in cases where the facts as finally established show that there is dumping and injury, for the possibility of definitive collection of provisional duties even if the imposition of a definitive anti-dumping duty is not decided on, on particular grounds;

Whereas it is essential, in order to ensure that anti-dumping and countervailing duties are levied in a correct and uniform manner, that common rules for the application of such duties be laid down; whereas, by reason of the nature of the said duties, such rules may differ from the rules for the levying of normal import duties; Whereas experience gained from the implementation of Regulation (EEC) No. 2176/84 has shown that assembly in the Community of products whose importation in a finished state is subject to anti-dumping duty may give rise to certain difficulties;

Whereas in particular:

- where assembly or production is carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to an anti-dumping duty, and
- where the value of the parts or materials used in the assembly or production operation and originating in the country of origin of the product subject to an anti-dumping duty exceeds the value of all other parts or materials used,

such assembly or production is considered likely to lead to circumvention of the anti-dumping duty;

Whereas, in order to prevent circumvention, it is necessary to provide for the collection of an anti-dumping duty on products thus assembled or produced;

Whereas it is necessary to lay down the procedures and conditions for the collection of duty in such circumstances;

Whereas the amount of anti-dumping duty collected should be limited to that necessary to prevent circumvention;

Whereas provision should be made for the review of regulations and decisions to be carried out, where appropriate, in part only;

Whereas, in order to avoid abuse of Community procedures and resources, it is appropriate to lay down a minimum period which must elapse after the conclusion of a proceeding before such a review may be conducted, and to ensure that there is evidence of a change in circumstances sufficient to justify a review;

Whereas it is necessary to provide that, after a certain period of time, anti-dumping and countervailing measures will lapse unless the need for their continued existence can be shown;

Whereas appropriate procedures should be established for examining applications for refunds of anti-dumping duties; whereas there is a need to ensure that refund procedures apply only in respect of definitive duties or amounts of any provisional duty which have been definitively collected, and to streamline the existing procedures for refunds;

Whereas this Regulation should not prevent the adoption of special measures where this does not run counter to the Community's obligations under the GATT;

Whereas agricultural products and products derived therefrom might also be dumped or subsidized; whereas it is, therefore, necessary to supplement the import rules generally applicable to these products by making provision for protective measures against such practices;

Whereas, in addition to the above considerations, which, in essence, led to the adoption of Regulation (EEC) No. 2176/84, experience has shown that it is necessary to define more precisely certain of the rules to be applied and the procedures to be followed in the context of anti-dumping proceedings.

Whereas, for the determination of normal value, it is appropriate to ensure that when this is based on domestic prices, the price should be that actually paid or payable in the ordinary course of trade in the exporting country or country of origin and, therefore, the treatment of discounts and rebates should be clarified, in particular, with regard to deferred discounts which may be recognized if evidence is produced that they were not introduced to distort the normal value. It is also desirable to state more explicitly how normal value is established on the basis of constructed value, in particular, that the selling, general and administrative expenses and profit should be calculated, depending on the circumstances, by reference to the expenses incurred and the profit realized on profitable sales made by the exporter concerned or by other producers or exporters or on any reasonable basis. In addition, it is appropriate to state that, where the exporter neither produces nor sells the like product in the country of origin, the normal value shall normally be established by reference to the prices or costs of the exporter's supplier. Finally, it is considered necessary to define more precisely the conditions under which sales at a loss may be considered as not having been made in the ordinary course of trade;

Whereas, for the determination of export prices, it is advisable to ensure that this is based on the price actually paid or payable and, therefore, the treatment of discounts and rebates should be clarified. In cases where the export price has to be reconstructed, it is necessary to state that the costs to be used in this reconstruction include those normally borne by an importer but paid by any party which appears to be associated with the importer or exporter;

Whereas, for the comparison of normal value and export prices, it is necessary to ensure that this is not distorted by claims for adjustments relating to factors which are not directly related to the sales under consideration or by claims for factors already taken into account. It is therefore appropriate to define precisely the differences which affect price comparability and to lay down more explicit rules on how any adjustment should be made, in particular, for differences in physical characteristics, transport, packing, credit, warranties and other selling expenses. With regard to such selling expenses, it is appropriate, for reasons of clarity, to specify that no allowance should be made for general selling expenses since such expenses are not directly related to the sales under consideration with the exception of salesmen's salaries which should not be treated differently to commissions paid. For reasons of administrative convenience, it is also appropriate to specify that claims for individual adjustments which are insignificant should be disregarded;

Whereas, it is expedient to clarify Community practice with regard to the use of averaging and sampling techniques;

Whereas, in order to avoid undue disruption to proceedings, it is advisable to clarify that the supply of false or misleading information may lead to such information being disregarded and any claims to which it refers being disallowed;

Whereas, experience 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;

Whereas, experience has also shown that the rules relating to the expiry of anti-dumping and countervailing measures should be clarified. For this purpose and in order to facilitate the administration of these rules, provision should be made for the publication of a notice of intention to carry out a review;

Whereas, it is appropriate to state more explicitly the methods to be used in the calculation of the amount to any refund, thus confirming the consistent practice of the Commission, as regards refunds and the relevant principles contained in the notice which the Commission has published concerning the reimbursement of anti-dumping duties⁴;

Whereas it is appropriate to take advantage of this opportunity to proceed to a consolidation of the provisions in question,

HAS ADOPTED THIS REGULATION:

Article 1

Applicability

This Regulation lays down provisions for protection against dumped or subsidized imports from countries not members of the European Economic Community.

Article 2

Dumping

A. PRINCIPLE

1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

4 O.J. No. C 266, 22.10.1986, p. 2.

2. A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.

B. NORMAL VALUE

3. For the purposes of this Regulation, the normal value shall be:

- (a) the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin. This price shall be net of all discounts and rebates directly linked to the sales under consideration provided that the exporter claims and supplies sufficient evidence that any such reduction from the gross price has actually been granted. Deferred discounts may be recognized if they are directly linked to the sales under consideration and if evidence is produced to show that these discounts were based on consistent practice in prior periods or on an undertaking to comply with the conditions required to qualify for the deferred discount.
- (b) when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison:
 - (i) the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price; or
 - (ii) the constructed value, determined by adding cost of production and a reasonable margin of profit. The cost of production shall be computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses. The amount for selling, general and administrative expenses and profit shall be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of like products on the domestic market. If such data is unavailable or unreliable or is not suitable for use they shall be calculated by reference to the expenses incurred and profit realized by other producers or exporters in the country of origin or export on profitable sales of the like product. If neither of these two methods can be applied the expenses incurred and the profit realized shall 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.

- (c) where the exporter in the country of origin neither produces nor sells the like product in the country of origin, the normal value shall be established on the basis of prices or costs of other sellers or producers in the country of origin in the same manner as mentioned in subparagraphs (a) and (b). Normally the prices or costs of the exporter's supplier shall be used for this purpose.

4. Whenever there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for consumption in the country of origin is less than the cost of production as defined in paragraph 3 (b) (ii), sales at such prices may be considered as not having been made in the ordinary course of trade if they:

- (a) have been made in substantial quantities during the investigation period as defined in Article 7(1)(c); and
- (b) are not at prices which permit recovery, in the normal course of trade and within the period referred to in paragraph (a) of all costs reasonably allocated.

In such circumstances, the normal value may be determined on the basis of the remaining sales on the domestic market made at a price which is not less than the cost of production or on the basis of export sales to third countries or on the basis of the constructed value or by adjusting the sub-production-cost price referred to above in order to eliminate loss and provide for a reasonable profit. Such normal value calculations shall be based on available information.

5. In the case of imports from non-market economy countries and, in particular, those to which Regulations (EEC) No. 1765/82⁵ and (EEC) No. 1766/82⁶ apply, normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

- (a) the price at which the like product of a market economy third country is actually sold:
 - (i) for consumption on the domestic market of that country; or
 - (ii) to other countries, including the Community; or
- (b) the constructed value of the like product in a market economy third country;

⁵ O.J. No. L 195, 5.7.1982 p. 1.

⁶ O.J. No. L 195, 5.7.1982 p. 21.

- (c) if neither price nor constructed value as established under (a) or (b) provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin.

6. Where a product is not imported directly from the country of origin but is exported to the Community from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the domestic market of either the country of export or the country of origin. The latter basis might be appropriate inter alia, where the product is merely transshipped through the country of export, where such products are not produced in the country of export or where no comparable price for it exists in the country of export.

7. For the purpose of determining normal value transactions between parties which appear to be associated or to 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 involved are comparable to those involved in transactions between parties which have no such link.

C. EXPORT PRICE

- 8. (a) The export price shall be the price actually paid or payable for the product sold for export to the Community net of all taxes, discounts and rebates actually granted and directly related to the sales under consideration. Deferred discounts shall also be taken into consideration if they are actually granted and directly related to the sales under consideration.
- (b) In cases where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party, or that for other reasons the price actually paid or payable for the product sold for export to the Community is unreliable, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer, or if the product is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis. In such cases, allowance shall be made for all costs incurred between importation and resale and for a reasonable profit margin. These costs shall include those normally borne by an importer but paid by any party either in or outside the Community which appears to be associated or to have a compensatory arrangement with the importer or exporter.

Such allowances shall include, in particular, the following:

- (i) usual transport, insurance, handling, loading and ancillary costs;
- (ii) customs duties, any anti-dumping duties and other taxes payable in the importing country by reason of the importation or sale of the goods;
- (iii) a reasonable margin for overheads and profit and/or any commission usually paid or agreed

D. COMPARISON

9. (a) The normal value, as established under paragraphs 3 to 7, and the export price, as established under paragraph 8, shall be compared as nearly as possible at the same time. For the purpose of ensuring a fair comparison, due allowance in the form of adjustments shall be made in each case, on its merits, for the differences affecting price comparability, i.e. for differences in:

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

(b) Where an interested party claims an adjustment it must prove that its claim is justified.

10. Any adjustments to take account of the differences affecting price comparability listed in paragraph 9(a) shall, where warranted, be made pursuant to the rules specified below.

(a) Physical characteristics:

The normal value as established under paragraphs 3 to 7 shall be adjusted by an amount corresponding to a reasonable estimate of the value of the difference in the physical characteristics of the product concerned.

(b) Import charges and indirect taxes:

Normal value shall be reduced by an amount corresponding to any import charges or indirect taxes, as defined in the notes to the Annex, 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.

(c) Selling expenses (i.e.):

- (i) Transport, insurance, handling, loading and ancillary costs:

Normal value shall be reduced by the directly related costs incurred for conveying the product concerned from the premises of the exporter to the first independent buyer. The export price shall be reduced by any directly related costs incurred by the exporter for conveying the product concerned from its premises in the exporting country to its destination in the Community. In both cases these costs comprise transport, insurance, handling, loading and ancillary costs.

- (ii) Packing:

Normal value and export price shall be reduced by the respective, directly related costs of the packing for the product concerned.

- (iii) Credit:

Normal value and export price shall be reduced by the cost of any credit granted for the sales under consideration.

The amount of the reduction shall be calculated by reference to the normal commercial credit rate applicable in the country of origin or export in respect of the currency expressed on the invoice.

- (iv) Warranties, guarantees, technical assistance and other after-sales services:

Normal value and export price shall be reduced by an amount corresponding to the direct costs of providing warranties, guarantees, technical assistance and services.

- (v) Other selling expenses:

Normal value and export price shall be reduced by an amount corresponding to the commissions paid in respect of the sales under consideration. The salaries paid to salesmen, i.e. personnel wholly engaged in direct selling activities, shall also be deducted.

(d) Amount of the adjustment:

The amount of any adjustment shall be calculated on the basis of relevant data for the investigation period or the data for the last available financial year.

(e) Insignificant adjustments:

Claims for adjustments which are insignificant in relation to the price or value of the affected transactions shall be disregarded. Ordinarily, individual adjustments having an ad valorem effect of less than 0.5% of that price or value shall be considered insignificant.

E. ALLOCATION OF COSTS

11. In general, all cost calculations shall be based on available accounting data, normally allocated, where necessary, in proportion to the turnover for each product and market under consideration.

F. LIKE PRODUCT

12. For the purposes of this Regulation, 'like product' means a product which is identical, i.e., alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration.

G. AVERAGING AND SAMPLING TECHNIQUES

13. 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.

H. DUMPING MARGIN

14. (a) 'Dumping margin' means the amount by which the normal value exceeds the export price.
- (b) Where dumping margins vary, weighted averages may be established.

Article 3

Subsidies

1. A countervailing duty may be imposed for the purpose of off-setting any subsidy bestowed, directly or indirectly, in the country

of origin or export, upon the manufacture, production, export or transport of any product whose release for free circulation in the Community causes injury.

2. Subsidies bestowed on exports include, but are not limited to, the practices listed in the Annex.
3. The exemption of a product from import charges or indirect taxes, as defined in the Notes to the Annex, effectively borne by the like product and by materials physically incorporated therein, when destined for consumption in the country of origin or export, or the refund of such charges or taxes, shall not be considered as a subsidy for the purposes of this Regulation.
4. (a) The amount of the subsidy shall be determined per unit of the subsidized product exported to the Community.
- (b) In establishing the amount of any subsidy the following elements shall be deducted from the total subsidy:
 - (i) any application fee, or other costs necessarily incurred in order to qualify for, or receive benefit of, the subsidy;
 - (ii) export taxes, duties or other charges levied on the export of the product to the Community specifically intended to offset the subsidy.

Where an interested party claims a deduction, it must prove that the claim is justified.

- (c) Where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount shall be determined by allocating the value of the subsidy, as appropriate, over the level of production or exports of the product concerned during a suitable period. Normally this period shall be the accounting year of the beneficiary.

Where the subsidy is based upon the acquisition or future acquisition of fixed assets, the value of the subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned. Where the assets are non-depreciating, the subsidy shall be valued as an interest-free loan.

- (d) In the case of imports from non-market economy countries and in particular those to which Regulations (EEC) No. 1765/82 and (EEC) No. 1766/82 apply, the amount of any subsidy may be determined in an appropriate and not unreasonable manner, by comparing the export price as calculated in accordance with Article 2 (8) with the normal value as determined in accordance with Article 2 (5). Article 2 (10) shall apply to such a comparison.

- (e) Where the amount of subsidization varies, weighted averages may be established.

Article 4

Injury

1. A determination of injury shall be made only if the dumped or subsidized imports are, through the effects of dumping or subsidization, causing injury i.e., causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry. Injuries caused by other factors, such as volume and prices of imports which are not dumped or subsidized, or contraction in demand, which, individually or in combination, also adversely affect the Community industry must not be attributed to the dumped or subsidized imports.

2. An examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

- (a) volume of dumped or subsidized 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 or subsidized 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 such as:
 - production,
 - utilization of capacity,
 - stocks,
 - sales,
 - market share,
 - prices (i.e., depression of prices or prevention of price increases which otherwise would have occurred),
 - profits,
 - return on investment,
 - cash flow,
 - employment.

3. A determination of threat of injury may only be made where a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as:

- (a) rate of increase of the dumped or subsidized exports to the Community;

- (b) export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community;
- (c) the nature of any subsidy and the trade effects likely to arise therefrom.

4. The effect of the dumped or subsidized imports shall be assessed in relation to the Community production of the like product when available data permit its separate identification. When the Community production of the like product has no separate identity, the effect of the dumped or subsidized imports shall be assessed in relation to the production of the narrowest group or range of production which includes the like product for which the necessary information can be found.

5. 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 except that:

when producers are related to the exporters or importers or are themselves importers of the allegedly dumped or subsidized product the term 'Community industry' may be interpreted as referring to the rest of the producers;

in exceptional circumstances the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a Community industry if,

- (a) the producers within such market sell all or almost all their production of the product in question in that market, and
- (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community.

In such circumstances injury may be found to exist even where a major proportion of the total Community industry is not injured, provided there is a concentration of dumped or subsidized imports into such an isolated market and provided further that the dumped or subsidized imports are causing injury to the producers of all or almost all of the production within such market.

Article 5

Complaint

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint.
2. The complaint shall contain sufficient evidence of the existence of dumping or subsidization and the injury resulting therefrom.
3. The complaint may be submitted to the Commission, or a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives.
4. The complaint may be withdrawn, in which case proceedings may be terminated unless such termination would not be in the interest of the Community.
5. Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.
6. Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of dumping or subsidization and of injury resulting therefrom for a Community industry, it shall immediately communicate such evidence to the Commission.

Article 6

Consultations

1. Any consultations provided for in this Regulation shall take place within an Advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately on request by a Member State or on the initiative of the Commission.
2. The Committee shall meet when convened by its chairman. He shall provide the Member States, as promptly as possible, with all relevant information.
3. Where necessary, consultation may be in writing only; in such case the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation.
4. Consultation shall in particular cover:
 - (a) the existence of dumping or of a subsidy and the methods of establishing the dumping margin or the amount of the subsidy;

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

Article 7

Initiation and subsequent investigation

1. Where, after consultation it is apparent that there is sufficient evidence to justify initiating a proceeding the Commission shall immediately:

- (a) announce the initiation of a proceeding in the Official Journal of the European Communities; such announcements shall indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with paragraph 5;
 - (b) so advise the exporters and importers known to the Commission to be concerned as well as representatives of the exporting country and the complainants;
 - (c) commence the investigation at Community level, acting in cooperation with the Member States; such investigation shall cover both dumping or subsidization and injury resulting therefrom and shall be carried out in accordance with paragraphs 2 to 8; the investigation of dumping or subsidization shall normally cover a period of not less than six months immediately prior to the initiation of the proceeding.
2. (a) The Commission shall seek all information it deems to be necessary and, where it considers it appropriate, examine and verify the records of importers, exporters, traders, agents, producers, trade associations and organizations.
- (b) Where necessary the Commission shall carry out investigations in third countries, provided that the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection. The Commission shall be assisted by officials of those Member States who so request.

3. (a) The Commission may request Member States:
 - to supply information,
 - to carry out all necessary checks and inspections, particularly amongst importers, traders and Community producers,
 - to carry out investigations in third countries, provided the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection.
- (b) Member States shall take whatever steps are necessary in order to give effect to requests from the Commission. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out.
- (c) Where this information is of general interest or where its transmission has been requested by a Member State, the Commission shall forward it to the Member States, provided it is not confidential, in which case a non-confidential summary shall be forwarded.
- (d) Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.
4. (a) The complainant and the importers and exporters known to be concerned, as well as the representatives of the exporting country, may inspect all information made available to the Commission by any party to an investigation as distinct from internal documents prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. To this end, they shall address a written request to the Commission indicating the information required.
- (b) Exporters and importers of the product subject to investigation and, in the case of subsidization, the representatives of the country of origin, may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties or the definitive collection of amounts secured by way of a provisional duty.
- (c) (i) requests for information pursuant to (b) shall:
 - (aa) be addressed to the Commission in writing,
 - (bb) specify the particular issues on which information is sought,

(cc) be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty;

(ii) the information may be given either orally or in writing as considered appropriate by the Commission. It shall not prejudice any subsequent decision which may be taken by the Commission or the Council. Confidential information shall be treated in accordance with Article 8;

(iii) information shall normally be given no later than 15 days prior to the submission by the Commission of any proposal for final action pursuant to Article 12. Representations made after the information is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.

5. The Commission may hear the interested parties. It shall so hear them if they have, within the period prescribed in the notice published in the Official Journal of the European Communities, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard orally.

6. Furthermore the Commission shall, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and any rebuttal argument put forward. In providing this opportunity the Commission shall take account of the need to preserve confidentiality and of the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

7. (a) This Article shall not preclude the Community authorities from reaching preliminary determinations or from applying provisional measures expeditiously.

(b) In cases in which any interested party or third country refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation, preliminary or final findings, affirmative or negative, may be made on the basis of the facts available. Where the Commission finds that any interested party or third country has supplied it with false or misleading information, it may disregard any such information and disallow any claim to which this refers.

8. Anti-dumping or countervailing proceedings shall not constitute a bar to customs clearance of the product concerned.

9. (a) An investigation shall be concluded either by its termination or by definitive action. Conclusion should normally take place within one year of the initiation of the proceeding.
- (b) A proceeding shall be concluded either by the termination of the investigation without the imposition of duties and without the acceptance of undertakings or by the expiry or repeal of such duties or by the termination of undertakings in accordance with Articles 14 or 15.

Article 8

Confidentiality

1. Information received in pursuance of this Regulation shall be used only for the purpose for which it was requested.
2. (a) Neither the Council, nor the Commission, nor Member States, nor the officials of any of these, shall reveal any information received in pursuance of this Regulation for which confidential treatment has been requested by its supplier, without specific permission from the supplier.
- (b) Each request for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary.
3. Information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.
4. However, if it appears that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded.

The information may also be disregarded where such request is warranted and where the supplier is unwilling to submit a non-confidential summary, provided that the information is susceptible of such summary.

5. This Article shall not preclude the disclosure of general information by the Community authorities and in particular of the reasons on which decisions taken in pursuance of this Regulation are based, or disclosure of the evidence relied on by the Community authorities in so far as necessary to explain those reasons in court proceedings. Such disclosure must take into account the legitimate interest of the parties concerned that their business secrets should not be divulged.

Article 9

Termination of proceedings where protective measures
are unnecessary

1. If it becomes apparent after consultation that protective measures are unnecessary, then, where no objection is raised within the Advisory Committee referred to in Article 6 (1), the proceeding shall be terminated. In all other cases the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the proceeding be terminated. The proceeding shall stand terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

2. The Commission shall inform any representatives of the country of origin or export and the parties known to be concerned and shall announce the termination in the Official Journal of the European Communities setting forth its basic conclusions and a summary of the reasons therefor.

Article 10

Undertakings

1. Where, during the course of an investigation, undertakings are offered which the Commission, after consultation, considers acceptable, the investigation may be terminated without the imposition of provisional or definitive duties.

Save in exceptional circumstances, undertakings may not be offered later than the end of the period during which representations may be made under Article 7 (4) (c) (iii). The termination shall be decided in conformity with the procedure laid down in Article 9 (1) and information shall be given and notice published in accordance with Article 9 (2). Such termination does not preclude the definitive collection of amounts secured by way of provisional duties pursuant to Article 12 (2).

2. The undertakings referred to under paragraph 1 are those under which:

- (a) the subsidy is eliminated or limited, or other measures concerning its injurious effects taken, by the government of the country of origin or export; or
- (b) prices are revised or exports cease to the extent that the Commission is satisfied that either the dumping margin or the amount of the subsidy, or the injurious effects thereof, are eliminated. In case of subsidization the consent of the country of origin or export shall be obtained.

3. Undertakings may be suggested by the Commission, but the fact that such undertakings are not offered or an invitation to do so is not accepted, shall not prejudice consideration of the case. However, the continuation of dumped or subsidized imports may be taken as evidence that a threat of injury is more likely to be realized.

4. If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the Commission, after consultation, so decides or if request is made, in the case of dumping, by exporters representing a significant percentage of the trade involved or, in the case of subsidization, by the country of origin or export. In such a case, if the Commission, after consultation, makes a determination of no injury, the undertaking shall automatically lapse. However, where a determination of no threat of injury is due mainly to the existence of an undertaking, the Commission may require that the undertaking be maintained.

5. The Commission may require any party from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertaking.

6. Where an undertaking has been withdrawn or where the Commission has reason to believe that it has been violated and where Community interests call for such intervention, it may, after consultations and after having offered the exporter concerned an opportunity to comment, apply provisional anti-dumping or countervailing duties forthwith on the basis of the facts established before the acceptance of the undertaking.

Article 11

Provisional duties

1. Where preliminary examination shows that dumping or a subsidy exists and that there is sufficient evidence of injury caused thereby and the interests of the Community call for intervention to prevent injury being caused during the proceeding, the Commission, acting at the request of a Member State or on its own initiative, shall impose a provisional anti-dumping or countervailing duty. In such cases, release of the products concerned for free circulation in the Community shall be conditional upon the provision of security for the amount of the provisional duty, definitive collection of which shall be determined by the subsequent decision of the Council under Article 12 (2).

2. The Commission shall take such provisional action after consultation or, in cases of extreme urgency, after informing the Member States. In this latter case, consultations shall take place 10 days at the latest after notification to the Member States of the action taken by the Commission.

3. Where a Member State requests immediate intervention by the Commission, the Commission shall within a maximum of five working days of receipt of the request, decide whether a provisional anti-dumping or countervailing duty should be imposed.

4. The Commission shall forthwith inform the Council and the Member States of any decision taken under this Article. The Council, acting by a qualified majority, may decide differently. A decision by the Commission not to impose a provisional duty shall not preclude the imposition of such duty at a later date, either at the request of a Member State, if new factors arise, or on the initiative of the Commission.

5. Provisional duties shall have a maximum period of validity of four months. However, where exporters representing a significant percentage of the trade involved so request or, pursuant to a notice of intention from the Commission, do not object, provisional anti-dumping duties may be extended for a further period of two months.

6. Any proposal for definitive action, or for extension of provisional measures, shall be submitted to the Council by the Commission not later than one month before expiry of the period of validity or provisional duties. The Council shall act by a qualified majority.

7. After expiration of the period of validity of provisional duties, the security shall be released as promptly as possible to the extent that the Council has not decided to collect it definitively.

Article 12

Definitive action

1. Where the facts as finally established show that there is dumping or subsidization during the period under investigation and injury caused thereby, and the interests of the Community call for Community intervention, a definitive and anti-dumping or countervailing duty shall be imposed by the Council, acting by qualified majority on a proposal submitted by the Commission after consultation.

2. (a) Where a provisional duty has been applied, the Council shall decide, irrespective of whether a definitive anti-dumping or countervailing duty is to be imposed, what proportion of the provisional duty is to be definitively collected. The Council shall act by a qualified majority on a proposal from the Commission.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there has been dumping or subsidization, and injury. For this purpose, 'injury' shall not include material retardation of the establishment of a Community industry, nor threat of material injury, except where it is found that

this would, in the absence of provisional measures, have developed into material injury.

Article 13

General provisions on duties

1. Anti-dumping or countervailing duties, whether provisional or definitive, shall be imposed by Regulation.
2. Such Regulation shall indicate in particular the amount and type of duty imposed, the product covered, the country of origin or export, the name of the supplier, if practicable, and the reasons on which the Regulation is based.
3. The amount of such duties shall not exceed the dumping margin provisionally estimated or finally established or the amount of the subsidy provisionally estimated or finally established; it should be less if such lesser duty would be adequate to remove the injury.
4. (a) Anti-dumping and countervailing duties shall be neither imposed nor increased with retroactive effect. The obligation to pay the amount of these duties is incurred in accordance with Directive 79/623/EEC⁷.

(b) However, where the Council determines:
 - (i) for dumped products:
 - that there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
 - that the injury is caused by sporadic dumping, i.e. massive dumped imports of a product in a relatively short period, to such an extent that, in order to preclude it recurring, it appears necessary to impose an anti-dumping duty retroactively on those imports; or
 - (ii) for subsidized products:
 - in critical circumstances that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from export subsidies paid or bestowed inconsistently with the provisions of the GATT and

⁷ O.J. No. L 179 17.7.1979 p. 31.

of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, and

- that it is necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on these imports; or

(iii) for dumped or subsidized products:

- that an undertaking has been violated,

the definitive anti-dumping or countervailing duties may be imposed on products in relation to which the obligation to pay import duties under Directive 79/623/EEC has been or would have been incurred not more than 90 days prior to the date of application of provisional duties, except that in the case of violation of an undertaking such retroactive assessment shall not apply to imports which were released for free circulation in the Community before the violation.

5. Where a product is imported into the Community from more than one country, duty shall be levied at an appropriate amount on a non-discriminatory basis on all imports of such product found to be dumped or subsidized and causing injury, other than imports from those sources in respect of which undertakings have been accepted.

6. Where the Community industry has been interpreted as referring to the producers in a certain region; the Commission shall give exporters an opportunity to offer undertakings pursuant to Article 10 in respect of the region concerned. If an adequate undertaking is not given promptly or is not fulfilled, a provisional or definitive duty may be imposed in respect of the Community as a whole.

7. In the absence of any special provisions to the contrary adopted when a definitive or provisional anti-dumping or countervailing duty was imposed, the rules on the common definition of the concept of origin and the relevant common implementing provisions shall apply.

8. Anti-dumping or countervailing duties shall be collected by Member States in the form, at the rate and according to the other criteria laid down when the duties were imposed, and independently of the customs duties, taxes and other charges normally imposed on imports.

9. No product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from the granting of any subsidy.

10. (a) Definitive and anti-dumping duties may be imposed, by way of derogation from the second sentence of paragraph 4(a), on products that are introduced into the commerce of the Community after having been assembled or produced in the Community, provided that:

- assembly or production is carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to a definitive anti-dumping duty,
- the assembly or production operation was started or substantially increased after the opening of the anti-dumping investigation,
- the value of parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty exceeds the value of all other parts or materials used by at least 50%.

In applying this provision, account shall be taken of the circumstances of each case, and, inter alia, of the variable costs incurred in the assembly or production operation and of the research and development carried out and the technology applied within the Community.

In that event the Council shall, at the same time, decide that parts or materials suitable for use in the assembly or production of such products and originating in the country of exportation of the product subject to the anti-dumping duty can only be considered to be in free circulation in so far as they will not be used in an assembly or production operation as specified in the first subparagraph.

- (b) Products thus assembled or produced shall be declared to the competent authorities before leaving the assembly or production plant for their introduction into the commerce of the Community. For the purposes of levying an anti-dumping duty, this declaration shall be considered to be equivalent to the declaration referred to in Article 2 of Directive 79/695/EEC⁸.
- (c) The rate of the anti-dumping duty shall be that applicable to the manufacturer in the country of origin of the like product subject to an anti-dumping duty to which the party in the Community carrying out the assembly or production is related or associated. The amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete product on the cif value of the parts or materials imported; it shall not exceed that required to prevent circumvention of the anti-dumping duty.

⁸ O.J. No. L 205, 13.8.1979, p. 19.

- (d) The provisions of this Regulation concerning investigation, procedure, and undertakings apply to all questions arising under this paragraph.
11. (a) Where the exporter bears the anti-dumping duty, an additional anti-dumping duty may be imposed to compensate for the amount borne by the exporter.
- (b) When any party directly concerned submits sufficient evidence showing that the duty has been borne by the exporter, e.g. that the resale price to the first independent buyer of the product subject to the anti-dumping duty is not increased by an amount corresponding to the anti-dumping duty, the matter shall be investigated and the exporters and importers concerned shall be given an opportunity to comment.

Where it is found that the anti-dumping duty has been borne by the exporter, in whole or in part, either directly or indirectly and where Community interests call for intervention, an additional anti-dumping duty shall, after consultation, be imposed in accordance with the procedures laid down in Articles 11 and 12.

This duty may be applied retroactively. It may be imposed on products in relation to which the obligation to pay import duties under Directive 79/623/EEC has been incurred after the imposition of the definitive anti-dumping duty, except that such assessment shall not apply to imports which were released for free circulation in the Community before the exporter bore the anti-dumping duty.

- (c) Insofar as the results of the investigation show that the absence of a price increase by an amount corresponding to the anti-dumping duty is not due to a reduction in the costs and/or profits of the importer for the product concerned then the absence of such price increase shall be considered as an indicator that the anti-dumping duty has been borne by the exporter.
- (d) Article 7(7)(b) applies within the context of investigations under this paragraph.

Article 14

Review

1. Regulations imposing anti-dumping or countervailing duties and decisions to accept undertakings shall be subject to review, in whole or in part, where warranted.

Such review may be held either at the request of a Member State or on the initiative of the Commission. A review shall also be held where an interested party so requests and submits evidence of changed circumstances sufficient to justify the need for such review, provided that at least one year has elapsed since the conclusion of the investigation. Such requests shall be addressed to the Commission which shall inform the Member States.

2. Where, after consultation, it becomes apparent that review is warranted, the investigation shall be re-opened in accordance with Article 7, where the circumstances so require. Such re-opening shall not per se affect the measures in operation.

3. Where warranted by the review, carried out either with or without re-opening of the investigation, the measures shall be amended, repealed or annulled by the Community institution competent for their introduction. However, where measures have been taken under the transitional provisions of an Act of Accession the Commission shall itself amend, repeal or annul them and shall report this to the Council; the latter may, acting by a qualified majority, decide that different action be taken.

Article 15

1. Subject to the provisions of paragraphs 3, 4 and 5, anti-dumping or countervailing duties and undertakings shall lapse after five years from the date on which they entered into force or were last modified or confirmed.

2. The Commission shall normally, after consultation and within six months prior to the end of the five year period, publish in the Official Journal of the European Communities a notice of the impending expiry of the measure in question and inform the Community industry known to be concerned. This notice shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with Article 7 (5).

3. Where an interested party shows that the expiry of the measure would lead again to injury or threat of injury, the Commission shall, after consultation, publish in the Official Journal of the European Communities a notice of its intention to carry out a review of the measure. Such notice shall be published prior to the end of the relevant five year period. The measure shall remain in force pending the outcome of this review.

However, where the initiation of the review has not been published within six months after the end of the relevant five year period the measure shall lapse at the end of that six month period.

4. Where a review of a measure under Article 14 is in progress at the end of the relevant five year period, the measure shall remain in force pending the outcome of such review. A notice to this effect

shall be published in the Official Journal of the European Communities before the end of the relevant five year period.

5. Where anti-dumping or countervailing duties and undertakings lapse under this Article the Commission shall publish a notice to that effect in the Official Journal of the European Communities. Such notice shall state the date of expiry of the measure.

Article 16

Refund

1. Where an importer can show that the duty collected exceeds the actual dumping margin or the amount of the subsidy, consideration being given to any application of weighted averages, the excess amount shall be reimbursed. This amount shall be calculated in relation to the changes which have occurred in the dumping margin or the amount of the subsidy which were established in the original investigation for the shipments to the Community of the importer's supplier. All refund calculations shall be made in accordance with the provisions of Articles 2 or 3 and shall 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.

2. In order to request the reimbursement referred to in paragraph 1, the importer shall submit an application to the Commission. The application shall be submitted via the Member State in the territory of which the products were released for free circulation and within three months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty.

The Member State shall forward the application to the Commission as soon as possible, either with or without an opinion as to its merits.

The Commission shall inform the other Member States forthwith and give its opinion on the matter. If the Member States agree with the opinion given by the Commission or do not object to it within one month of being informed, the Commission may decide in accordance with the said opinion. In all other cases, the Commission shall, after consultation, decide whether and to what extent the application should be granted.

Article 17

Final provisions

This Regulation shall not preclude the application of:

1. any special rules laid down in agreements concluded between the Community and third countries;

2. the Community Regulations in the agricultural sector and of Regulations (EEC) No. 1059/69⁹, (EEC) No. 2730/75¹⁰, and (EEC) No. 2783/75¹¹; this Regulation shall operate by way of complement to those Regulations and in derogation from any provisions thereof which preclude the application of anti-dumping or countervailing duties;
3. special measures, provided that such action does not run counter to obligations under the GATT.

Article 18

Repeal of existing legislation

Regulation (EEC) No. 2176/84 is hereby repealed.

References to the repealed Regulation shall be construed as references to this Regulation.

Article 19

Entry into force

This Regulation shall enter into force on the third day following its publication in the Official Journal of the European Communities.

It shall apply to proceedings already initiated.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 July 1988.

For the Council
The President
P. ROUMELIOTIS

⁹ O.J. No. L 141, 12.6.1969, p. 1.

¹⁰ O.J. No. L 281, 1.11.1975, p. 20.

¹¹ O.J. No. L 282, 1.11.1975, p. 104.

ANNEX

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

- (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
- (b) Currency retention schemes or any similar practices which involve a bonus on exports.
- (c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
- (d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.
- (e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises. Notwithstanding the foregoing, deferral of taxes and charges referred to above need not amount to an export subsidy where, for example, appropriate interest charges are collected.
- (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.
- (g) The exemption or remission in respect of the production and distribution of exported products, or indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption. The problem of the excessive remission of value added tax is exclusively covered by this paragraph.
- (h) The exemption, remission or deferral of prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in

the exported product. This paragraph does not apply to the value added tax systems and border tax adjustments related thereto.

- (i) The remission or drawback of import charges in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years. This paragraph does not apply to value added tax systems and border tax adjustments related thereto.
- (j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.
- (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated at the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms. Provided, however, that if the country of origin or export is a party to an international undertaking on official export credits to which at least 12 original signatories to the Agreement on Interpretation and application of Articles VI, XVI and XXIII of the GATT are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice the country of origin or export applies the interest rate provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy.
- (l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the GATT.

Notes:

For the purposes of this Annex the following definitions apply:

- 1 The term "direct taxes" shall mean taxes on wages, profits, interest, rents, royalties, and all other forms of income, and taxes on the ownership of real property.
- 2 The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in these Notes that are levied on imports.
- 3 The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges.
- 4 "Prior stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product.
- 5 "Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production.
- 6 "Remission" of taxes includes the refund or rebate of taxes.

APPENDIX 2

COUNCIL REGULATION (EEC) No. 288/82
of 5 February 1982

on common rules for imports¹

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the instruments establishing common organization of agricultural markets and to the instruments concerning processed agricultural products adopted in pursuance of Article 235 of the Treaty, in particular the provisions of those instruments which allow for derogation from the general principle that all quantitative restrictions or measures having equivalent effect may be replaced solely by the measures provided for in those same instruments,

Having regard to the proposal from the Commission,

Whereas the common commercial policy must be based on uniform principles; whereas the import rules established by Regulation (EEC) No. 926/79² are an important aspect of that policy;

Whereas the liberalization of imports, that is to say the absence of any quantitative restrictions subject to exceptions and derogations provided for in Community rules, is the starting point for common rules in this field;

Whereas the Commission must be informed by the Member States of any danger created by trends in imports which might call for protective measures;

Whereas it may become apparent that there should be either community surveillance at national level over certain of these imports;

Whereas, in such a case, the Commission must examine import terms and conditions, import trends, the various aspects of the economic and commercial situation, and the measures, if any, to be taken;

Whereas in this case the putting into free circulation of the products concerned should be made subject to production of an import document satisfying uniform criteria; whereas that document must, on

1 O.J. No. L 35, 9.2.1982, p. 1.

2 O.J. No. L 131, 29.5.1979, p. 15.

declarations or on simple application by the importer, be issued or endorsed by the authorities of the Member States within a certain period but without the importer thereby acquiring any right to import; whereas the document must therefore be valid only during such period as the import rules remain unchanged;

Whereas it is in the interest of the Community that the Member States and the Commission should make as full an exchange as possible of information resulting from either Community surveillance or surveillance at national level;

Whereas it is for the Commission and the Council to adopt the protective measures called for by the interests of the Community with due regard for existing international obligations; whereas, therefore, protective measures against a country which is a contracting party to GATT may be considered only if the product in question is imported into the Community in such greatly increased quantities and on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products, unless international obligations permit derogation from this rule;

Whereas Member States should be empowered, in certain circumstances and provided that their actions are on an interim basis only, to take protective measures individually;

Whereas Articles 14(6) and 16(1) of Regulation (EEC) No. 926/79 provide that the Council shall decide on the adjustments to be made to that Regulation;

Whereas a review of the Regulation, in the light of experience gained in applying it, has shown that it is necessary to adopt more precise criteria for assessing possible injury and to introduce an investigation procedure while still allowing the Commission and the Member States to introduce appropriate measures in urgent cases;

Whereas to this end more detailed provisions should be introduced on the opening of investigations, on the checks and inspections required, on the hearing of those concerned, the treatment of information obtained and the criteria for assessing injury;

Whereas the provisions on the investigations introduced by this Regulation do not prejudice Community or national rules concerning professional secrecy;

Whereas, furthermore, in a desire for simplicity and greater transparency of import arrangements, it seemed preferable to draw up a list of quantitative restrictions still applicable at national level rather than a common liberalization list;

Whereas a procedure should be available for application where import restrictions maintained by certain Member States are amended; whereas in order to prevent these autonomous amendments from constituting obstacles to the implementation of the common commercial

policy and from injuring the interests of the Community or one of its Member States, these amendments should be subject to prior consultation and, where necessary, to an authorization procedure;

Whereas, in addition, the provisions of the Agreement on import licencing procedures signed within the framework of GATT should be transposed into Community law, in particular so as to ensure a greater transparency of the systems of restrictions applied by the Member States;

Whereas the Regulation this amended should be published in its entirety,

HAS ADOPTED THIS REGULATION;

TITLE I

General Principles

Article 1

1. This Regulation shall apply to imports of products covered by the Treaty originating in third countries, except for

- textile products subject to specific common import rules for the duration of those rules, subject to measures which may be taken regarding these products in accordance with Title IV,
- the products originating in State-trading countries listed in Regulation (EEC) No. 925/79³;
- the products originating in the People's Republic of China listed in Regulation (EEC) No. 2532/78⁴,
- products originating in Cuba.

2. Importation into the Community of the products referred to in paragraph 1 shall be free, and therefore not subject to any quantitative restriction, without prejudice to

- measures which may be taken under Title V,
- measures maintained under Title VI,
- quantitative restrictions for the products listed in Annex I and maintained in the Member States indicated opposite these products in that Annex.

³ O.J. No. L 131, 29.5.1979, p. 1.

⁴ O.J. No. L 306, 31.10.1978, p. 1.

Article 2

The Council may, acting by a qualified majority on a proposal from the Commission, decide to delete certain products from Annex I, if it considers that such action is not liable to create a situation where the reintroduction of protective measures would be justified.

TITLE II

Community information and consultation procedure

Article 3

The Commission shall be informed by the Member States should trends in imports appear to call for surveillance or protective measures. This information shall contain the available evidence on the basis of the criteria laid down in Article 9. The Commission shall pass on this information to all the Member States forthwith.

Article 4

Consultations may be held, either at the request of a Member State or on the initiative of the Commission. They shall take place within eight working days following receipt by the Commission of the information provided for in Article 3 and, in any event, before the introduction of any measure of surveillance or protective measure by the Community.

Article 5

1. Consultation shall take place within an advisory committee (hereinafter called "the Committee") which shall consist of representatives of each Member State with a representative of the Commission as chairman.
2. The Committee shall meet when convened by its chairman. He shall provide the Member States, as promptly as possible, with all relevant information.
3. Consultation shall cover in particular:
 - (a) terms and conditions of importation, import trends, and the various aspects of the economic and commercial situation as regards the produce in question;
 - (b) the measures, if any, to be taken.
4. Consultations may be in writing if necessary. The Commission shall in this event inform the Member States, which may express their opinion or request oral consultations within a period of five to eight working days to be decided by the Commission.

TITLE III

Community investigation procedure

Article 6

1. Where, after consultation it is apparent to the Commission that there is sufficient evidence to justify an investigation, the Commission shall:

- (a) announce the opening of an investigation in the Official Journal of the European Communities; such announcements shall give a summary of the information received, and stipulate that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing;
- (b) commence the investigation, acting in cooperation with the Member States.

2. The Commission shall seek all information it deems to be necessary and, where it considers it appropriate, after consulting the Committee, endeavour to check this information with importers, traders, agents, producers, trade associations and organizations.

The Commission shall be assisted in this task by staff of the Member State on whose territory these checks are being carried out, provided this Member State so wishes.

3. The Member States shall supply the Commission, at its request and following procedures laid down by it, with all information at their disposal on developments in the market of the product being investigated.

4. The Commission may hear the interested natural and legal persons. Such parties must be heard where they have applied in writing within the period laid down in the notice published in the Official Journal of the European Communities, showing that they are actually likely to be affected by the outcome of the investigations and that there are special reasons for them to be heard orally.

5. Where the information requested by the Commission is not supplied within a reasonable period, or the investigation is significantly impeded, findings may be made on the basis of the facts available.

Article 7

1. At the end of the investigation, the Commission shall submit a report on the results to the Committee.

2. If the Commission considers that no Community surveillance or protective measures are necessary, it shall publish in the Official Journal of the European Communities, after consulting the Committee, a notice that the investigations are closed, stating the main conclusions of the investigations.

3. If the Commission considers that Community surveillance or protective measures are necessary, it shall take the necessary decisions in accordance with Titles IV and V.

4. The provisions of this Title shall not preclude the taking, at any time, of surveillance measures in accordance with Articles 10 to 14 or, in an emergency, protective measures in accordance with Articles 15 to 17.

In the latter case, the Commission shall immediately take the investigation measures it considers to be still necessary. The results of the investigation shall be used to re-examine the measures taken.

Article 8

1. Information received in pursuance of this Regulation shall be used only for the purpose for which it was requested.

2. (a) Neither the Council, nor the Commission, nor Member States, nor the officials of any of these, shall reveal any information of a confidential nature received in pursuance of this Regulation, or any information provided on a confidential basis, without specific permission from the supplier of such information.

(b) Each request for confidentiality shall state the reasons why the information is confidential.

However, if it appears that a request for confidentiality is unjustified and if the supplier of the information wishes neither to make it public nor to authorize its disclosure in general terms or in the form of a summary, the information concerned may be disregarded.

3. Information will in any case be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.

4. The above paragraphs shall not preclude reference by the Community authorities to general information and in particular to reasons on which decisions taken in pursuance of this Regulation are based. These authorities must, however, take into account the legitimate interest of the legal and natural persons concerned that their business secrets should not be divulged.

Article 9

1. The examination of the trend of imports, of the conditions in which they take place and of the substantial injury or threat of substantial injury to Community producers resulting from such imports, shall cover in particular the following factors:

- (a) the volume of imports, in particular where there has been a significant increase, either in absolute terms or relative to production or consumption in the Community;
- (b) the prices of the imports, in particular where 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 Community producers of similar or directly competitive products as indicated by trends in certain economic factors such as;

- production,
- utilization of capacity,
- stocks,
- sales,
- market share,
- prices (i.e. depression of prices or prevention of price increases which would normally have occurred),
- profits,
- return on capital employed,
- cash flow,
- employment.

2. Where a threat of serious injury is alleged the Commission shall also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as:

- (a) rate of increase of the exports to the Community;
- (b) export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community.

TITLE IV

Surveillance

Article 10

1. Where developments on the market in respect of a product originating in a third country covered by this Regulation threaten to cause injury to Community producers of like or directly competing products and where the interests of the Community so require,

importation of that product may be made subject, as the case may be, to:

- (a) retrospective Community surveillance carried out according to the procedures laid down in the Decision referred to in paragraph 2, or
- (b) prior Community surveillance carried out according to the procedures laid down in Article 11.

In these cases the product together with the indication "EUR" shall be entered in Annex II.

2. Where the decision to impose surveillance is taken simultaneously with the liberalization of importation of the product in question, that decision shall be taken by the Council, acting by a qualified majority on a proposal from the Commission. In all other cases it shall be taken by the Commission and Article 15(5) shall apply.

3. The surveillance measures shall be of limited duration. Unless otherwise provided, they shall cease to be valid at the end of the second half calendar year following that in which they were introduced.

Article 11

1. Products under prior Community surveillance may be put into free circulation only on production of an import document. Such document shall be issued or endorsed by Member States, free of charge, for any quantity requested and within a maximum of five working days following submission, in accordance with the national laws in force, either of a declaration or simply of an application by any Community importer, regardless of his place of business in the Community, without prejudice to the observance of the other conditions required by the regulations in force.

2. Subject to any provision to the contrary made when surveillance was imposed and under the procedure there followed, the declaration or application by the importer must give:

- (a) the name and address of the importer;
- (b) a description of the product with the following particulars:
 - commercial description,
 - tariff heading, or reference number, of the product in the goods nomenclature used for foreign trade purposes by the country concerned,
 - country of origin,
 - exporting country;

- (c) the cif price free-at-frontier and the quantity of the product in units customarily used in the trade in question;
- (d) the proposed date or dates as well as the place or places of importation.

Member States may request further particulars.

3. Paragraph 2 shall not preclude the putting into free circulation of the product in question if the unit price at which the transaction is effected exceeds that indicated in the import document, or if the total value or quantity of the products to be imported exceeds the value or quantity given in the import document by less than 5%. The Commission, having heard the opinions expressed in the Committee and taking account of the nature of the products and other special features of the transactions concerned, may fix a different percentage, which, however, should not normally exceed 10%.

4. Import documents may be used only for such time as arrangements for the liberalization of imports remain in force in respect of the transactions concerned and in any event not beyond the expiry of a period laid down, with regard to the nature of the products and other special features of the transactions, at the same time and by means of the same procedure as the imposition of surveillance.

5. Where the decision taken under Article 10 so requires, the origin of products under Community surveillance must be proved by a certificate of origin. This paragraph shall not prejudice other provisions concerning the production of any such certificate.

6. Where the product under prior Community surveillance is not liberalized in a Member State, the import authorization granted by that Member State may replace the import document.

Article 12

1. Where importation of a product has not been made subject to prior Community surveillance within a period of eight working days following the end of consultations, the Member State, having informed the Commission under Article 3 may carry out surveillance over such importation at national level.

2. In cases of extreme urgency the Member State may carry out surveillance at national level after informing the Commission in accordance with Article 3. The latter shall inform the other Member States.

3. The Commission shall be informed, upon the entry into force of the surveillance, of the detailed rules for its application and shall amend Annex II by means of a notice published in the Official Journal of the European Communities, by entering the name of the Member State applying the surveillance opposite the product in question.

Article 13

Products under national surveillance may be put into free circulation only on production of an import document. Such document shall be issued or endorsed by the Member State, free of charge, for any quantity requested and within a maximum of five working days following submission of a declaration or simply of an application by any Community importer, regardless of his place of business in the Community, without prejudice to the observance of the other conditions required by the regulations in force. Import documents may be used only for such time as arrangements for the liberalization of imports remain in force in respect of the transactions concerned.

Article 14

1. Member States shall communicate to the Commission within the first 10 days of each month in the case of Community surveillance and within the first 20 days of each quarter in the case of national surveillance:

- (a) in the case of prior surveillance, details of the sums of money (calculated on the basis of cif prices) and quantities of goods in respect of which import documents were issued or endorsed during the preceding period;
- (b) in every case, details of imports during the period preceding the period referred to in subparagraph (a).

The information supplied by Member States shall be broken down by product and by countries.

Different provisions may be laid down at the same time and by the same procedure as the surveillance arrangements.

2. Where the nature of the products or special circumstances so require, the Commission may, at the request of a Member State or on its own initiative, amend the timetables for submitting this information.

3. The Commission shall inform the Member State.

TITLE V

Protective measures

Article 15

1. Where a product is imported into the Community in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products, and where a critical situation, in which any delay would cause injury which it would be difficult to

remedy, calls for immediate intervention in order to safeguard the interests of the Community, the Commission may, acting at the request of a Member State or on its own initiative:

- (a) limit the period of validity of import documents within the meaning of Article 11 to be issued or endorsed after the entry into force of this measure;
- (b) alter the import rules for the product in question by providing that it may be put into free circulation only on production of an import authorization, the granting of which shall be governed by such provisions and subject to such limits as the Commission shall lay down pending action, if any, by the Council under Article 16.

The measures referred to in (a) and (b) shall take effect immediately.

2. Where the establishment of a quota constitutes a withdrawal of liberalization, account shall be taken in particular of:

- the desirability of maintaining, as far as possible, traditional trade flows,
- the volume of goods exported under contracts concluded on normal terms and conditions before the entry into force of a protective measure within the meaning of this Title, where such contracts have been notified to the Commission by the Member State concerned,
- the need to avoid jeopardizing achievement of the aim pursued in establishing the quota.

3. (a) The measures referred to in this Article shall apply to every product which is put into free circulation after their entry into force. They may be limited to imports intended for certain regions of the Community.

- (b) However, such measures shall not prevent the putting into free circulation of products already on their way to the Community provided that the destination of such products cannot be changed and that those products which, under Articles 10 and 11 may be put into free circulation only on production of an import document are in fact accompanied by such a document.

4. Where intervention by the Commission has been requested by a Member State, the Commission shall take a decision within a maximum of five working days of receipt of such request.

5. Any decision taken by the Commission under this Article shall be communicated to the Council and to the Member States. Any Member State may, within one month following the day of communication, refer such decision to the Council.

6. If a Member State refers the decision taken by the Commission to the Council, the Council shall, by a qualified majority, confirm, amend or revoke the decision of the Commission.

If within three months of the referral of the matter to the Council, the latter has not given a decision, the measure taken by the Commission shall be deemed revoked.

Article 16

1. Where the interests of the Community so require, the Council may, acting by a qualified majority on a proposal from the Commission, adopt appropriate measures:

- (a) to prevent a product being imported into the Community in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, substantial injury to Community producers of like or directly competing products;
- (b) to allow the rights and obligations of the Community or of all its Member States to be exercised and fulfilled at international level, in particular those relating to trade in primary products.

2. Article 15(2) and (3) shall apply.

Article 17

1. In the following cases a Member State may, as an interim protective measure, alter the import rules for a particular product by providing that it may be put into free circulation only on production of an import authorization, the granting of which shall be governed by such provisions and subject to such limits as that Member State shall lay down:

- (a) where there exists in its territory a situation such as that defined as regards the Community in Article 15(1);
 - (b) where such measure is justified by a protective clause contained in a bilateral agreement between the Member State and a third country.
2. (a) The Member State shall inform the Commission and the other Member States by telex of the reasons for and the details of the proposed measures. The Commission and the other Member States shall treat this information in strictest confidence. The Commission shall forthwith convene the Committee. The Member State may take these measures after having heard the opinions expressed by the Committee.
- (b) Where a Member State claims that the matter is especially urgent, consultations shall take place within a period of five working days following information transmitted to the Commission; at the end of this period, the Member State may

take these measures. During this period the Member State may make imports of the product in question subject to production of an import authorization to be granted under the procedure and within the limits to be laid down at the end of the said period.

3. The Commission shall be notified by telex of the measures immediately following their adoption.
4. The notification shall be equivalent to a request within the meaning of Article 15(4). The measures shall operate only until the coming into operation of the decision taken by the Commission. However, where the Commission decides not to introduce any measure or adopts measures pursuant to Article 15, different from those taken by the Member State, its decision shall apply as from the sixth day following its entry into force, unless the Member State which has taken the measures refers the decision to the Council; in that case, the national measures shall continue to operate until the entry into force of the decision taken by the Council and for the maximum of one month following referral of the matter to the latter. The Council shall take a decision before the expiry of that period. The Council may under the same conditions decide in certain cases to extend this period, which may, in no fashion, exceed a total of three months.

The preceding subparagraph does not affect the Member States' right of recourse under Article 15(5) and (6).

5. This Article shall apply until 31 December 1984. Before 31 December 1983, the Commission shall propose to the Council amendments to be made to it. The Council shall act, before 31 December 1984 by a qualified majority, upon the Commission proposal. However, the provisions relating to protective measures:

- justified by a safeguard clause contained in a bilateral agreement shall not be effected by that time limit,
- concerning imports of products which have been liberalized in certain Member States but subject to quota in other shall apply until 31 December 1987.

Article 18

1. While any measure of surveillance or protective measure applied in accordance with Titles IV and V is in operation, consultations within the Committee shall be held, either at the request of a Member State or on the initiative of the Commission. The purpose of such consultations shall be:

(a) to examine the effects of the measure;

(b) to ascertain whether its application is still necessary.

2. Where, as a result of the consultations referred to in paragraph 1, the Commission considers that any measure referred to in

Articles 10, 12, 15 or 16 should be revoked or amended it shall proceed as follows;

- (a) where the Council has acted on a measure, the Commission shall propose that it be revoked or amended; the Council shall act by a qualified majority;
- (b) in all other cases, the Commission shall amend or revoke Community protective measures and measures of surveillance. Where this decision concerns national measures of surveillance, it shall apply as from the sixth day following its publication in the Official Journal of the European Communities, unless the Member State which has taken the measure refers it to the Council; in that case the national measure shall continue to operate until the entry into force of the decision taken by the Council, but in no event after the expiry of a period of three months following referral of the matter to the latter. The Council shall act before the expiry of that period.

TITLE VI

Transitional and final provisions

Article 19

1. By 31 December 1984 at the latest, the Council shall decide on the adjustments to be made to this Regulation for the purpose of greater uniformity of rules for imports. The Council shall act by a qualified majority on a proposal from the Commission and with due regard to the progress of the common commercial policy.
2. Pending these adjustments:
 - (a) in so far as standardization between the areas of liberalization has not been wholly realized. Member States may subject imports of products not included in the Annex to Regulation (EEC) No. 925/79 to the requirement that not only the country of origin but also the country of purchase or the country of export shall be among the countries covered by this Regulation; for the Federal Republic of Germany, this shall apply also to those products included in the Annex to the abovementioned Regulation whose importation is not yet exempted in respect of all third countries, under German import arrangements, from the requirement of an import authorization;
 - (b) the Italian Republic may subject imports of products originating in Egypt, Yugoslavia and Japan to the requirement that the country of origin shall be the same as the country of export;
 - (c) import documents required for Community surveillance under Article 11 shall be valid only in the Member State which issued or endorsed them;

- (d) the Benelux countries and the Italian Republic may retain the automatic-licence or import-declaration formalities currently applied by them to imports originating in Japan and Hong Kong;
- (e) the Member States listed in Annex II opposite the products marked with an asterisk may retain national surveillance over imports of such products, including imports under automatic licences; Article 12, Article 13, last sentence, Article 14 and Article 18 shall not be applicable;
- (f) this Regulation shall not preclude the continuance of measures taken by the Italian Republic - pursuant to the Ministerial Decree of 6 May 1976, including the list annexed thereto and the subsequent amendments to it - making subject to special authorization the importation of articles, machinery and equipment, whether used or new but in poorly maintained condition, falling within heading No. 73.24, Chapters 84 to 87 and 93 or subheading 97.04B of the Common Customs Tariff.

3. Member States shall forward to the Commission details of any measures taken in conformity with the Agreement on import licensing procedures concluded by the Community by Decision 80/271/EEC⁵. In particular they shall make available to the Commission the rules and all information concerning the procedures for the submission of requests for licences, including the conditions relating to admissibility of persons, enterprises or institutions who submit such requests. All changes of these rules shall also be sent to the Commission.

Article 20

- 1. Where a Member State which applies an import restriction referred to in the last indent of Article 1(2) intends to change it, it shall inform the Commission and the other Member States thereof.
- 2. (a) At the request of the Commission or a Member State, the measures referred to in paragraph 1 shall be the subject of prior consultation within the Committee.
- (b) If the Commission does not request on its own initiative consultations within five working days after receiving the information referred to in paragraph 1, nor at the request of a Member State made sufficiently early before the end of the said period the Member State concerned, may then put the proposed measure into effect.
- (c) In other cases, the consultation procedure shall commence within five working days after the expiry of the period provided for in (b).

⁵ O.J. No. L 71, 17.3.1980, p. 1.

3. (a) If after consultation no objection has been raised by the other Member States or by the Commission, the Commission shall forthwith inform the Member State concerned, which may put the measure into effect immediately.
- (b) In other cases, the Member State concerned may not put the proposed measure into effect until three weeks after the opening of the consultation.
- (c) If, within this period, the Commission submits to the Council, under Article 113 of the Treaty, a proposal meeting the objections raised, the proposed measure may not be put into effect until the Council has acted.

4. In cases of extreme urgency, the following provisions shall apply:

- (a) a quota may be reduced or any possibility of importation may be taken away without prior consultation but after the transmission of information referred to in paragraph 1;
- (b) when a quota has been exhausted and the economic requirements of a Member State call for additional imports from the non-member country or countries benefiting from the quota the Member State concerned may, without prior notification, open additional import facilities up to a maximum of 20% of the quantity or value of the exhausted quota; it shall forthwith inform the Commission and the other Member States thereof. The emergency procedure laid down in this paragraph shall not apply once the opening of negotiations with the non-member country concerned has been authorized;
- (c) at the request of any Member State or of the Commission, subsequent consultation under the terms of paragraph 3 shall be held on measures taken by a Member State under this paragraph.

5. Where a Member State intends to make a unilateral change to its import arrangements for a petroleum product which is entered in Annex I and referred to in Article 3 of the Council Regulation (EEC) No. 802/68 of 27 June 1968 on the common definition of the concept of the origin of goods⁶, it shall inform the Commission and the other Member States thereof. The procedure laid down in paragraphs 2, 3 and 4 shall be applicable in this case; the other provisions of this Regulation shall not apply.

6. The Benelux countries may, where they are mentioned in Annex II opposite a product listed in that Annex and marked with an asterisk,

⁶ O.J. No. L 148, 28.6.1968, p. 1.

retain the automatic licence formality as currently applied by them; such licences shall be issued, free of charge, for any quantity requested and simply on submission of an application by the Community importer, regardless of his place of business in the Community; Article 13 shall not apply to these products.

Article 21

Without prejudice to other Community provisions, this Regulation shall not preclude the adoption or application by Member States;

- (a) of prohibitions, quantitative restrictions or measures of surveillance on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property;
- (b) of special formalities concerning foreign exchange;
- (c) of formalities introduced pursuant to international agreements in accordance with the Treaty.

Article 22

1. This Regulation shall be without prejudice to the operation of the instruments establishing the common organization of agricultural markets or of Community or national administrative provisions derived therefrom or of the specific instruments adopted under Article 235 of the Treaty applicable to goods resulting from the processing of agricultural products; it shall operate by way of complement to those instruments.

2. However, in the case of products covered by the instruments referred to in paragraph 1, Articles 10 to 14 and 18 shall not apply to those in respect of which the Community rules on trade with third countries require the production of a licence or other import document.

Articles 15, 17 and 18 shall not apply to those products in respect of which such rules make provision for the application of quantitative import restrictions.

Article 23

The Commission shall publish at regular intervals an updated text of Annexes I and II which will take account of Acts adopted in accordance with this Regulation both by the Community and by Member States. The Commission shall be informed of the introduction, amendment or repeal of all national measures.

Article 24

Regulation (EEC) No. 926/79 is hereby repealed.

References to the repealed Regulation shall be understood as referring to this Regulation.

Article 25

This Regulation shall enter into force on the day of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5 February 1982.

For the Council
The President
L. TINDEMANS

APPENDIX 3

COUNCIL REGULATION (EEC) No. 2641/84
of 17 September 1984

on the strengthening of the common commercial policy
with regard in particular to protection against
illicit commercial practices¹

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the rules establishing the common organization of agricultural markets and the rules adopted under Article 235 of the Treaty, applicable to goods processed from agricultural products, and in particular those provisions thereof which allow for derogation from the general principle that any quantitative restriction or measure having equivalent effect may be replaced solely by the measures provided for in those instruments,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Whereas the common commercial policy must be based on uniform principles, notably with regard to commercial protection; whereas Council Regulation (EEC) No. 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community⁴ and the rules for imports laid down pursuant to Regulation (EEC) No. 288/82⁵, as amended by Regulations (EEC) No. 899/83⁶, (EEC) No. 1765/82⁷ and (EEC)

1 O.J. No. L 252, 20.9.1984, p. 1.

2 O.J. No. C 205, 1.8.1983, p. 2.

3 O.J. No. C 211, 8.8.1983, p. 24.

4 O.J. No. L 201, 30.7.1984, p. 1.

5 O.J. No. L 35, 9.2.1982, p. 1.

6 O.J. No. L 103, 21.4.1983, p. 1.

7 O.J. No. L 195, 5.7.1982, p. 1.

No. 1766/82⁸, as amended by Regulations (EEC) No. 35/83⁹ and (EEC) No. 101/84¹⁰, constitute important components of that policy;

Whereas in the light of experience and of the conclusions of the European Council of June 1982, which considered that it was of the highest importance to defend vigorously the legitimate interests of the Community in the appropriate bodies, in particular GATT, and to make sure the Community, in managing trade policy, acts with as much speed and efficiency as strengthened, notably in the fields not covered by the rules already adopted;

Whereas to this end it is advisable to provide the Community with procedures enabling it:

- to respond to any illicit commercial practice with a view to removing the injury resulting therefrom,
- to ensure full exercise of the Community's rights with regard to the commercial practices of third countries;

Whereas, in particular, the Community should be enabled to remove the injury resulting from third countries' practices whose illicit nature is evident from their incompatibility regarding international trade practices either with international law or with the generally accepted rules;

Whereas the measures taken under the procedures in question should, however, be without prejudice to other measures in cases not covered by this Regulation which might be adopted directly pursuant to Article 113 of the Treaty;

Whereas the Community must act in compliance with its international obligations and, where such obligations result from agreements, maintain the balance of rights and obligations which it is the purpose of those agreements to establish;

Whereas it is necessary to confirm, by establishing a formal complaints procedure, the right of Community industry to submit to the Commission any complaint regarding illicit commercial practices by third countries;

Whereas for the purposes of implementation of this Regulation there should be cooperation between the Member States and the Commission and, to this end, arrangements should be made for consultations within an advisory committee;

8 O.J. No. L 195, 5.7.1982, p. 21.

9 O.J. No. L 5, 7.1.1983, p. 12.

10 O.J. No. L 14, 17.1.1984, p. 7.

Whereas it is appropriate to lay down clearly the rules of procedure to be followed during the examination, in particular the rights and obligations of the Community authorities and the parties involved, and the conditions under which interested parties may have access to information and may ask to be informed of the essential facts and considerations resulting from the examination procedure;

Whereas, in conducting the defence of its commercial interests, the Community needs to have at its disposal a decision-making process which permits rapid and effective action,

HAS ADOPTED THIS REGULATION;

Article 1

Aims

This Regulation establishes procedures in the matter of commercial policy which, subject to compliance with existing international obligations and procedures, are aimed at;

- (a) responding to any illicit commercial practice with a view to removing the injury resulting therefrom;
- (b) ensuring full exercise of the Community's rights with regard to the commercial practices of third countries.

Article 2

Definitions

1. For the purposes of this Regulation, illicit commercial practices shall be any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules.
2. For the purposes of this Regulation, the Community's rights shall be those international trade rights of which it may avail itself either under international law or under generally accepted rules.
3. For the purposes of this Regulation, injury shall be any material injury caused or threatened to Community industry.
4. The term 'Community industry' shall be taken to mean all Community producers:
 - of products identical or similar to the product which is the subject of illicit practices or of products competing directly with that product, or
 - who are consumers or processors of the product which is the subject of illicit practices,

or all those producers whose combined output constitutes a major proportion of total Community production of the products in question; however:

- (a) when producers are related to the exporters or importers or are themselves importers of the product alleged to be the subject of illicit practices, the term 'Community industry' may be interpreted as referring to the rest of the producers;
- (b) in particular circumstances, the producers within a region of the Community may be regarded as the Community industry if their collective output constitutes the major proportion of the output of the product in question in the Member State or Member States within which the region is located provided that:
 - (i) where the illicit practice concerns imports into the Community, their effect is concentrated in that Member State or those Member States,
 - (ii) where the illicit practice concerns Community exports to a third country, a significant proportion of the output of those producers is exported to the third country concerned.

Article 3

Complaint on behalf of Community producers

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of illicit commercial practices may lodge a written complaint.
2. The complaint must contain sufficient evidence of the existence of illicit commercial practices and the injury resulting therefrom. Proof of injury must be given on the basis of the factors indicated in Article 8.
3. The complaint shall be submitted, to the Commission, which shall send a copy thereof to the Member States.
4. The complaint may be withdrawn, in which case the procedure may be terminated unless such termination would not be in the interests of the Community.
5. Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.

Article 4

Referral by a Member State

1. Any Member State may ask the Commission to initiate the procedures referred to in Article 1.
2. It shall supply the Commission with the necessary evidence to support its request. Where illicit commercial practices are alleged, proof thereof and of the injury resulting therefrom must be given on the basis of the factors indicated in Article 8.
3. The Commission shall notify the other Member States of the requests without delay.
4. Where it becomes apparent after consultation that the request does not provide sufficient evidence to justify initiating an investigation, then the Member State shall be so informed.

Article 5

Consultation procedure

1. For the purpose of consultations pursuant to this Regulation, an advisory committee, hereinafter referred to as 'the Committee', is hereby set up and shall consist of representatives of each Member State, with a representative of the Commission as chairman.
2. Consultations shall be initiated at the request of a Member State or on the initiative of the Commission. The chairman of the Committee shall provide the Member States, as promptly as possible, with all relevant information in his possession.
3. The Committee shall meet when convened by its chairman.
4. Where necessary, consultations may be in writing. In such case the Commission shall notify in writing the Member States who, within a period of eight working days from such notification shall be entitled to express their opinions in writing or to request oral consultations.

Article 6

Community examination procedure

1. Where, after consultation, it is apparent to the Commission that there is sufficient evidence to justify initiating an examination procedure and that it is necessary in the interest of the Community, the Commission shall act as follows:

- (a) it shall announce the initiation of an examination procedure in the Official Journal of the European Communities; such

announcement shall indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with paragraph 5;

- (b) it shall so officially notify the representatives of the country or countries which are the subject of the procedure, with whom, where appropriate, consultations may be held;
 - (c) it shall conduct the examination at Community level, acting in cooperation with the Member States.
2. (a) If necessary, and notably in cases of allegations of illicit commercial practices, the Commission shall seek all the information it deems necessary and attempt to check this information with the importers, traders, agents, producers, trade associations and organizations, provided that the undertakings or organizations concerned give their consent.
- (b) Where necessary, the Commission shall carry out investigations in the territory of third countries, provided that the governments of the countries concerned have been officially notified and raise no objection within a reasonable period.
 - (c) The Commission shall be assisted in its investigation by officials of the Member State in whose territory the checks are carried out, provided that the Member State in question so requests.
3. Member States shall supply the Commission, upon request, with all information necessary for the examination, in accordance with the detailed arrangements laid down by the Commission.
4. (a) The complainants and the exporters and importers concerned, as well as the representatives of the principal exporting or importing country or countries concerned, may inspect all information made available to the Commission except for internal documents for the use of the Commission and the administrations, provided that such information is relevant to the protection of their interests and not confidential within the meaning of Article 7 and that it is used by the Commission in its examination procedure. The persons concerned shall address a reasoned request in writing to the Commission, indicating the information required.
- (b) The complainants and the exporters and importers concerned and the representatives of the principal exporting or importing country or countries concerned may ask to be informed of the principal facts and considerations resulting from the examination procedure.

5. The Commission may hear the parties concerned. It shall hear them if they have, within the period prescribed in the notice published in the Official Journal of the European Communities, made a written request for a hearing showing that they are a party primarily concerned by the result of the procedure.

6. Furthermore, the Commission shall, on request, give the parties primarily concerned an opportunity to meet, so that opposing views may be presented and any rebuttal argument put forward. In providing this opportunity the Commission shall take account of the wishes of the parties and of the need to preserve confidentiality. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

7. When the information requested by the Commission is not supplied within a reasonable time or where the investigation is significantly impeded, findings may be made on the basis of the facts available.

8. The Commission shall take a decision as soon as possible on the opening of a Community examination procedure following any complaint or request made in accordance with Articles 3 and 4; the decision shall normally be taken within 45 days of referral; this period may be extended to 60 days in special circumstances.

9. When it has concluded its examination the Commission shall report to the Committee. The report should normally be presented within five months of the announcement of initiation of the procedure, unless the complexity of the examination is such that the Commission extends the period to seven months.

Article 7

Confidentiality

1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.

2. (a) Neither the Council, nor the Commission, nor Member States, nor the officials of any of these, shall reveal any information of a confidential nature received pursuant to this Regulation, or any information provided on a confidential basis by a party to an examination procedure, without specific permission from the party submitting such information.

(b) Each request for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information or a statement of the reasons why the information is not susceptible of such summary.

3. Information will normally be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.

4. However, if it appears that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded.

5. This Article shall not preclude the disclosure of general information by the Community authorities and in particular of the reasons on which decisions taken pursuant to this Regulation are based. Such disclosure must take into account the legitimate interest of the parties concerned that their business secrets should not be divulged.

Article 8

Examination of injury

1. An examination of injury shall involve in particular the following factors:

- (a) the volume of Community imports or exports concerned, notably where there has been a significant increase or decrease, either in absolute terms or relative to production or consumption on the market in question;
- (b) the prices of the Community producers' competitors, in particular in order to determine whether there has been, either in the Community or on third country markets, significant undercutting of the prices of Community producers;
- (c) the consequent impact on Community industry as defined in Article 2 (4) and as indicated by trends in certain economic factors such as:
 - production,
 - utilization of capacity,
 - stocks,
 - sales,
 - market share,
 - prices (that is, depression of prices or prevention of price increases which would normally have occurred),
 - profits,
 - return on capital,
 - investment,
 - employment.

2. Where a threat of injury is alleged, the Commission shall also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard, account may also be taken of factors such as;

- (a) the rate of increase of exports to the market where the competition with Community products is taking place;
- (b) export capacity in the country of origin or export, which is already in existence or will be operational in the foreseeable future, and the likelihood that the exports resulting from that capacity will be to the market referred to in point (a).

1. Injury caused by other factors which, either individually or in combination, are also adversely affecting Community industry must not be attributed to the practices under consideration.

Article 9

Termination of the procedure

- 1. When it is found as a result of the examination procedure that the interests of the Community do not require any action to be taken, the procedure shall be terminated in accordance with Article 12.
- 2. (a) When, after an examination procedure, the third country or country concerned take(s) measures which are considered satisfactory the procedure may also be terminated in accordance with the provisions of Article 11.
- (b) The Commission shall supervise the application of these measures, where appropriate on the basis of information supplied at intervals, which it may request from the third countries concerned and check as necessary.
- (c) Where the measures taken by the third country or countries concerned have been rescinded, suspended or improperly implemented or where the Commission has grounds for believing this to be the case or, finally, where a request for information made by the Commission as provided for by point (b) has not been granted, the Commission shall inform the Member States, and where necessary and justified by the results of the investigation and the new facts available any measures shall be taken in accordance with Article 11.

Article 10

Adoption of commercial policy measures

- 1. Where it is found as a result of the examination procedure that action is necessary in the interests of the Community in order to:
 - (a) respond to any illicit commercial practice with the aim of removing the injury resulting therefrom; or

- (b) ensure full exercise of the Community's rights with regard to the commercial practices of third countries

the appropriate measures shall be determined in accordance with the procedure set out in Article 11.

2. Where the Community's international obligations require the prior discharge of an international procedure for consultation or for the settlement of disputes, the measures referred to in paragraph 3 shall only be decided on after that procedure has been terminated, and taking account of the results of the procedure.

3. Any commercial policy measures may be taken which are compatible with existing international obligations and procedures, notably;

- (a) suspension or withdrawal of any concession resulting from commercial policy negotiations;
- (b) the raising of existing customs duties or the introduction of any other charge on imports;
- (c) the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.

4. The corresponding decisions shall state the reasons on which they are based and shall be published in the Official Journal of the European Communities. Publications shall also be deemed to constitute notification to the countries and parties primarily concerned.

Article 11

Decision-making machinery

1. The decisions referred to in Articles 9 and 10 shall be adopted in accordance with the following provisions.

2. Where a response to an illicit commercial practice within the meaning of Article 1(a) is to be made:

- (a) where the Community follows formal international consultations or dispute settlement procedures, decisions relating to the initiation, conduct, or termination of such procedures shall be taken in accordance with Article 12;
- (b) where the Community, after the conclusion of such an international procedure, has to take a decision on the measures of commercial policy to be adopted, the Council shall act, on the proposal from the Commission, in accordance with Article 113 of the Treaty, by a qualified majority, not later than 30 days after receiving the proposal.

3. Where the full exercise of the Community's rights within the meaning of Article 1(b) is to be ensured, the Council shall act, on the proposal from the Commission, in accordance with Article 113 of the Treaty, by a qualified majority, not later than 30 days after receiving the proposal.

Article 12

Should reference be made to the procedure provided for in this Article, the matter shall be brought before the Committee by its chairman.

The Commission representative shall submit to the Committee a draft of the decision to be taken. The Committee shall discuss the matter within a period to be fixed by the chairman, depending on the urgency of the matter.

The Commission shall adopt a decision which it shall communicate to the Member States and which shall apply after a period of 10 days if during this period no Member State has referred the matter to the Council.

The Council may, at the request of a Member State and acting by a qualified majority revise the Commission's decision.

The Commission's decision shall apply after a period of 30 days if the Council has not given a ruling within this period, calculated from the day on which the matter was referred to the Council.

Article 13

This Regulation shall not apply in cases covered by other existing rules in the common commercial policy field. It shall operate by way of complement to the:

- rules establishing the common organization of agricultural markets and their implementing provisions;
- specific rules adopted under Article 235 of the Treaty, applicable to goods processed from agricultural products.

It shall be without prejudice to other measures which may be taken pursuant to Article 113 of the Treaty.

Article 14

This Regulation shall enter into force on the third day following its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 September 1984.

For the Council
The President
P. BARRY

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