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EU ANTI-DUMPING POLICY

-A Study in the CTV Case

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ABSTRACT

After integration for approximate half of century, EU, which compasses 25 Member State on 1st May, 2004, grows its influence on global economy day by day. There has been a significant increase of international trade between EU and China since 1990s. EU anti-dumping policy is playing such a key role among the external trade policies and the trade between EU and China. In order to help Chinese exporters to have the better understanding of the characteristics of EU anti-dumping regulations and legislations, this thesis will, according to recent judgment of Chinese CTVs case on anti-dumping measures, deeply analyze the characteristics of EU anti-dumping legislation and compare EU antidumping regulation to WTO Anti-dumping Agreement.

In this thesis, I will firstly introduce the background of EC Anti-Dumping Regulations, and present its source of law, fact, procedure and prospective evolution. After the study of CTVs case, I will draw the comments on characteristics of EU antidumping regulation while comparing EC with GATT/WTO Anti-Dumping Agreements. Furthermore, some advises on how to deal with antidumping charges should be given to Chinese exporters and policy recommendations will be given to Chinese government.

Through the CTVs study, it can be found that the governing body is conferred in excessively broad power by EU anti-dumping law and there are some incompatible measures of the Commission in implementation of EC Anti-Dumping Law against WTO Agreement. Since China `s entry into WTO, how to use WTO Dispute Settlement Mechanism so as to help exporters strive for fair treatment and adjust domestic economic policy is the prospective direction of governmental improvement.

Key words: Color television, Anti-dumping, WTO, EU-China, 384/96, CTV

List of Abbreviations

ADA	Anti-Dumping Agreement
Art.	Article
Basic Regulation	Council Regulation EC No 384/96
COM	Commission
CTV	Color Television
EC	European Community
EU	European Union
ECJ	European Court of Justice
EEC	European Economic Community
LSI	Large Scale Integrated circuit
NICS	New Industrialized Countries
NME	Non-Market Economy
OJ	Official Journal
R&D	Research and Development
WTO	World Trade Organization

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Preface

The subject of external regulations of EU has been extensively studied and thus anyone opening these pages should not expect a revelation. The paper serves as a chance for the author, and those interested enough in reading it, to learn something new and to expand the mental horizon.

The main purpose is nevertheless to provide an understanding of EU anti-dumping policy for those starting from the same position as the author- little knowledge and willingness to learn something new. It has to be emphasized that the paper is practical and it is useful for those that want to broaden their perspective and /or to make an already complex matter more confusing – like the author itself. The length of the paper and the amount of research has had the unfortunate effect of accomplishing more width than depth.

The paper is a result of a year of study in the Master Programme of European Business Law and Business Administration at Lund University. It has provided me with more experience and knowledge than several previous years combined. This has not been only in terms of academic knowledge and experience but also socially. It has been so mainly because of the other graduate students with whom I share this year-Richard, Olga, Andrew, Teng, Alenka, Jean-Christopher and many others-thank you all! My grateful thank also goes to wonderful professors-Henrik and Cecile from the business law department, Professor Larsson, Oxelheim and Persson from department of business administration, and naturally my supervisors Anneli and Jans who kept their faith in me through this hard and stressful journey. I want to deeply thank my parents for their profound moral support and expectation, without which I could never have been able to come this far in my journey in the West; Alongside me all these years, my wife Yuke has experienced many a hardship; I can see their tears, smiles and love underneath the text of my thesis.

I dedicate this thesis to my family.

Zhong Sheng
Lund
Summer of 2004

1. INTRODUCTION¹

1.1 Problem Discussion

With the globalization of world trade which has been occurring so rapidly in recent times has come much more intense competition in the world markets for goods and services. To succeed, industries providing goods and services must increasingly be efficient and competitive, not just by domestic standards, but by world standards. Those industries which have been heavily protected by their governments' policies over many years have struggled in their ability to adjust to this new dynamic and global market environment. Governments, too, have struggled to come to terms with this irresistible force of globalization and international competitiveness. The urge to protect domestic industries has necessarily been tempered by the need for access to world markets to ensure the viability and survival of those very same industries, and to enable their countries to prosper and pay their way in the world. Hence the new WTO regime has reinforced the message that trade and market liberalization must continue to occur, and that protectionism in its old form and sense is no longer acceptable.

During the period 1995-2000, 1500 anti-dumping investigations were recorded. More than half of these investigations were initiated by developing or transition countries demonstrating the growing use of anti-dumping procedures². This somewhat, peculiar contrast in standards of 'fairness' in international and domestic competition regulation has vexed economists for a long time. Therefore, how to get balance between eliminating 'unfairness' trade and free trade will become the significant challenge of prospective anti-dumping policy.

¹ The introducing part is based on the general discussion, where there are two main primary sources that include EC anti-dumping Law and WTO anti-dumping code.

² WTO/MIN/(01)/2

Since 1979, when the first anti-dumping case against China was initiated by the European Union, the European Union has lodged nearly 80 anti-dumping proceedings against China by the end of 2000³. In 2000, the anti-dumping cases regarding China reached a peak of around 20 percent of the EU 's total annual anti-dumping proceedings. This paper will describe the characteristics and the trends of EU anti-dumping policies against China over the past two decades and provides a comprehensive analysis in Chinese CTV case of the factors that may have led to China's vulnerability to EU anti-dumping charges. Some future prospects in relation to China's membership of the World Trade Organization (WTO) are also presented.⁴

In this thesis I document the general trends and characteristics of two decades of European anti-dumping policy against China. I do this by tabulating a number of interesting aspects of EU anti-dumping case of CTV against China where I primarily base myself on the *Official Journal* reports published by the European Commission and WTO. I pinpoint several factors that seem to have affected the vulnerability of Chinese products to EU anti-dumping charges. These include the non-market economy treatment of China, anti-circumvention regulation of the EC, anti-absorption regulation of the EC and the Community interest regulation of the EC. Research questions of this thesis are following:

- What are the characteristics of EC anti-dumping legislation comparing to WTO Anti-dumping Agreement?
- What is the negative side of EC Anti-dumping Law?

³ For a survey to 1990, see Vermulst and Graafsma, "A Decade of EC Anti-Dumping Law and Practice Applicable to Imports from China", (1992) 26 *Journal of World Trade Law* 5-60. See also Hu Yuanxiang, *Legal and Policy Issues of the Trade and Economic Relations between China and the EEC: A Competitive Study*(Kluwer, 1991), pp. 231-289. For criticisms of EC Law and Practice, See e.g. Lei Wang, "China `s Difficulties and Concerns as a Respondent to Antidumping Proceedings"(1996) 19 *World Competition*, 55-58; Jiangyu Wang, "A Critique of the Application to China of the Non-market Economy Rules of Antidumping Legislation and Practice of the European Union", *Journal of World Trade* (1999)33, 117-145.

⁴ `European Union Anti-dumping Cases Against China An Overview and Future Prospects With Respect to China's World Trade Organization Membership` Xiang LIU* and Hylke VANDENBUSSCHE** *Journal of World Trade* 36(6): 1125-1144, 2002. © 2002 *Kluwer Law International. Printed in The Netherlands.pp1*

1.2 Purpose and Motivation

The past 50 years have seen an exceptional growth in world trade. Merchandise exports grew on average by 6% annually. Total trade in 2000 was 22-times the level of 1950. GATT and the WTO have helped to create a strong and prosperous trading system contributing to unprecedented growth. The system was developed through a series of trade negotiations, or rounds, held under GATT. The first rounds dealt mainly with tariff reductions but later negotiations included other areas such as anti-dumping and non-tariff measures. The last round—the 1986-94 Uruguay Round—led to the WTO's creation. During this period, anti-dumping instead of tariff becomes the key measure due to gradual decrease of tariff. It has been highly concerned by developing countries Whether or not the anti-dumping measures are improperly implemented by developed countries to protect domestic industries and to restrict import products of developing countries.

In order to protect domestic industries, developing countries has been racing to imitate developed countries to counterwork. Thus, this tendency is incompatible with `s free trade tenet of GATT/WTO. How to keep the balance between eliminating unfair treatment and maintenance of free competitive trade, therefore, has been the biggest challenge.

With a population of 1.3 billion, China is the largest developing country and offers a vast potential market for foreign goods and services. Over the past 25 years, China has made important progress in opening its market to foreign goods and services as well as foreign investment. Economic and financial reforms have introduced market forces into China, and privileges accorded state-owned firms are gradually being removed. However, the transition from a state-controlled economy to a market-driven one is far from complete.

In 1988, EU investigated Chinese and Korean TV manufacturers for anti-dumping charges, and raised anti-dumping taxes against Chinese TV manufacturers twice during this period. In December of that same year, the Korean enterprises appealed and won back its original tax rate. However, a 44.6% anti-dumping tax was imposed on Chinese enterprises. Since then, Chinese TVs have nearly disappeared from European markets. In March 1995, EU twice resorted to hefty tariff measures and shut the door to big-screen and small-screen Chinese-made televisions. And, in November 1998, EU took another stern measure to

charge 44.6 per cent tariff on Chinese television sets alleged of dumping in Europe.

After China joined the WTO, Chinese enterprises, however, lack experts and experience in appealing anti-dumping charges. Thus, China must learn quickly and cultivate talents in this area. Therefore, it drove me to study the EU anti-dumping policy in order to give some suggestions to Chinese exporters so that they can adopt properly preventive measures or take correct reaction to reduce loss while EU anti-dumping measure is brought into effect.

1.3 Target Audience

The primary target audiences for this thesis are students and faculty members at Lund University and CTV makers. It can, however, also be read by analysts of government, people active in the industry and persons with general interest in this field of study as well as researchers and students at other universities. Given the theoretical backdrop it requires some prior knowledge concerning business, economics, law and academic research methods. Technical jargon has been kept on to a minimum for general readers and explanations of necessary abbreviations are included in the text as footnotes.

1.4 Boundaries

The focus of this thesis will be on the EU anti-dumping regulations and EU-China trade and its particular situation in Chinese CTV manufacturing industry as it has been mostly affected by recent developments of EU anti-dumping policy for about 15 years. Naturally, because of the similar circumstances facing industries in Turkey, Turkey was considered as a reasonable choice of analogue country as it is a competitive market and it has significant production and domestic consumption. There are several domestic producers leading to strong internal competition and Turkish sales of the product concerned are significant and comparative discussions will be included to establish normal value in accordance with Article 2(7) of the basic Regulation of EC.

Moreover, the reader should emphatically be aware that this study does not examine the GATT legality of the unfair trade cases and actions that are reviewed. Legal analyses suggest that the recent expansion of national definitions of dumping and injury are within

the limits the GATT specifies. So it is probably safe to assume that the unfair trade cases and actions that are analyzed do not violate the GATT. The reader is likewise cautioned that the presumed GATT legality of the measures does not provide them with credentials as good economics, from the perspective of either the exporting or the importing country.

This study is also something as policy suggestions. The basic recommendation I offer about anti-dumping is both negative one and positive one: 'do not do it!' and 'how to do it' Yet, the cultural mores of policy analysis seem to demand that when examination shows one set of policies to be wanting the analyst suggests an alternative set.

1.5 Sources

In law section, the primary sources of GATT anti-dumping law are Article VI of the GATT and the rules embodied in the GATT Anti-dumping Code of 1967 and 1994, including preambles, interpretative notes and annexes. The secondary sources are the history of the GATT and Codes, the notable activities of the Committee on Anti-dumping Practices established under the Codes and its subsidiary bodies, such as ad hoc groups, panels, etc.

In the EC, the constitutional basis of anti-dumping actions is Article 133 (ex Article 113) of the Treaty Establishing the European Community, under which the Council enacted EC anti-dumping legislation the EC Regulation 384/96 (hereinafter the Basic Regulation). The specific rules of EC Anti-Dumping Law are contained in the Basic Regulations as adopted and EC rules were applied by the EC administrative authorities, the Commission and the Council, in administrative anti-dumping proceedings, and by the Court of Justice and the Court of First instance, in court cases. The first EC administrative anti-dumping proceedings and a large number of court cases in the EC.

Nevertheless, the current EC practice, to most extent, was established initially during the late 1980s and the early 1990s⁵, in particular, in the areas of determination of dumping and determination of injury. This study therefore confines its scrutiny mainly to the

⁵ For a comprehensive exposition of the early EC anti-dumping law, including the transitional period, the court cases and the practices since the first anti-dumping proceeding, see J.F. Beseler and A.N. Williams, *Anti-Dumping and Anti-Subsidy Law: the European Communities* (London: Sweet & Maxwell, 1986) See also I. Van Bael & J.F. Bellis, *Anti-Dumping and other Trade protection Laws of the EEC* (Bicester: CCH Edition, 2nd ed. 1990)

administrative proceedings initiated or reviewed since the late 1980s unless the origin of some practices is traced to the earlier proceedings, and chooses the CTV case relevant to the issues discussed in each chapter.

In the course of the demonstration and evaluation of EC rules and practices, the existing economic and legal literature is used as both inspirations and references. As inspirations, author develops ideas on a proper appreciation and evolution of the rules. In the process of deliberation on this thesis, both economic and legal literatures are inquired as far as available.

The central parts of this study are characteristics of EU antidumping regulation such as current rules and practices for determination of dumping, determination of injury and anti-dumping procedure. In each part, the study starts with the conceptual issues of the subject-matter, identified problematic areas, and the goal pursued in that part, followed by origin and historical evolution of the relevant rules before and within the EC anti-dumping regimes. The current EC rules are then described and analyzed in connection with the GATT activities, if any or relevant, and with the selected EC CTV case. On this basis, this study proceeds further to evaluate and assess the main issues and problems identified in the current rules and practices with an aim to promote the goal set forth in each part, leading to a tentative conclusion.

1.6 Methodology

In methodology, the study is something of a reaction to the imperialism of the economics of my generation – the methodology of forcing everything into a particular and standardized economic model. In this study, I have tried to avoid teaching economics of this case I have examined. Instead, I have tried to learn economics from this case. Thus, in going over this case, I have looked for its major theme, hoping that I have selected case with a variety of themes to offer.

Through a case analysis of Chinese CTV, this study is focused on characteristics of EU antidumping regulation while illuminating interaction in international anti-dumping negotiations. Furthermore, when EU anti-dumping action is incompatible with WTO relating regulation. And the CTV case is discussed from both business perspective and Law

perspective. Both business section and law section are thus presented in historical perspective and in current shapes. This paper used “the contextual approach” as the main research method, including literature review, historical approach, statistical analysis, and case study. First, literature review will be utilized to analyze the background of EU anti-dumping measures, and its role in external trade policy of EU. Second, the case study of Chinese CTV will be presented to reach the controversial argument of EU anti-dumping law. In addition, comparative analysis will be used to look at the distinction between EU anti-dumping Law and WTO anti-dumping regulations. Finally, after statistical analysis and epagoge, illustrate the prospective direction of evolution of EU anti-dumping policy, and EU `s response regarding to the future tendency of evolution of WTO anti-dumping convention. From Law perspective Current EC Anti-Dumping Law as an implementation of GATT law is presented. In the course of demonstration and evaluation, this study is both descriptive and analytical. The descriptions demonstration, step by step, the current EU anti-dumping policy in both business and law theories and expose main issues and problems in each part whereas the analyses provide insight views on the current law and practices in both areas, including main issues and problems identified. Both descriptions and analyses facilitate further appreciation and evolution of anti-dumping law presently in force.

Author hopes, after introducing the regulations and analyzing and CTV case, that Chinese CTV makers and government could more understand the EU anti-dumping policy, especially the changing section of EU regulations concerning non-market economy, so as to properly evaluate the investment risk.

1.7 Structure

To have a systematic study, this thesis is organized in line with six chapters. First chapter introduces author`s motivation, objectives, methodology, and so on. Chapter two is focused on characteristics of CTV trade and the importance of CTV manufacturing industry in EU-China trade. It consists of five sections, covering an overview to introduce EU-China relation and EU-China Trade, background of China`s CTV manufacturing industry, current status of TV industry in China and developmental tendency of Chinese CTV manufacturing industry.

In chapter three, the focus is shifted to important document analysis of EU anti-dumping measures. Seven sections are devoted to the description and analysis of the current rules and practices for historical evolution of EU anti-dumping measures, determination of dumping, export price, determination of injury, circumvention and community interest.

A case study of Chinese CTV is dealt with in chapter 4, in which current measures in EU regulations concerning Chinese CTV and analysis and review of EU anti-dumping law are presented, arranging in five sections. As in the first three parts, the starting point is

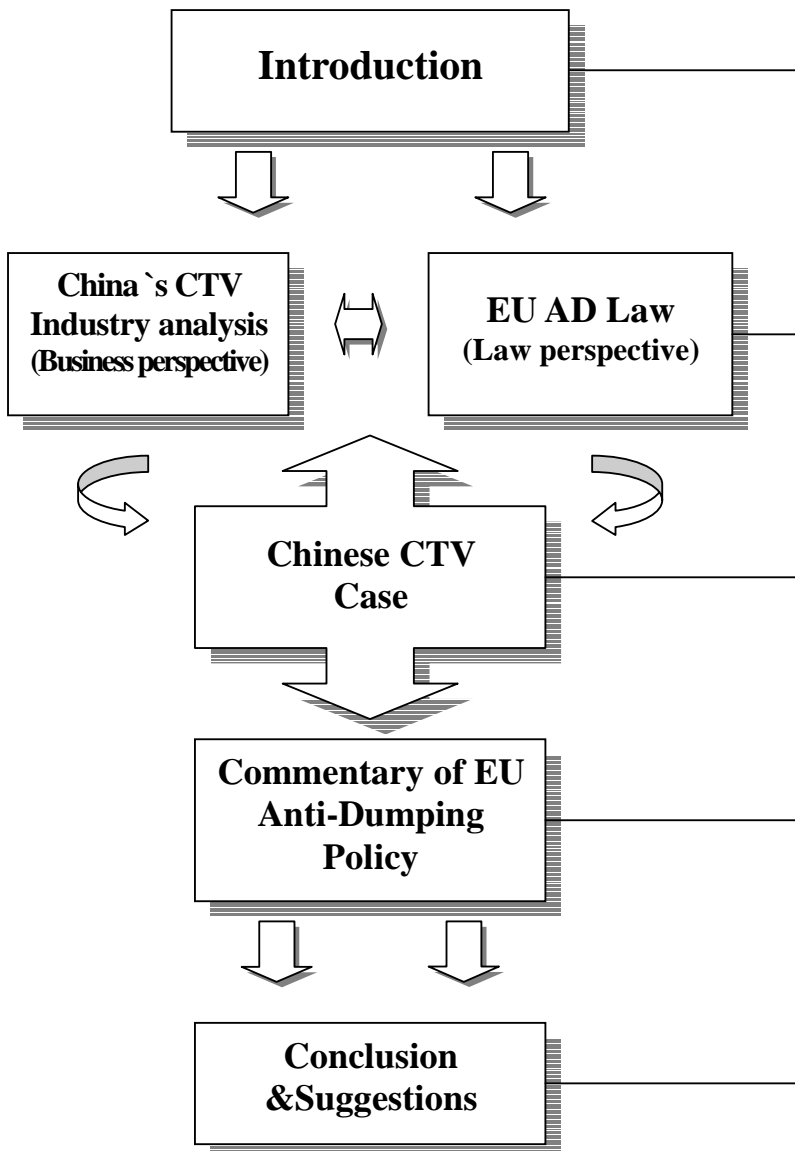


Figure 1.7: Intended flow and Structure of Thesis

the facts and arguments of law and the judgment. The following sections are about analysis and comparison of the cases followed by the structure of the current legal mechanism for anti-dumping procedure and the assessments of main issues in the current procedural rules, and the conclusion.

Chapter five is shift to commentary of EU Anti-Dumping policy. It consists four sections, including comparison between EC and GATT/WTO Anti-Dumping Agreements, trends in the use of anti-dumping, commentary of EU anti-dumping policy, leading to a conclusion.

In chapter six, the concluding chapter, an attempt is made to conclusion of EU anti-dumping policy and some suggestions to Chinese exporters and government.

2. EU-CHINA TRADE AND CHINESE CTV INDUSTRY ANALYSIS

The following industry study explains how the industry functions, how it fits into the local and the world economy, and how it contributes to the overall economic development of the country.⁶ The industry study identifies the policies, if any used by the home country government to support the industry and asks whether the basic story of the industry 's success is the story of the government policies or the story of businesspeople interacting in a competitive environment.⁷

The Chinese economy was not a market economy over the period our study covers. The focus of study is on how effective anti-dumping regulations have been as an interface between the market economies of the west and the socialist economy of China.

2.1. An Overview

2.1.1. EU-China Trade Relation

From 1978, the year when China's economic reform started, to the year 2001, total trade volume between China and the European Union has increased more than forty fold. Since the early eighties, an increasing number of anti-dumping proceedings have been initiated by the authorities of the EU. While Japan and, subsequently, South Korea have been the focus of the EU 's anti-dumping attention, New Industrialized Countries ('NICS') have become a more 'popular' target. In the early 1990's, there has been frequent EU anti-dumping proceedings against China. In 1992, there were 20 anti-dumping measures against China,

⁶ My own experience with manuscript referees who downgraded a paper not for its lack of analytical content but because of its institutional content led me to add the following comment as a footnote: "Various sorts of information have gone into the development of this theory, much of it derived from first-hand observation of how things are done. The reaction of several readers to earlier drafts suggests that trained economists find 'institutional information' (such as what the anti-dumping law actually says) repugnant, and that they are unwilling to admit such information as evidence in the testing of theories. Their position, it would seem, is that reading what the law says will not help one understand what it means. This meaning they seem to assume can only be grasped by interpreting regression results "(Finger, Hall and Nelson 1982, 452)

⁷ Frank Taussig and Harry Dexter White 's Some Aspects of the Tariff Question, published in 1931 pp10-21

and the figure increases to 30 at the end of 1995 (Roger Strange, 1998)⁸. As China's economy grows, the European Union begins to focus on fostering a more stable relationship with China.

In 1995, the European Union passed a document entitled "A Long-Term Policy for China-Europe Relations." This document emphasizes the importance of developing more active economic engagements with China. Further EU policies toward China were set out in the 1998 communication "Building a Comprehensive Partnership with China", which was implemented in 2001, with suggestions about concrete ways of furthering EU-China relations. Table 2.1.1⁹ shows the top 10 Chinese exports to and imports from the European Union.¹⁰

EU export to China is highly concentrated in electrical and non-electrical machinery, accounting for 56% of its total exports to China. Although concentration on this category of exports is fairly common with China's other trading partners, the extent of such concentration is unique to the European Union. For example, the percentage share of electrical and non-electrical machinery in U.S. total exports to China is 35.8% in 2000 and comparable figure for Japan for the same year is 47%¹¹. In addition, electrical and non-electrical machinery are also important items on the list of EU imports from China. In 2000, this category of goods constitutes 35.5% of total imports from China to the European Union.

A bilateral EU-China agreement on China's accession to the WTO was concluded on May 19, 2000. China agreed to cut its average import tariffs for 150 key products¹² from 18.6%

⁸ Xiang LIU* and Hylke VANDENBUSSCHE** *Journal of World Trade* 36(6): 1125–1144, 2002. © 2002 *Kluwer Law International. Printed in The Netherlands.* European Union Anti-dumping Cases Against China *An Overview and Future Prospects With Respect to China's World Trade Organization Membership pp.1-4*

⁹ Foreign Trade of China K.C. Fung University of California, Santa Cruz University of California, Santa Cruz Sarah Tong university of Hong Kong June 2002 last page

¹⁰ Supra footnote 9. pp22-25

¹¹ Brown, S. (2001), "The People's Republic of China and US Unfair Trade Laws", 66 *Journal of World Trade* 4, pp. 74–94.

¹² These key products are spirits, cosmetics, leather articles, textiles, building materials, and machinery and appliances.

to 10.6%¹³. Furthermore, the agreement made specific commitment in the automobile industry.

In the future, China may face increasing challenges in exporting to the European Union. The first challenge is the increased use of anti-dumping duties by the European Union towards China. According to China Daily (March 28, 2002), the current total number of anti-dumping cases against Chinese products launched by the European Union reaches 91, accounting for about one-fifth of the total anti-dumping cases that China faces. Second, with the launch of the Euro and plans to expand the European Union to include more members, there should be an increase of intra-EU trade. In some instances, the increase in intra-EU trade may occur at the expense of trade with non-EU countries such as China.

¹³ Everaert, G. and Vandenbussche, H. (2001), "Does Protection Harden Budget Constraints?", *LICOS Discussion Paper* 8/2001, Catholic University of Leuven (KULeuven), p. 25.

2.1.2 EU-China Trade¹⁴

Table 2.1.2 EU-China trade

EU-China trade (Eurostat figures)								
	Jan.- March 2003	Growth, year-on- year	2002	Growth, year-on- year	2001	Growth, year-on- year	2000	Growth, year-on- year
Total (€ bn)	30,9	18,0%	115,3	8,7%	106,0	10,7%	95,8	38,8%
EU imports	21,9	16,1%	81,3	7,1%	75,9	8,0%	70,3	41,5%
EU exports to China	9,0	23,0%	34,0	12,9%	30,1	18,0%	25,5	31,8%
EU trade deficit	12,8	11,7%	47,3	3,2%	45,8	2,3%	44,8	47,8%

Comparison (Chinese figures)								
N.B. Figures differ considerably, as trade (esp. exports) going through HK is not fully taken into account, Eurostat figures consider such export no significant value is added in HK.								
	Jan.-April 2003	Growth, year-on- year	2002	Growth, year-on- year	2001	Growth, year-on- year	2000	Growth, year-on- year
Global trade								
Total (USD bn)	243,9	39,8%	620,8	21,8%	509,8		474,3	
Chinese imports	121,9	46,8%	295,2	21,2%	266,2			
Chinese exports	122,0	33,5%	325,6	22,3%	243,6			
Trade balance	0,1	-98,8%	30,4	34,7%	22,6			
China-EU trade								
Total (USD bn)	35,6	40,5%	86,8	13,2%	76,6	11,0%	69,0	24,0%
Chinese imports	15,6	35,5%	38,5	7,9%	35,7	15,8%	30,8	21,2%
Chinese exports	20,0	44,6%	48,2	17,9%	40,9	7,1%	38,2	26,4%
Trade balance	4,3	94,5%	9,7	86,8%	5,2	-28,8%	7,3	54,6%
China-US trade								
Total (USD bn)	36,3	35,5%	97,2	20,8%	80,5	8,1%	74,5	21,2%
Chinese imports	11,1	36,9%	27,2	3,9%	26,2	17,2%	22,4	14,8%
Chinese exports	25,2	34,9%	70,0	28,9%	54,3	4,2%	52,1	24,2%
Trade balance	14,1	33,6%	42,7	52,1%	28,2	-5,6%	29,7	32,4%
China-Japan trade								
Total (USD bn)	40,3	36,3%	101,9	16,2%	87,8	5,5%	83,2	25,7%
Chinese imports	22,3	48,6%	53,5	25,0%	42,8	3,1%	41,5	22,9%
Chinese exports	18,0	23,7%	48,4	7,8%	45,0	7,9%	41,7	28,5%
Trade balance	-4,3	813,4%	-5,1		2,2		0,1	

Source: `EU relations with China` European Union Official Journal, DG Relex.H.2 – 24.09.2003 pp3

From above table, it could be found that in 2002, China took the place of Japan to become the EU's 3rd trading partner, after the US and Switzerland. The EU was China's 3rd export market (14.8% of total), and the 2nd largest source of imports (13.0% of total). Moreover, EU-China trade continued to increase in 2002. EU exports to China stagnated. The EU trade deficit thus continued to rise, and reached yet another record in 2002, making it, once again, the largest deficit the EU has with any trading partner (China in 2000 replaced Japan in this respect).¹⁵

¹⁴ `EU relations with China` European Union Official Journal, DG Relex.H.2 – 24.09.2003 pp3

¹⁵ Supra footnote 14

2.2. Background of Chinese CTV Manufacturing Industry

Starting in the middle of 1970s, when there was only one product line in Tianjin Tongguang Television Factory up to now, China color TV industry has developed a lot for 20 years. Until now, there are 90 color TV enterprises of production on whole CTV set, 20 productive companies of CTV kinescope¹⁶, in which an integrative industry system on production of CTV set, kinescope and relevant hardware has come into being.

China color TV industry has gone through three historical periods according to the differences of technical level. They are: the lead-in period between the middle of 1970s and the early of 1980s, the up-growing period between the middle of 1980s and the early of 1990s¹⁷, and the mature period in the middle and the end of 1990s till now.

When it entered the third period, the production technologies on CTV were changed a lot because of the development of Large Scale Integrated circuit (LSI) and computer technology and digital technical application. During this period, foreign brands were gradually taken the place by domestic CTV brands which have taken up the primary position.

China color TV industry had matured into full scale in production technology, production and sale volumes and the enterprise management. The comprehensive brand competition has formed in color TV market and the brand sale has become the most influential factor in the enterprise management concept. The enterprises compete for the technology, the price and the service. The brand effects have become more centralized and the trend that the main brands monopolized the market appears¹⁸. In a word, the color TV industry has become one of those fields in the household appliances with most fierce competition.

Statistics from the State Information Industry Ministry shows that there were 300 million TV users in China in 1998, and the production value of electronic products such as TV and

¹⁶ Where is China's Color TV Industry Heading?", China Securities Bulletin (May 5, 1999).pp5

¹⁷ Supra footnote 16. pp 5-7

¹⁸ "China Television Price War Hurts Listed Firms", Reuters Business Briefing (August 29, 1996).pp1

its inherent electronic elements and components accounted for about 43%¹⁹ of the total production value of the national electronic and information industry. The TV has experienced a long period from the early black-and-white one to the color one and from the analog to the digital. Its display has been developed from the spherical to the planar and even has been applied by the color TV technologies of big screen, plasma, rear projection, 3-D and high definition etc²⁰. The innovational speed is becoming faster and faster. The products of color TV enterprises, in the era of brand competition, are involved by not only their tangible commodities but also their services, credit, brands, management concepts and enterprise cultures.

2.3. Current Status of CTV Market

As well known, global color TV market has been more and more mature. Although global output reached 127 million CTV sets, the annual increase rate is keeping 3.3% in recent years. With the global depression in 2001, global market including markets in US, EU and Japan decreased rapidly about 3%²¹, while markets in Asian, China and other developing countries kept increasing.

With open door policy and the increase of living standard in China, the demand of CTV appears strong upswing which has never taken place before. China has been the biggest productive countries of CTV set since 1994 when the output of CTV set in China exceeded that of US for the first time. The saleroom of Chinese CTV set shared the 29.6% of global sales in 2001, when annual output reached 41.50 million units, including 71.6% sales in domestic market and 28.4% sales in foreign market. Production value of Chinese CTV manufacturing industry was 109.01 billion Yuan in 2000, respectively 109.8 billion Yuan in 2001²².

¹⁹ Ministry of Foreign Trade & Economic Co-operation (MoFTEC) of The People's Republic of China, <http://www.moftec.gov.cn>.

²⁰ Global Market Information Database [Electronic], Euromonitor, October, 1999, pp.6

²¹ KONKA GROUP CO., LTD. SEMI-ANNUAL REPORT 2003 pp.11-12

²² Guo Bin, Price Competition, Price War and Industry Performance: an Empirical Analysis on China Color Television Manufacturing Industry. P164-165

2.4. CTV Manufacturing Industry Characteristic in China

A. Government`s industry support

In 1980s, like other industries in China, the electronics industry benefited from the government`s development strategy of promoting industrialization for export.²³ To boost domestic production capacity and speed technology development, the government supported its domestic industry in various ways. Direct subsidies were provided for research and development. Tax exemptions²⁴, accelerated depreciation allowances, and preferential loans were given to manufacturing companies that invested in new facilities.

The international dimensions of the Chinese government`s industry support program have also been important. The government has actively supported foreign investment to develop the intermediate parts and components industry, while prohibiting foreign investment in companies producing finished goods. And during the formative years of industrial development in China, imports of competing products were banned. On the export side, the promotion policies of government were equally extensive. Chinese firms with letters of credit for exports automatically received access to preferential loans. Export companies were exempted from various indirect taxes and received tax breaks for depreciation and tariff payments; they also had access to duty-free imports of capital goods.

It could be found in 1980s that state-owned enterprises (SOEs) are still the key drivers of China`s industrial economy, accounting for almost half of industrial production. Despite by their status as state-owned enterprises, `each is clearly managed in an entrepreneurial, market-oriented manner`²⁵, making the Chinese CTV market highly competitive. In recent years, the result of changes in enterprise governance and structure, is that state-owned enterprises are now undoubtedly more responsive to market pressures and to the need to make profits. When SOEs assume responsibility and accountability for their own performance, they have no alternative but to improve their performance. However, most of state-owned firms including Changhong are considering transformation itself as a company with private ownership. It is predictable that more and more private-owned Chinese CTV

²³ World Bank, 1993. *The East Asian Miracle: economic growth and public policy*. Oxford University Press, New York.pp11-13

²⁴ Cooper, C., 1991. *Are innovation studies on industrialized economies relevant to technology policy in developing countries?* UNU/INTECH Working Paper No. 3.

²⁵ Kraemer, K., Dedrick, J., 2002. *Enter the dragon: China`s computer industry*, Computer. February, 28–36.

companies will emerge in international market.

The government subsidies for export had been reduced gradually after the early 1990. Anti-Subsidy Regulations of the People's Republic of China was promulgated by the State Council, March 25, 1997 in order to maintain foreign trade order and fair competition and to protect domestic industry. After that, there is no evidence showing that any subsidies are given to Chinese CTV exporters or manufacturers by government.²⁶ Therefore, In April 1998 the European Council with Council Regulation (EC) No 905/98 gave Chinese and Russian CTV companies the opportunity to claim that they operate in market economy conditions on a case-by-case basis. This regime was extended twice in 2000 and 2004.

B. Deregulation²⁷

CTV manufacturing industry is expressed by a dynamic interaction between manufacturers and government in the area of regulation. At the beginning of competency building, the several companies were supported by government to acquire advanced technology and management from foreign companies. However, several factors restricted the effort of the government. The transformation of military industry into civilian industry, different interests between the central government and local governments, all these encouraged too many companies to make CTVs, far more than the government's expectation²⁸. During early 1990s, the government set sale prices for firms. There was a strange phenomenon in the CTV manufacturing industry at that time: 'a highly competitive market structure without market price competition'²⁹ because of the fixed price on manufacturers imposed by government. In 1989, when the Changhong Company first reduced the price of its product, the reform took place in which it was an important transition point development of the CTV manufacturing industry. It represented the tendency of competition taking over and also pointed out the ways in which market economy could work to consumers' benefit. After that, price-based competition became more popular in China. In 1996, a price war

²⁶ KONKA GROUP CO., LTD. SEMI-ANNUAL REPORT 2003 pp.19

²⁷ Differences between learning processes in small tigers and large dragons Learning processes of two color TV (CTV) firms within China Wei Xie*, Guisheng Wu p.1466

²⁸ Xie, W., 2002a. Technological learning in China's color television set industry, Technovation (in press).pp 11

²⁹ <http://finance.sina.com.cn/roll/20031107/1703510080.shtml> visit time 2004-5-19

within China's CTV manufacturing industry took place.³⁰ This price war not only reduced profits, created financial pressure, but it led to technological development and diversification of product within the CTV manufacturing industry.

C. High degree of maturity, lack of competence of R&D

CTV market as previously developed consumable market, which has experienced the development for approximately 20 years, has been plagued by chronic problems of over-capacity. For example, the extent of over-capacity is not exactly known, but it is deemed that the total CTV capacity in 1995 was about 30-35 million units, which was far in excess of the domestic demand of 15-16 million units and exports of about 4 million units.³¹ Current consumption of CTV in urban area was mainly made up of families' renewal, bridal purchase and a small quantity of twice-purchase³². The urban market has been saturated and it might hardly increase dramatically.

In fact, Chinese CTV manufacturing industry is still an assembly industry since the uppermost technology, like the technology of kinescope, is monopolized by developed countries. The competitive advantages in domestic market are low cost, developed distribution network and good after-service. The lack of capability of investment on R&D is the main factor that has restricted the development of Chinese CTV manufacturing industry for a long time. Whether or not it can develop independently is deeply dependent on material breakthrough of the capacity of R&D in the big CTV enterprises.

D. Market maintenance rate, market share and market concentration rate

Market maintenance rate refers to share of that market based on time accumulation by respective brands. Market share refers to the percentage of the total sales of a given type of product or service that are attributable to a given company.

The distinct between these indicators is that market share is supposed to differ in years. It could be found in table 2.4.1 that Panasonic and Changhong have the highest market share in recent years, where their maintenance rates of both of them have exceeded 10%. Konka,

³⁰ Cui, G., Liu, Q., 2000. Regional market segments of China: opportunities and barriers in a big emerging market. *The Journal of Consumer Marketing* 17 (1), 55-70.

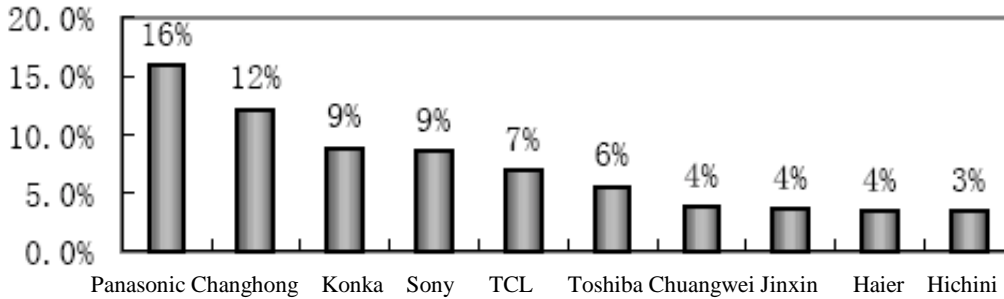
³¹ Supra footnote 22 pp101-102

³² Supra footnote 20. pp7-8

Sony, TCL, Toshiba also share some quotient.

Table 2.4.1

Maintenance rate in four biggest cities in China³³

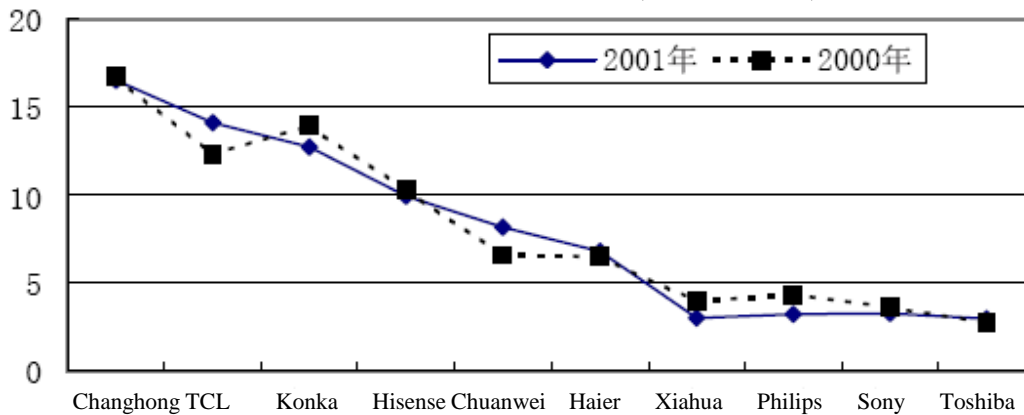


Source: <http://www.kitking.com>

With price war in Chinese CTV industry, market status of domestic CTV brands has been improved a lot, while that of foreign country has been weakened. Changhong, TCL, and Konka have taken the top three in domestic sales at the same time Hisense has experienced a dramatic increase these years. Although Sony and Toshiba that win the high market maintenance rate also take their place in top 10, they have to stand on the bottom.

Table 2.4.2³⁴

Market share of dominant CTV brands (Sales volume) in China



Source: <http://www.kitking.com>

The market concentration rate in recent years is not very high. Annual sum of the top 10 in market share have gone beyond 80% (thereinto, market concentration rates (CR) are 81.1% in 2000 and 80.7% in 2001), which is higher (about 10 point) than market concentration rate in air conditioning market. With the deep development in Chinese CTV industry, the market concentration rate is supposed to be higher and higher. And the market structure

³³ <http://www.kitking.com/market/Default.asp> visited time: 2004-5-21

³⁴ <http://www.kitking.com/market/Default.asp> visited time: 2004-5-22

that mainly be formed by above mentioned companies has started to come into being.

E. International competitive capability and increasing export

Chinese CTV manufacturing industry has taken a place in international market and frustrated the foreign brand in the domestic market after technological investment, development of new product and adjustment of industrial structure. In 1990s, with the increasing output of CTV, the foreign trade has played a key role for solving the contradiction on supply and demand of Chinese CTV. In 2000, exporting volume of CTV broke through 10 million units and reached 11.79 million units in 2001.³⁵ Therefore, expansion of international market has become the main method for accelerating healthy development of Chinese CTV companies.

In addition, several companies have established foreign factories and research centers, for example Haier `s factory in US and Chuangwei `s subsidiaries in EU.

Table 2.3.1 Export of Chinese CTV between 1999 and 2001³⁶

	1999	2000	2001
Gross volume(million units)	5.69	10.32	11.79
Total sales (million dollar)	640	1120	1430

Source: <http://www.kitking.com>

F. Serious price war and decreasing industrial profit

Price competition has been the most frequently and directly applicable measure of Chinese CTV companies. With gradual fall of product price, the decrease of industrial profit was also caused by price war. The price of CTV fell averagely 15.6% in 2000 and 18 in 2001. It seems that the price war is becoming more and more serious so as to the great loss in this industry. For example, price war caused the loss of about 3 billion Yuan of the whole CTV manufacturing industry.

Chinese CTV manufacturing industry has turned from high payoff industry to low payoff industry. The profit is keeping decreasing (see table 2.3.2). Until 2001, the payoff

³⁵ KONKA GROUP CO., LTD. SEMI-ANNUAL REPORT 2003 pp.15

³⁶ <http://www.kitking.com/market/Default.asp> visited time: 2004-5-12

capability decreased 2.84% comparing 2000³⁷. As far as economic profit was concerned, the performance of Chinese leading companies have been worse than that in former years, Especially, some companies even started to have a deficit.

The reason of above mentioned circumstances is obvious. On one hand, the imported product lines were quite similar with each other, while the phenomenon of the same structure on lots of companies and excess capacity in domestic market are serious. On the other hand, lack of creative capability in several CTV companies and continuous price war led to the decrease of payoff in the whole Chinese CTV manufacturing industry.

Table 2.3.2 Profit level of Chinese CTV manufacturing industry between 1999 and 2001³⁸

	1999	2000	2001
Production value (billion Yuan)	111	107,9	109.8
Profit (billion Yuan)	2.506	2.277	2.251
Production value/ profit margin (%)	2.26	2.11	2.05

Source: <http://www.kitking.com>

2.5. Developmental Tendency of Chinese CTV Manufacturing Industry

As far as prospective tendency of development of Chinese CTV manufacturing industry was concerned, there would be great change on competitive situation, competitive focus and competitive measure. It could be found that the CTV companies that participate into competition from hundreds of companies³⁹ will re-concentrate on less than 10⁴⁰ corporations through M&A in the future. The focus and measure of competition in which it is expressed by the single model of price war will become into the multiple model in which it depends on technical creation and renovation.

³⁷ Guo Bin, Price Competition, Price War and Industry Performance: an Empirical Analysis on China Color Television Manufacturing Industry. P116

³⁸ <http://www.kitking.com/market/Default.asp> visited time: 2004-5-12

³⁹ Supra footnote 22. p.3

⁴⁰ <http://finance.sina.com.cn/roll/20031107/1703510080.shtml> visited time 2004-5-27

1) Competitive situation

After 6 times 'price war'⁴¹ in which domestic CTV sets took the place of imported CTV sets, the domestic CTV manufacturing industry was recombined from previous hundreds of companies into about 10 enterprises⁴². With the deep development in CTV manufacturing industry and consumers' increasing consciousness on brand, CTV market will continue re-concentrating at the same time the CTV manufacturer will keep reducing to minority of modern corporations.

With China's accession to WTO, foreign CTV manufacturers has infiltrate into Chinese domestic market. For example, Toshiba stated that they ceased producing kinescope in Japanese domestic market and transferred all the product line into Chinese mainland. Hitachi invested 4 billion Yen⁴³ to establish the first product line on kinescope of new generation CTV, while Panasonic, Samsung and LG have also increased the investment in China. Thomson Multimedia also entered into Chinese market. These multinational companies quit low-class CTV market and focus on high-class CTV market. It could be seen that the competition between Chinese and foreign brands will focus on high-class CTV market.

2) Competitive focus

Apart from the characteristics in other industry that was directed by the consumers' demand, the developmental tendency of CTV manufacturing industry is determined by manufacturers. Therefore, all the manufactures are trying to provide the information that their CTV expresses the developmental direction of CTV. Thus, Changhong's 'precise display', Konka's 'softness' and TCL's 'HiD' were good examples⁴⁴. Every product argued that their products symbolized the developmental direction of CTV.

However, which one is the real representative of developmental tendency of CTV manufacturing industry? This question itself is not important. The key point is that, after several times on price war, big manufacturers all understood that the basis of development is technical creation and renovation. And CTV manufacturing industry is moving towards a healthy and regular market. It could be predictable that technical creation and renovation in

⁴¹ Supra footnote 33 pp. 105

⁴² Supra footnote 38 visited time 2004-5-26

⁴³ Supra footnote 33 pp. 106

⁴⁴ Supra footnote 31 pp. 16

stead of price war would be the competitive focus in the future.

3) *Competitive measure*

Due to lack of uppermost technology and the structural problem, the competition among Chinese CTV manufacturers focuses on the similar price war in a low level. With the development of R&D, it will gradually be changed into diversity competition which is dependent on technical creation and innovation, and even the competition situation which is shared by network, technology and other social resources.

It could be found, in a report from Ministry of Chinese Information Industry, that the price war in CTV market will be tempered. More attention will be paid into the R&D of new product. The strategy of uppermost development of foreign companies will be more explicit at the same time domestic companies start to reinforce the investment on R&D and to touch the competition in uppermost area. Additionally, the cooperation between Chinese and foreign companies will be intensified. For example, TCL has contract of distribution with Panasonic. This expresses that 'seeking cooperation in competition and competition in cooperation' will be the tendency in the future.

3.EU ANTI-DUMPING LAW

3.1. General Concepts

A. What is dumping?

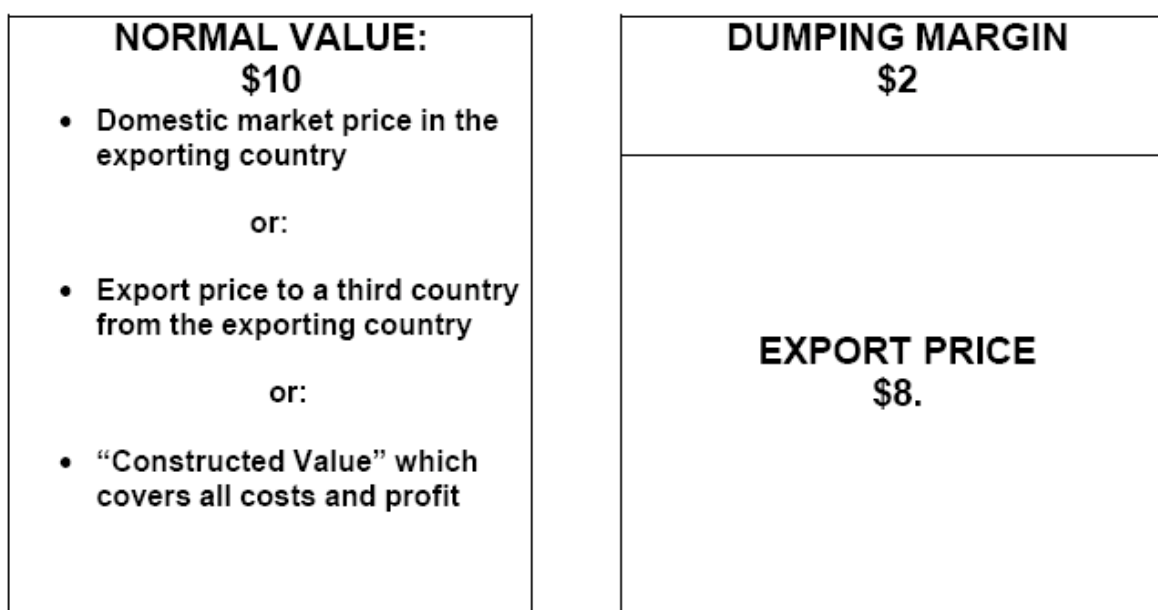
Dumping is traditionally defined as price discrimination between national markets by Viner⁴⁵.

Although this definition theoretically encompasses both the situation in which the dumping producer sells at a lower price in his home market than in his foreign market than abroad and the situation in which he sells at a higher price in his home market than in his export market, it has been agreed since the beginning of the twentieth century that only the latter situation may give rise to problems in the importing country.⁴⁶

⁴⁵ Viner, *Dumping, a Problem in International Trade* 1936 p.3; Dale, *Anti-Dumping Law in a liberal Trade order* 1980; Seavey, *Dumping Since the War* 1970 p.2; Wares, *The theory of dumping and American Commercial Policy* 1977

Imperfect competition: J. Robinson, *The Economics of Imperfect Competition* (London, Macmillan 1932; 2nd ed. 1969) Edward H. Chamberlin, *The Theory of Monopolistic Competition* (Cambridge: Harvard University Press, 1st ed. 1933, 7th ed. 1960) T.O. Yntema, *the Influence of Dumping on Monopoly Price*, in 36, *Journal of Political Economy* 1928, pp. 686-696.

⁴⁶ See John J. Barcelo, *Antidumping laws as Barriers to Trade: the United States and The International Antidumping Code*, in Vol. 57, *Cornel Law Review* 1972, pp. 491-560; John J. Barcelo, *The Antidumping law: Repeal It or revise It*, in Vol. 1, *Michigan Yearbook of International legal studies* 1979, pp. 53-93; William A. Wares, *The Theory of Dumping and American Commercial policy* (Lexington: Lexington Books, 1977); Richard Dale, *Anti-dumping law in a Liberal Trade Order* (London: Macmillan, 1980); Wilfred J. Ethier, *Dumping*, in Vol. 90 No.3, *Journal of Political Economy* 1982, pp.487-506; Roger D. Blair and Leonard Cheng, *On Dumping*, in Vol. 50 No. 1 *Southern Economic Journal* 1983, pp. 857-865; James Brander and Paul Krugman, *A 'reciprocal Dumping' Model of International Trade*, in 15, *Journal of International Economics* 1983, pp. 313-321; Brian Pinto, *Repeated Games and the 'Reciprocal Dumping' model of Trade*, in 20, *Journal of International Economics* 1986, pp. 357-366; Dan Bernhardt, *Dumping , Adjustment Costs and Uncertainty*, in 8, *Journal of Economic Dynamics and Control* 1984, 349-370; Arye L. Hillman and Eliakim Katz, *Domestic Uncertainty and Foreign Dumping*, in Vol. 19 No. 3, *the Canadian Journal of Economics* 1986, pp/403-416; Howard K. Gruenspecht, *Dumping and Dynamic Competition*, in 25, *Journal of International Economics* 1988, pp 225-248; Avinash Dixit, *Anti-dumping and Hindley, the Economics of Dumping and Antidumping Action: Is there a baby in the bathwater?* In P. K M. Tharakan, *Policy Implications of Antidumping Measures* pp. 25-43; Peter Berck and Jeffrey M. Perloff, *Dynamic Dumping*, In 8, *International Journal of Industrial Organisation* 1990, pp. 225-243

Figure 3.1 What is dumping?⁴⁷

Source: International Trade Centre ‘Anti-dumping Proceedings: Guidelines for importers and exporters’

The basic principle of EU anti-dumping rules is that ‘an anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury’ ...if...’the interests of the Community call for Community intervention’⁴⁸

Thus, an anti-dumping duty can only be imposed where the following has been established:

- ✧ The product is shown to have been imported at dumped prices;
- ✧ An EU industry is shown to have suffered injury;
- ✧ There is a causal link between the dumping and the injury; and
- ✧ The interests of the EU call for EU intervention

A product will be considered ‘dumped’ where ‘its export price to the Community is less than the normal value of the like product’⁴⁹ Therefore, dumping does not necessarily coincide with sales at a loss. An exporter may be ‘dumping’ even though he is not selling his products as a loss to the EU export market.

⁴⁷ The sale of goods into an export market at a price that is lower than the price of those same goods on the domestic market of the exporting country (conditions apply)

⁴⁸ Article 1(1) of EC Council Regulation 384/96 (Basic Regulation for Anti-Dumping)

⁴⁹ Article 1(2) of EC Council Regulation 384/96 (Basic Regulation for Anti-Dumping)

B. What is injury (and threat of injury)?

What makes dumping “unfair” is the “injury” it causes, or threatens to cause, to the domestic industry of the importing country. "Injury" exists when:⁵⁰

- ✓ there is a significant increase in the volume of dumped imports, and
- ✓ the dumped imports have caused significant price undercutting or depression, or have prevented price increases in the importing country, and
- ✓ there are actual and potential negative effects on domestic producers’ sales, profit, output, market share, productivity, return on investment, utilization of capacity, cash flow, inventories, employment, wages, growth, ability to raise capital or investments, etc.

"Threat of injury" exists in a situation where dumping causing injury is clearly foreseen and imminent, i.e., when there is:

- ✓ already a significant increase in the volume of dumped imports, and
- ✓ a sufficient freely disposable capacity of the exporter or an imminent, substantial increase in this capacity, and
- ✓ a potentially significant depressing or suppressing effect on domestic prices because of the increased risk of dumped imports (taking into account the availability of other export markets to absorb any additional exports), and
- ✓ a significant increase in the inventories of the investigated product.

C. What is an anti-dumping measure?

The World Trade Organization (WTO) rules allow member countries to take measures necessary to protect their domestic industries from "unfair" trade practices of foreign exporters. Dumping of exports is considered to be one of these unfair trade practices. If, after carrying out an anti-dumping investigation, an importing country determines that:⁵¹

- ✓ the imports of a product are being "dumped" and
- ✓ those imports cause or threaten "injury" to the domestic producers of the “like product” or materially retard the establishment of a domestic industry, then it may apply an anti-dumping measure in the form of an “anti-dumping duty” or “price undertaking” on

⁵⁰ International Trade Center ‘Anti-Dumping Proceedings: Guidelines for Importers and Exporters’ ITC/249/3/97-II-TP (Updated 2002) pp.6

⁵¹ Supra footnote 44 pp.4

the imports in question.

By this approach, determination of "dumping" is not sufficient to levy anti-dumping duties. In fact, what is also necessary - and what actually triggers all anti-dumping proceedings - is the injury that the domestic industry suffers.

In the EC, the legal basis for anti-dumping measures is Article 133 (ex Article 113) of the EC Treaty which provides that:

'The common commercial policy shall be based on uniform principle, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.'

3.2. Historical Evolution of EU Anti-Dumping Policy

In order to implement protection measure of external trade, according to second item of Article 133, 'The Commission shall submit proposals to the Council for implementing the common commercial policy.' And the Council shall be responsible for ensuring the negotiations and act by a qualified majority. Lastly, the Council shall announce anti-dumping regulation.⁵²

The first basic EC anti-dumping regulation initiated in 1968⁵³, which was nothing more than transposition of the 1967 Code in the GATT context. Subsequent amendments to this legislation were frequent, to take account of successive GATT Agreements, in which anti-dumping rules appeared first in the second regulation, Regulation No 3017/79, and continued in the three subsequent regulations, Regulation No 2176/84, Regulation No 2423/88 and Regulation No 2383/94. The currently applicable anti-dumping rules are EC Regulation 384/96⁵⁴

In the Basic Regulation, Article 1(1) lays down that the condition of levying on anti-dumping duty is 'any dumped product whose release for free circulation in the Community causes injury'. It specifies three substantive conditions that must be met in

⁵² CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY Official Journal of the European Communities, C 325/33

⁵³ Council Regulation No. 459/68, Official Journal of the European Communities, O.J.L 93, 17.4.1968, p.1.

⁵⁴ OJ No L 56, 6.3 96 p.1 (reprinted in Appendix 1 below). CF also Bierwagen 1995, Muller 1995, Neumann 1996, Vermulst/ Waer 1995

order to apply an anti-dumping duty. 1. Dumping 2. Injury 3 the link between dumping and injury.

In addition, Article 21 requires that the adoptions of measures are in the interest of the Community. this thesis is also seen as the third condition from the imposition of anti-dumping duties. The further analysis about the three conditions is following:

Under what conditions is an anti-dumping measure applied?

In general, there are three main sources of EU anti-dumping policy. The first comes from Article 133 of the Common Commercial Policy⁵⁵. The second origin refers to, from the layer of administration and manipulation of the Commission itself, relevant Council Regulations. It was provided with general theory, principle and relating detailed rules. Moreover, case law is the third sources. According to plenty of cases ruled by ECJ, the case law is considered to insure the implementation of relevant regulations. I will discuss current EU anti-dumping regulation from following five aspects⁵⁶:

3.3. Determination of Dumping

As far as dumping is concerned, under Article 1(2) in the Basic Regulation, dumping exists where the normal value of the product in question on the exporter`s domestic market exceeds the export price⁵⁷. The comparison between the prices of a product as export as exported to the Community (export price) and the normal value of the like product has been used to determine the dumping action. Additional rules exist for the assessment of allegedly dumped imports originating in non-market economy countries. The normal value refers to the value of exporting goods in the market.

According to Basic Regulation, the domestic price is referred to as `normal value`. The term `normal value` is an art of legal draftsmanship. In comparison with the economic term, `domestic market price, normal value is more flexible and apt to be applied in various

⁵⁵ Treaty Establishing the European Community, Nov. 10, 1997, art. 113. O.J. (C340) 3. 237 (1997), "...shall be based on uniform principles, particularly in regard to ... export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies"

⁵⁶ See Lei Yu at 330& n. 173 (stating the first EU anti-dumping legislation was enacted in 1968.... The current EU anti-dumping laws entered into force between March 1995 and April 1998)

⁵⁷ Council Regulation 384/96 on Protection Against Dumped Imports from Countries Not Members of the European Community, art. 1(2). 1996 O.J. (L 56) 1.4 "A is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country."

domestic business situations. Article 2(1) provides that “the normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country”. Therefore, normal value is considered to the standard of determination of dumping. In other words, determination of dumping is related to the comparison between the export price of specific goods and normal value. But before the comparison, the elements which would influence the prices should be considered and be properly adjusted in order to determine the dumping if export price is less than normal value. In addition, according to EC anti-dumping regulation, even though this dumping product accords with the substantive of anti-dumping duty, the exemption would be justified due to Community Interest.

Determination of Normal Value⁵⁸

1) Ordinary course of trade: this part was mentioned in Article 2(1) of the Basic Regulation rules three situations of non-ordinary course of trade. The transaction price can, therefore, not determine the basis of normal price⁵⁹.

The key conditions are now defined as follows:

- A. Sales below cost.
 - a. Extended period of time: A definition as to what should be considered an `extended period of time` can be found in the third subparagraph of Article 2 (4). According to this provision, an extended period of time shall normally be one year but shall in no case be less than six months. However, it shall be exempted if sales at low prices take place contingently.
 - b. Substantial quantities: This states that sales below unit cost shall be considered to have been made in substantial quantities within the period. b. weighted average selling price is below the weighted average unit cost or the volume of sales below unit cost is not less than 20 percent of sales being used to determine normal value within the extended period of time.
 - c. Reasonable period of time: if prices which are below costs at the time of sale are

⁵⁸ In this part, analysis will be focused on Market Economy part. The Non-market Economy part will be discussed in the next chapter.

⁵⁹ I.V. Bael and J.F. Bellis, *Anti-dumping and other Trade Protection Laws of the EC*, Bicester Third Edition, CCH Europe, 1996, pp. 71-75.

above weighted average costs for the period of investigation, they shall be considered to provide for cost recovery within a reasonable period of time.

- B. Transactions between related parties: can not be considered as the basis of determination of normal value unless transactions are not influenced by relationship. There is no relevant article regarding the boundary of definition of related parties in Article 2(1). Actually, the Commission consider the related parties regarding not only relationship of jural ownership, including directly and indirectly, even if actual relationship of ownership, but also the same owner or relatives. Therefore, there could be free space of judgment of the Commission.
- C. Compensatory agreement: Under Article 2 (1), Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value

2) Representativity of domestic sales

According to five percent representative rule, interpretation of the Commission set out two conditions, namely, global producer-by-producer and a model-by-model⁶⁰. Moreover, the 5% representative means the total sales volume of the product to the Community, or total sales volume of individual like product. There is no relevant definition under Article 2(2). As there would be a possibility that individual like product is more than 5% boundary, but less than 5% of total sales volume. In this situation, there has been no method to calculate it.

3) Constructed normal value

When domestic price of a product or like product can not be used to determine the normal value, Article 2(3) of the Basic Regulation should apply to construct normal value (Community institutions can also turn to the use of export prices to a third country).

A constructed normal value of the like product consists of the unit costs of manufacture (fixed and variable) in the country of origin plus a reasonable amount for selling, general and administrative expenses (SGA) and for profits.

4) Export price to a third country

⁶⁰ Stefano Inama and Edwin Vermulst, *European Business Law & Practice Series Customs and Trade Laws of the European Community*, London Kluwer Law International 1999, p. 239.

This method of establishing normal value can, like the constructed normal value, only be applied when domestic sales prices, either of the exporter concerned, or of other exporters can not be used for this purpose. There are three preconditions for basing normal value on the export price to a third country:

- The sales volume of the third country must be the representative of export price.
- It belongs to actual transactional price during the transaction process.
- It must be the proper export price of the third country.

The products exported to that country are fully comparable to those exported to the Community⁶¹.

3.4. Export Price

1) Actual export price

According to Article 2(8) of the Basic Regulation, “the export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.” Exports to the Community made via third countries should be taken into consideration when determining the export price.

2) Constructed export price

The first sentence of Article 2(9) of the Basic Regulation defines the circumstances under which the export price may be constructed. This is the case if there is no export at all or if the export price is unreliable because of an association or a compensatory agreement between the exporter and the importer. This provision lays down two possibilities for constructing the export price. The first possibility is that the export price may be constructed ‘on the basis of the price at which the imported products are first resold to an independent buyer’. This possibility is limited to cases where there is indeed a resale of the product in the same condition as that in which it was imported. If these two conditions are not met, the second possibility applies, i.e. the construction of the export price ‘on any reasonable basis’

⁶¹ OJ No L 255, 1.10.94 p. 50 (recitals 44 and 45)- CTVs from Malaysia P.R.China, Korea, Singapore and Thailand / provisional. Vermulst/ Waer(1995) p. 55 display a more favourable attitude towards the use of third country export prices.

In the circumstances mentioned above, adjustment for all costs, including duties and taxes, incurred between importation and resale, and for profits accruing, shall be made so as to establish a reliable export price.

The items for which adjustment shall be made shall include usual transport, insurance, handling, loading and ancillary costs; customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods; and a reasonable margin for selling, general and administrative costs and profit.

3) Comparison

The following conditions should be met while comparing normal value to export price:

- The same level of trade
- Sales made at as nearly as possible the same time
- Proper consideration about elements that may influence the price comparability.

Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be listed as follows:⁶²

- (a) Physical characteristics
- (b) Import charges and indirect taxes
- (c) Discounts, rebates and quantities
- (d) Level of trade
- (e) Transport, insurance, handling, loading and ancillary costs
- (f) Packing
- (g) Credit
- (h) After-sales costs
- (i) Commissions

4) Dumping balance

Dumping balance means the amount in which normal value is much more than export price. If the amount cannot be balanced, it should be referred to weighted general value.

⁶² Supra footnote 44 pp.5

3.5. Determination of Injury

1) Definition⁶³

Pursuant to this Regulation, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

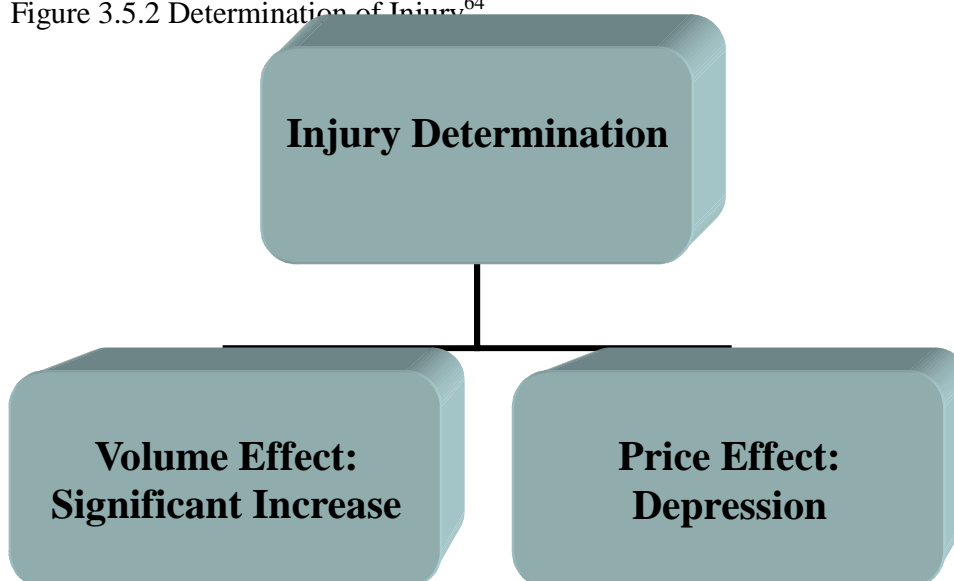
2) Determination of injury

The determination of material injury must, according to Article 3(2) of the Basic Regulation, be based on an examination of:

the volume of the dumped imports and their effect on prices and

the consequent impact of these imports on the Community industry including the question of a causal link between the dumped imports and the injury suffered by the Community industry.

Figure 3.5.2 Determination of Injury⁶⁴



Source: 'Anti-dumping: a guide' Directorate General of Anti-Dumping & Allied Duties

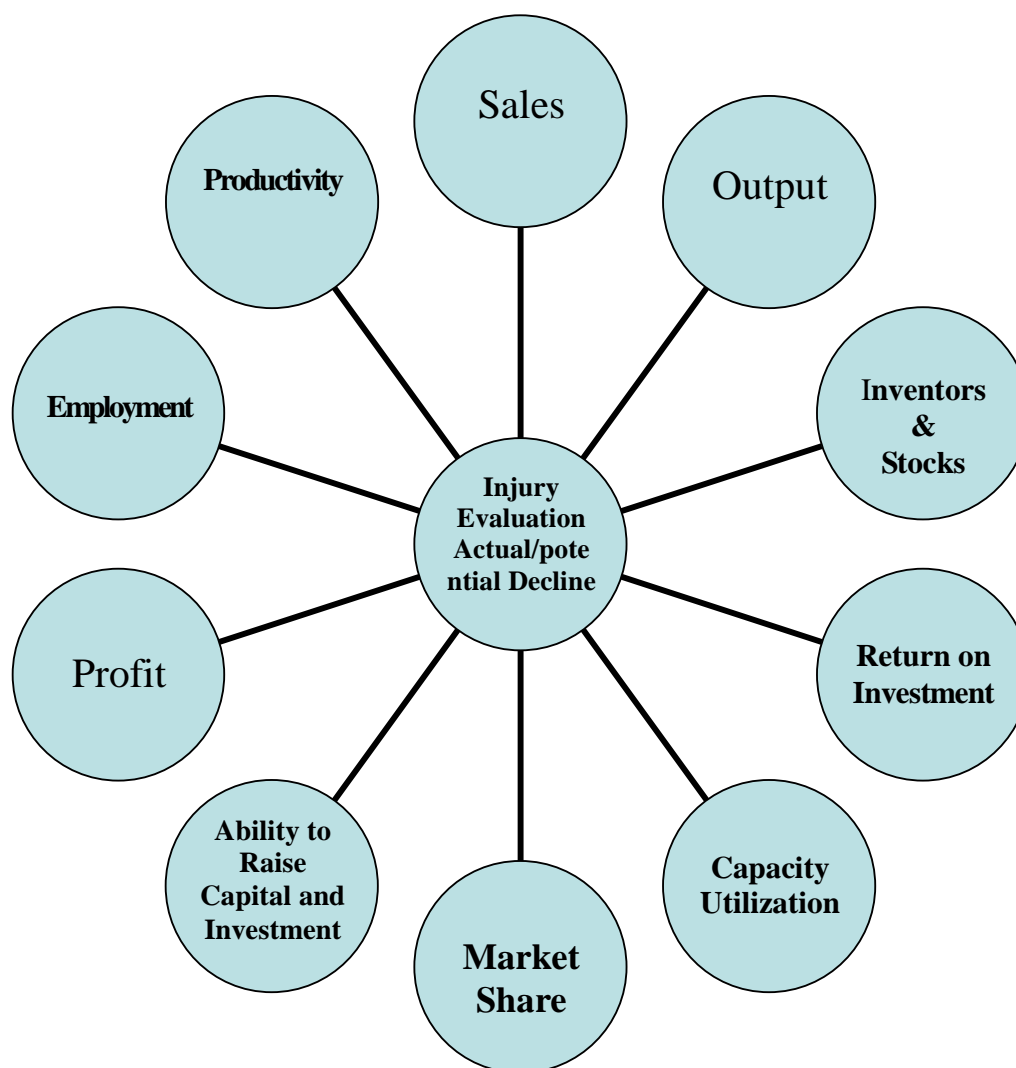
⁶³ Council Regulation EC No 384/96 Article 3(1)

⁶⁴ 'Anti-dumping: a guide' Directorate General of Anti-Dumping & Allied Duties pp.6

3) Indicators

Injury analysis is a detailed and intricate examination of all the relevant factors. It is not necessary that all the factors considered relevant should individually show injury to the domestic industry.

Figure 3.5.3 Injury-Evaluation of Economic Indicators⁶⁵:



Source: 'Anti-dumping: a guide' Directorate General of Anti-Dumping & Allied Duties

4) Calculation

Cumulation evaluation

Pursuant to Article 3(4) of the Basic Regulation, four conditions have to be met in order to

⁶⁵ 'Anti-dumping: a guide' Directorate General of Anti-Dumping & Allied Duties pp.7

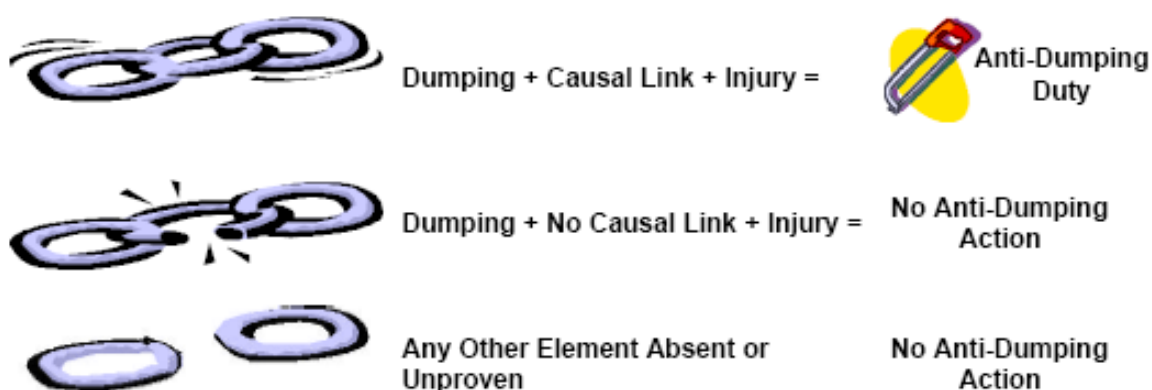
assess exports from different countries cumulatively for the purpose of evaluating injury:

- (a) where imports of a product from more than one country are simultaneously subject to anti-dumping investigations
- (b) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in Article 9 (3)
- (c) the volume of imports from each country is not negligible;
- (d) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

5) Causality

A 'causal link' must exist between the material injury being suffered by the EU industry and the dumped imports. In addition, other injury causes have to be investigated so that they are not attributed to dumping. Some of these are volume and prices of imports not sold at dumped prices, contraction in demand or changes in the pattern of consumption, export performance, productivity of the domestic industry etc.

Figure 3.5.5 The Basic Principles⁶⁶



Source: International Trade Centre 'Anti-dumping Proceedings: Guidelines for importers and exporters'

⁶⁶ International Trade Centre 'Anti-dumping Proceedings: Guidelines for importers and exporters' Appendix 3

3.6. Circumvention

According to Article 13, anti-dumping duties may be extended to imports from third countries of like products, or parts thereof, when circumvention of the anti-dumping measures is taking place.⁶⁷

1) Definition

“Circumvention shall be defined as a change in the pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products and there is evidence of dumping in relation to the normal values previously established for the like or similar products.”⁶⁸

2) Action considered as circumvention⁶⁹

Assembly operations falling under Article 13(2) constitute circumvention of anti-dumping measures. Such circumvention is defined to include the following elements:

- (a) the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures; and
- (b) the parts constitute 60 % or more of the total value of the parts of the assembled product, except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25 % of the manufacturing cost, and
- (c) the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and
- (d) there is evidence of dumping in relation to the normal values previously established for the like or similar products.

⁶⁷ A general introduction in the subject can be found with Holmes (1995) pp. 161 et seq.

⁶⁸ Council Regulation EC No 384/96 Article 13 (1)

⁶⁹ Council Regulation ECNo 384/96 Article 13 (2)

3) Others⁷⁰

Exemption certificates are an essential element for confining anti-circumvention measures within their proper scope. The extension of anti-dumping measures to certain parts will necessarily be of general application to those parts. Imports of such parts made by individual companies may however be used for purposes which do not constitute circumvention. The issue of exemption certificates therefore ensures that such individual companies are not affected by the extension of anti-dumping measures.

3.7. Community Interest Test

A further precondition for the imposition of anti-dumping measures is that such intervention is in the Community interest.⁷¹ In this respect, four groups have obtained rights to participate actively in the process that leads to the assessment of Community interest, namely the complainants, importers and their representative organizations, representative users and representative consumer organizations.

Current rules

1) Basis of evaluation

A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole.

2) Scope

Include the interests of the domestic industry and users and consumers

3) Special factors which should be considered

- Eliminate the trade distorting effects of injurious dumping.
- Restore effective competition shall be given special consideration

4) Procedure

EC Regulation 384/96⁷² defines clearly the parties that enjoy various rights with regard to

⁷⁰ Council Regulation EC No 384/96 Article 13 (4)

⁷¹ With regard to undertakings it should be noted that they can already be accepted at a time at which not even a preliminary determination as to whether or not measures are in the Community interest has been made. It would, however, appear that such examination should subsequently be carried and, in case of a negative finding, the undertaking should lapse in accordance with Article 8(6).

⁷² Council Regulation EC No 384/96 Article 21(2)

Community interest. These are:

- Complainants
- Importers and their representative organizations
- Representative users
- Representative consumer organizations

In other words, each individual complainant company and each importer can submit information on matters of Community interest. If a user of the product concerned wishes to avail itself of the rights contained in Article 21 he has to show that he is representative of users of the product.⁷³ Individual consumers do not enjoy these rights. Their submissions would be inadmissible. Only their representative organizations can participate in anti-dumping proceedings. A community producer who is not a complainant does not enjoy *per se* the rights laid down under Article 21 unless it also falls under the categories 'importer' or 'representative user'. Exporters and government representatives from the exporting country do not benefit from the rights laid down under Article 21 either. Finally, it is interesting to note that the upstream industry is not mentioned in the list of parties having standing contained in Article 21(2).

Exporter`s Domestic Sales Price

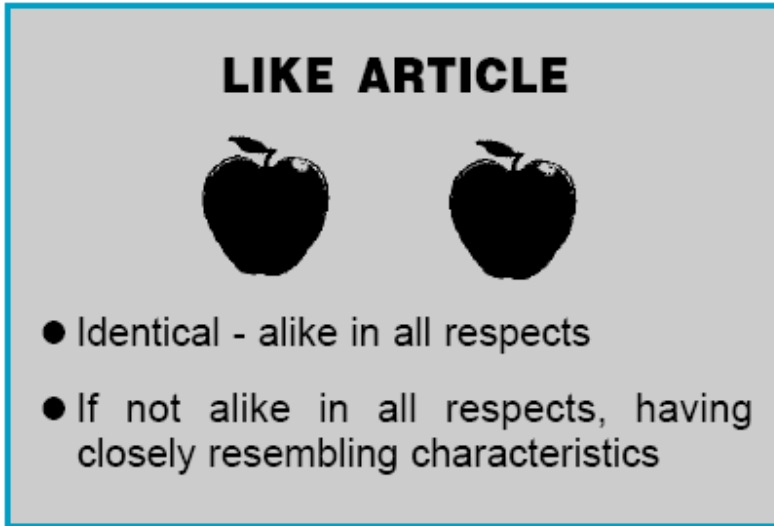
The price of home market is used by the Commission in the majority of cases involving products imported from market economy countries. It consists of three prerequisite:

1. must normally be domestic sales price of like product which means that the price is taken place but still unpaid
2. should meet five percent rule: Sales of the like product (see Figure 3.7) intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5 % or more of the sales volume of the product under consideration to the Community. However, a lower volume of sales may be used when, for example,

⁷³ Representativity must exist in respect of the facts to be examined, i.e. the effect of possible anti-dumping measures on the cost of production of the user. Where the Commission takes the initiative to contact parties by sending them questionnaires, it will, in case the number of parties is large, apply sampling. The criteria for sampling are those set out in Article 17.

the prices charged are considered representative for the market concerned.⁷⁴

Figure 3.7 Like product⁷⁵



Source: 'Anti-dumping: a guide' Directorate General of Anti-Dumping & Allied Duties

⁷⁴ 31996R0384 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community *Official Journal L 056*, 06/03/1996 P. 0001 - 0020 *CONSLEG* - 96R0384 - 30/04/1998 - 52 P.

⁷⁵ 'Anti-dumping: a guide' Directorate General of Anti-Dumping & Allied Duties pp.5

4. A Case Study-Chinese Color Television

4.1. Fact of law⁷⁶

In 1988, EU investigated Chinese and Korean TV manufacturers for anti-dumping charges, and raised anti-dumping taxes against Chinese TV manufacturers. In December of the same year, the Korean enterprises appealed and won back its original tax rate. However, a 44.6%⁷⁷ anti-dumping tax was imposed on Chinese enterprises. Since then, Chinese TVs have nearly disappeared from European markets.

Ever since 1988, EU has started its investigation into allegation that China's color television producers sold their products in European market at a price below cost. In July 1991, and in March 1995, EU twice resorted to hefty tariff measures and shut the door to big-screen and small-screen Chinese-made televisions.

Furthermore, in November 1998, EU took another stern measure to charge 44.6 per cent tariff on Chinese television sets alleged of dumping in Europe.

In 2002, EU accepted the promise on the quantitative ceilings and price made by the China Chamber of Commerce for Import and Export of Machinery and Electronic Product (hereinafter the CCCME) and seven Chinese TV producers, including Xiamen Overseas Chinese Electronic Co Ltd, Haier Electrical Appliances Corporation Ltd, Hisense Import & Export Co, Konka Group Co Ltd, Sichuan Changhong Electric Co Ltd, Skyworth Multimedia International (Shenzhen) Co Ltd, TCL King Electrical Appliances Co Ltd.⁷⁸ color TV sets made by other companies in the country, except the seven involved, will still face a duty rate of 44.6 percent.

Chinese color TVs finally got the chance to access European Union (EU) markets after a 15-year-long anti-dumping investigation.

⁷⁶ COUNCIL REGULATION (EC) No 1531/2002 of 14 August 2002 imposing a definitive anti-dumping duty on imports of color television receivers originating in the People's Republic of China, the Republic of Korea, Malaysia and Thailand and terminating the proceeding regarding imports of color television receivers originating in Singapore

⁷⁷ Supra footnote 70 Para. 70

⁷⁸ See Table 4.1.1

4.1.1. Previous investigations and existing measures

Agenda of this case⁷⁹

(1) In April 1990 the Council, by Regulation (EEC) No 1048/90 (2), imposed definitive anti-dumping duties on imports of small-screen color television receivers, i.e. those with a diagonal screen size of more than 15,5 cm but not exceeding 42 cm ('SCTVs'), originating in the Republic of Korea (Korea).

(2) Subsequently, in July 1991, the Council, by Regulation (EEC) No 2093/91 (3), imposed definitive anti-dumping duties on imports of SCTVs originating, *inter alia*, in the People's Republic of China (China).

(3) In November 1992, the Council, by Regulation (EC) No 710/ 95 (5), imposed definitive anti-dumping duties on imports of CTVs with a diagonal screen size exceeding 15,5 cm, originating in Malaysia, China, Korea, Singapore and Thailand. Although this proceeding established that there were no longer grounds for differentiating between color television receivers according to their screen size, since anti-dumping measures were already in force in respect of SCTVs originating in China and Korea, the scope of the investigation and the definitive anti-dumping duties imposed by Regulation (EC) No 710/95 as regards China and Korea were limited to color televisions with a diagonal screen measurement exceeding 42 cm, i.e. large-screen CTVs.

(4) In November 1998, the Council by Regulation (EC) No 2584/98 (6) amended Regulation (EC) No 710/95 as far as the duties applicable to CTVs originating in China and Korea were concerned in order to take account of the findings in Regulation (EC) No 710/95 that there were no grounds for differentiating between televisions according to their screen size.

(5) Imports under one of the following TARIC additional codes (see table below) which are produced and directly exported (i.e. shipped and invoiced) by a company named below to a company in the Community acting as an importer shall be exempted from the anti-dumping duty imposed by Article 1 according to Regulation (EC) No 1531/02.

⁷⁹ Supra footnote 70 Para. 3

Table 4.1.1 Companies exempted from the anti-dumping duty⁸⁰

Country of origin	Company	TARIC additional code
People's Republic of China	Haier Electrical Appliances Corporation Ltd, Haier Road 1, Haier Industrial Park, Qingdao, Shandong, China	A291
People's Republic of China	Hisense Import & Export Co., Ltd, 11 Jiangsi Road, Qingdao 266071, China	A292
People's Republic of China	Konka Group Co., Ltd, Overseas Chinese Town, Shenzhen 518053, China	A293
People's Republic of China	Sichuan Changhong Electric Co. Ltd, 35 East Mianxin Road, High Tech Park, Mianyang, Sichuan, China	A294
People's Republic of China	Skyworth Multimedia International (Shenzhen) Co., Ltd, — 4F,425 Ba Gua Ling Ind. District, Shenzhen, China	A295
People's Republic of China	TCL King Electrical Appliances (Huizhou) Co., Ltd — 19, ZhongKai Development Zone Huizhou, Guangdong, China	A296
People's Republic of China	Xiamen Overseas Chinese Electronic Co. Ltd, 22 Huli Dadao, Xiamen SEZ, Xiamen, Fujian Province, China	A297

Source: Council Regulation EC No 1531/2002, Article 3(1)

4.1.2. Expiry and interim review investigations

(1) Following the publication of a notice of impending expiry (7) of the anti-dumping measures in force on imports of CTVs originating in China, Korea, Malaysia, Singapore and Thailand, the Producers of European Televisions in Cooperation (Poetic), requested an expiry review of the measures in force pursuant to Article 11(2) of the Basic Regulation

(2) The request was based on the grounds that the expiry of the measures would be likely to result in the continuation or recurrence of dumping and injury to the Community industry. The request also contained information that showed that the various markets involved and the product, itself, had undergone significant changes over the last few years. This information, together with the allegations on dumping and injury, led the Commission to conclude that an interim review of both dumping and injury should also be carried out pursuant to Article 11(3) of the basic Regulation. Having determined, after consultation of

⁸⁰ See Council Regulation EC No 1531/2002, Article 3(1) L231/24

the Advisory Committee, that sufficient evidence existed for the initiation of an expiry and an interim review pursuant to Articles 11(2) and 11(3) of the basic Regulation, the Commission published a notice of initiation in the *Official Journal of the European Communities* (1) and commenced the investigation.

4.2. Arguments

4.2.1. Product concerned and like product⁸¹:

One importer requested the exclusion from the scope of the investigation of the so-called internet-CTVs which integrate an internet modem and computer operating system allowing access to the internet via the TV screen and controlled by a remote control unit which comprises a full keyboard. Moreover, the importer argued that the exclusion was warranted in view of the differences in basic physical and technical characteristics between CTVs and internet-CTVs and in view of the different consumer perceptions of both products because of the basic physical characteristics, basic technical characteristics and integrated internet circuit elements of internet-CTVs. Regarding the basic technical characteristics it was argued that the internet CTV sends and receives data not via broadcasting technology but via the telephone system using the modem.

However, in the Commission's point of view, it was found that despite differences in screen sizes, in sound system, in broadcast system, in screen type and format and in picture. All CTVs shared the same basic physical and technical characteristics and the same use and form therefore one product.

4.2.2. Analogue country⁸²

Since the China is a non-market economy country, an analogue market economy third country had to be selected for the establishment of normal value in accordance with Article 2(7) of the basic Regulation. For this purpose, the Notice of Initiation suggested Singapore, which was also the proposal made in the review request. Within the time limit specified in the relevant notice of initiation, certain Chinese companies objected to this approach and

⁸¹ Council Regulation EC No 1531/2002

Paragraph 21-34

⁸² Council Regulation EC No 1531/2002

Paragraph 47-52

requested that the lowest normal value found in the other countries subject to the investigation be used. One Chinese company suggested the use of Malaysia, Thailand or Korea. Finally, the Commission decided to use Turkey as an analogue country.

4.2.3. Normal value⁸³

A Chinese exporter contested the method used to establish the constructed values. They argued that the sales, general and administrative expenses and the profit which had been used in constructing the values were excessive and did not adequately reflect its situation. The Commission considers that the arguments put forward by the exporter are not duly justified. In addition, the Commission concluded that it was done by establishing the proportion of domestic sales to independent customers, of each exported product model, sold in the ordinary course of trade on the domestic market during the second half of the review IP. For those product models where more than 80 % by volume was sold at a profit on the domestic market, and where the weighted average sales price was equal to or higher than the weighted average production cost, normal value, by product model, was calculated as the weighted average of all domestic sales prices of the type in question. For those product models where at least 10 %, but no more than 80 %, by volume, was sold at a profit on the domestic market, normal value, by product model, was calculated as the weighted average of the profitable domestic sales prices only, of the model in question.

4.2.4. Export price⁸⁴

The investigation showed that the exports of Chinese origin CTVs by the Turkish company concerned, via its related exporters in Turkey, were made both to unrelated and to related customers in the Community. Therefore, for those sales made to unrelated customers in the Community, the export price was established in accordance with Article 2(8) of the basic Regulation, on the basis of export prices actually paid or payable. (59) For sales made via related importers, the export price was constructed on the basis of resale prices to independent customers. Adjustments were made for all costs incurred between importation and resale by that importer, including selling, general and administrative expenses (SG&A), and for the profit margin found in the investigation to have been attained by unrelated

⁸³ Council Regulation EC No 1531/2002

Paragraph 53-56

⁸⁴ Council Regulation EC No 1531/2002

Paragraph 57-59

importers of the product concerned, in accordance with Article 2(9) of the basic Regulation. One of the exporters considered that the profit margin used in the construction of the export price could not be considered reasonable. The Commission notes, however, that it has been consistent in its approach with the methodology used in the previous investigation concerning SCTVs originating in the Republic of Korea.

4.2.5. Comparison⁸⁵

For the purposes of a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences which were claimed and demonstrated to affect price comparability in accordance with Article 2(10) of the basic Regulation. On this basis, adjustments were made where appropriate with regard to import taxes and indirect taxes, rebates, transport, insurance, handling, loading and ancillary costs, after sales costs, commissions and credit.

4.2.6. Dumping margin for Chinese product⁸⁶

There was no reason to believe that the dumping margin for China would be less than the residual dumping margin established during the previous investigation. Pursuant to Article 18 of the basic Regulation, therefore, a dumping margin of 44.6 % has been attributed to all producers in China.

4.2.7. Injury⁸⁷

The Commission concluded in its provisional findings that the Community SCTV manufacturing industry had suffered material injury. It based this finding principally on the Hong Kong and Chinese exporters' rapid increase in volume of exports and in market share, the price undercutting practiced by these exporters in the Community market and the price erosion resulting there from for the complainant producers' selling prices. The Commission, however, maintains its arguments that they competed with each other and with the Community products and were sold through the same distribution network and that the volumes imported from each of the two countries taken in isolation can, in no way, be

⁸⁵ Council Regulation EC No 1531/2002

Paragraph 60-66

⁸⁶ Council Regulation EC No 1531/2002

Paragraph 70

⁸⁷ Council Regulation EC No 2093/1991

Paragraph 22

described as negligible. In addition, the Commission notes that the market behavior of the Chinese and the Hong Kong exporters can be considered very similar.

4.2.8. Causation of injury⁸⁸

The Commission notes that prices play a very important role in the market and price undercutting due to dumping has therefore an immediate negative effect on the prices practiced by the Community industry. It should be stressed that the effects of the price undercutting found do not refer only to the models of sCTVs in the Community which may be considered to be directly comparable to the Hong Kong and Chinese exports, but that they apply to the whole range including the newest and most enhanced models.

4.2.9. Community interest⁸⁹

On the basis of interest of the Community industry, importers/traders and consumers, it is concluded that there are no compelling reasons on the grounds of Community interest against the continuation of the anti-dumping measures. Several exporters questioned the standing of the complainants, on the grounds that the criteria used to define the producers' 'main core of business' were too weak, particularly in the light of the fact that imports by the Community industry from the countries concerned accounted for up to 25 % of their Community production sold in the Community.

4.3. Judgment

4.3.1. Product concerned and like product⁹⁰

The Commission concluded that CTVs, originating in or exported from the countries concerned and destined for the Community, sharing the same basic physical and technical characteristics and end-uses as CTVs manufactured and sold by the Community industry on the Community market, are alike within the meaning of Article 1(4) of the basic Regulation. A definitive anti-dumping duty is hereby imposed on imports of color television receivers with a diagonal screen

⁸⁸ Council Regulation EC No 2093/1991

Paragraph 27

⁸⁹ Council Regulation EC No 1531/2002

Paragraph 209-226

⁹⁰ Council Regulation EC No 1531/2002

Paragraph 21-34

size of more than 15.5 cm, whether or not combined in the same housing with a radio broadcast receiver and/or clock, other than those incorporating a modem and a computer operating system (CTVs) and falling within CN codes, and originating the People's Republic of China.

- 4.3.2. **Analogue country**⁹¹: Since the China is a non market economy country, an analogue market economy third country had to be selected for the establishment of normal value in accordance with Article 2(7) of the basic Regulation. For this purpose, the Notice of Initiation suggested Singapore, which was also the proposal made in the review request. Within the time limit specified in the relevant notice of initiation, certain Chinese companies objected to this approach and requested that the lowest normal value found in the other countries subject to the investigation be used. One Chinese company suggested the use of Malaysia, Thailand or Korea. Finally, the Commission decided to use Turkey as an analogue country.
- 4.3.3. **Normal value**⁹²: given that domestic sales of the like product by the Turkish producers during the first half of the IP were found to be made in sufficient quantities and in the ordinary course of trade, normal value was based on the actual prices paid or payable for the corresponding product model, by independent customers in Turkey during the second half of the review IP.
- 4.3.4. **Dumping margin for Chinese product**⁹³: there was no reason to believe that the dumping margin for China would be less than the residual dumping margin established during the previous investigation. Pursuant to Article 18 of the basic Regulation, therefore, a dumping margin of 44.6 % has been attributed to all producers in China.
- 4.3.5. **Community interest**⁹⁴: On the basis of interest of the Community industry, importers/traders and consumers, it is concluded that there are no compelling reasons on the grounds of Community interest against the continuation of the

⁹¹ Council Regulation EC No 1531/2002

Paragraph 47-52

⁹² Council Regulation EC No 1531/2002

Paragraph 53-56

⁹³ Council Regulation EC No 1531/2002

Paragraph 70

⁹⁴ Council Regulation EC No 1531/2002

Paragraph 209-226

anti-dumping measures.

4.4. Case Analysis

Relevant articles under EC Council Regulation 384/96

Article 1 (4), 2 (1) – 2 (6), 2 (9), 2 (10) (d) (i)

Article 3 (1), 3 (2), 3(3), 3(5), 3(6)

Article 4 (1), 4 (2), 5(4), 21(1), 21(3), 21(6)

4.4.1 Argument Analysis

A. Non-market concern

The distinction between ‘market economy’ and ‘non-market economy’ is part of the received wisdom of contemporary EC Anti-Dumping Law. It runs like a red thread through EC anti-dumping actions against China. Its significance stems from the very concept of dumping. In legal terms, dumping is based on the notion of price discrimination on two different markets.⁹⁵ To adopt anti-dumping measures, the EC authorities must make an affirmative determination that dumping exists, that it has caused injury, and that the adoption of anti-dumping measures is in the EU `s interest.⁹⁶ A determination of dumping consists in a comparison between the price of the product exported to the EU and the ‘normal value’ of the identical or like product.⁹⁷ But how is ‘normal value’, or market price, to be determined for exports from state-trading countries, where by definition the ‘market’ does not exist? Historically, the classification of an exporting country as a ‘non-market economy’ (NME) rather than a ‘market economy’ (ME) has provided a way of resolving this dilemma, which posed a host of real economic and legal problems, at least in the past.

⁹⁵ See Jacob Viner, *Dumping: A problem in International Trade* (Chicago University Press, 1923); p3, Jackson, ‘Dumping in the International Trade: its Meaning and Context’, in John H. Jackson and Edwin A. Vermulst (eds), *Antidumping Law and Practice: A Comparative Study* (Harvester Wheatsheaf, 1990) pp. 1-22 at 2-3. See also Case 157/87, *Electroimpex and Others v Council*, 1990 ECR I-3021. It is therefore often argued that competition law should replace anti-dumping law. See for example Rainer W. Bierwigen, *GATT Article VI and the Protectionist Bias in Anti-dumping Laws* (Kluwer, 1990); Hoekman and Mavriodis, ‘Dumping, Antidumping and Antitrust’, 1996 *Journal of World Trade* 27. For a contrary view, see Weiss, ‘From World Trade Law to World Competition Law’ 2000, 23 *Fordham International Law Journal* S250-S273. For the middle ground, see Trebilcock, ‘Competition Policy and Trade Policy: Mediating the Interface’, (1996) 30 *Journal of World Trade* 71-106.

⁹⁶ Articles 1(1), 7(1) and 9(4) Council Regulation (EC) 384/96, OJ 6.3.96 L56/1.

⁹⁷ Article 1(2) and 1(4) Council Regulation (EC) 384/96. OJ 6.3.96 L56/1

During 1989 to 1998, EC Anti-Dumping Law always treated China as a 'non-market economy'.⁹⁸ This has been discussed for a long time in the history of EC anti-dumping legislation.

The classification of China as a 'non-market economy' in EC Anti-Dumping Law has two important consequences. First, the normal value of exports from China is calculated according to the so-called analogue or surrogate market-economy method. This means that normal value is not calculated on the basis of domestic information available in China concerning either prices or costs of production, because these are considered not to reflect supply and demand. Instead, it is established by reference to prices and production costs in a comparable market-economy third country. Second, all export transactions of the same product by all exporters from China during the investigation period are considered together. And a single anti-dumping margin is calculated. This is the 'single duty rule'. Hence, a single anti-dumping duty applies to all exports of the same product from China.⁹⁹ The sole exception is the case in which an exporter is granted individual treatment. Then the dumping margin is calculated using normal value from a surrogate country, but the exporter's own export prices to the EU. This usually results in a lower dumping margin, and hence lower anti-dumping duty. In legal terms, the use of an analogue country and the single duty rule follow from the fact that, until the partial legislative reform in 1998, EC Anti-Dumping Law has always classified China as a 'non-market economy'.¹⁰⁰

B. Like product

The definition of like product under EC Regulation 384/1996 is identical to the definition under Article 2(2) of second WTO anti-dumping regulation. In this context, like product refers not only to the product which is identical to product under consideration in all respects, but also to the product which is although not alike in all respects, has characteristics closely resembling those of the product under consideration. As to complaint perspective, the scope of like product is extremely important since it would be in a dilemma of confront

⁹⁸ The 1998 reform of EC anti-dumping law allowed Chinese companies to try to prove that they operated on a market economy basis. See Council Regulation 905/98, OJ 30.4.98 L128/18. See also Francis Snyder, *International Trade and Customs Law of the European Union* (Butterworths, 1998), pp. 221-22.

⁹⁹ See Wolfgang Muller, Nicholas Khan and Hans-Adolf Neumann, *EC Anti-dumping Law---A Commentary on Regulation 384/96* (John Wiley & Sons, 1998) at 152; Francis Snyder, *International Trade and Customs Law of the European Union* (Butterworths, 1998) at 219, 228.

¹⁰⁰ See Council Regulation 905/98, OJ 30.4.98 L128/18.

conflicting interest. If the scope of definition is too wide, the volume of EU industry under consideration of investigation would expand so that there would be increasing burden of representative of EU relevant industry, while if it is too narrow, the anti-dumping measures can not achieve the effect of protection of domestic industry due to the narrow bound because the regulation measures would be circumvented as long as the physical characteristics of the product is modified¹⁰¹.

Therefore, the standard of determination of like product of imported products should be not the purpose but physical characteristics. At a word, both replaceable products and similar products should not belong to like product. For example, in the case of onboard motor¹⁰², the Commission excluded the onboard motor which worked higher than 85 horsepower out of consideration of investigation as this product was replaceable and competitive with like product within EU in which this type of product was not manufactured. In this circumstance, the definition of like product is much narrower than that of definition under Basic Regulation.

During recent years, the Commission also adopts other methods of determination of like product except for physical characteristics. For example, in the printer case in 1987 and the case of Video Cassette Recorders in 1988¹⁰³, the Commission accepted functional similarity of determination of like product during proceeding of investigation. In addition, the distinction between quality and price of product is and another example in spite of non-physic-characteristics. If distinction of price is significant, there should be great distinction of quality. Therefore, whether or not it is like product can not be defined without exception.

In the CTV case, the anti-dumping proceeding concerning CTV from China was initiated for all television sets. The scope of the proceeding therefore also covered internet-CTVs. This type of CTVs was still at a development stage and was not available to the public except in very limited circumstances. The exclusion should have been warranted in view of the differences in basic physical and technical characteristics between CTVs and internet-CTVs and in view of the different consumer perceptions of both products.

¹⁰¹ See Marco Bronckers and Natalie Mcnelis, "Rethinking the Like Product Definition in WTO Anti-Dumping Law," in 33 *Journal of World Trade* 1999, pp.77-78.

¹⁰² *Outboard Motors*, O.J. No L 152, 10.6.1983, p.18.

¹⁰³ *Printers*, O.J. No L 130, 26.5.1988, p.12; *Video Cassette Recorders*, O.J. No L 240, 31.8.1988, p.5.

However, the Commission decided that anti-dumping measures should apply to this product type and that these products are alike within the meaning of Article 1(4) of the basic Regulation. As to the applicant's argument, the Commission did not adopt the functional similarity standard of determination of like product referring to the printer case and the case of Video Cassette Recorders. The extended definitive scope should be inappropriate in this sense.

C. Calculation of the normal value

According to Basic Regulation 2 (1), 'the normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers. Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship'

Article 2 (2): 'Sales of the like product intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5 % or more of the sales volume of the product under consideration to the Community....'

Article 2 (3): 'When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits,....'

Article 2 (4): 'Sales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining normal value,....'

Article 2 (5) '5. Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally

accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.

Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilized. In the absence of a more appropriate method, preference shall be given to the allocation of costs on the basis of turnover. Unless already reflected in the cost allocations under this subparagraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production.....`

As no Chinese exporters or importers of the product concerned cooperated, for the purpose of establishing normal value, it was not possible to select models in the market economy third country which corresponded exactly to the types of the product concerned imported into the Community. In view of the fact that the quantity imported and reported under this CN code accounted for only 4.7% of total imports of the product concerned, the Commission decided that the investigation of the other models could already be considered to be representative for the Chinese imports concerned. With regard to CTVs falling within CN code 8528 12 66, it was found that these imports represented less than 0,01 % of total imports from the PRC and could therefore have no effect on the calculation of the dumping margin.

It was then assessed for each model selected whether sufficient sales had been made in the ordinary course of trade in accordance with Article 2(4) of the basic Regulation. For three models, the weighted average selling price was equal to, or higher than, the weighted average unit cost of production and normal value was established on the basis of the weighted average sales prices actually paid for all domestic sales of that model. For one model there were insufficient sales in the ordinary course of trade, and normal value was therefore constructed in accordance with Article 2(3) and (6) of the basic Regulation, i.e. on the basis of the manufacturing costs incurred by this company when producing the model in question plus a reasonable amount for SGA expenses and profit. The amount for SGA expenses and profit was based on actual data pertaining to production and sales, in the ordinary course of trade, of representative models of the like product, made by the cooperating producer in the market economy third country.

There are three preconditions of 'sales below costs': extended period of time (normally 6-12 months), substantial quantities (not less than 20 % of sales being used to determine normal value) and non-recovery of costs.

Particularly, if prices that are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

Two points should be mentioned here:

First, the conjunction of the preconditions mentioned above is not 'or' but 'and', which means accumulative application. It seems that there was no relevant investigation of the Commission involving the circumstance where prices that are below costs at the time of sale are above weighted average costs for the period of investigation. The investigation should also consider the 'costs' means the whole productive costs. However, if economy depression takes place, it is proportionate that exporters's sales price regarding domestic like product price is more than marginal costs since corporations intend to seek survival. It cannot be concerned as non-normal transactional proceeding.

Second, in this case, some manufacturers contended that manufacturing costs in the questionnaire should be used instead of account report. The Commission considered that the manufacturers in the domestic market overvalued the costs on the questionnaire, or underestimated the manufacturing cost, while the account report involved more details. Therefore, questionnaire is unreliable because of the distinction.

Manufacturers argued to refer to manufacturing cost on the questionnaire instead of account reports from companies. According to 2(5) of the Basic Regulation, Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned. And consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilized. Thus, the Commission's consideration is reasonable in this respect.

D. Community interest

According to 21 (1) of the Basic Regulation, a determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests

taken as a whole, including the interests of the domestic industry and users and consumers; In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures may not be applied where the authorities can clearly conclude that it is not in the Community interest to apply such measures. Historically, there were few cases in which exporters successfully called for this article to exempt anti-dumping duty. Community interest is actually manufacturers `s interest within the EC, but not the interest of the whole Community.

Bael & Bellis deem that according to the judgment of European Court of Justice, the criterion of judgment referred to the interest of economy and diplomatism of EC did not, basically, consider the interest of importer in EC in order to avoid the unfair injury in international trade.¹⁰⁴ 21(3) of the Basic Regulation also says the parties may request a hearing which shall be granted when they are submitted within the time limits, and when they set out the reasons, in terms of the Community interest, why the parties should be heard. Although this article intensified the protection for consumers, it will take some time to see whether this new addition has practical effects of implementation in the future.¹⁰⁵

In this case, the argument involved levying antidumping duty, restricting consumers` right to free choice products, conducting to monopolization of EC manufacturers, making against EC so as to influence competition and creation of color TV in EU. In terms of the interpretations of the Commission and ECJ and the 21(1) in the Basic Regulation, `Measures may not be applied where the authorities can clearly conclude that it is not in the Community interest to apply such measures.` It is obvious that this article lean to protection of the Community industry, especially the competitive competence of high technology industry. Perhaps the point of view on Community interest would be changed in the future because of progressive consumer `s consciousness. Nevertheless, I doubt it is not easy to see transform of EC `s standpoint regarding avoidance from the injury in unfair international trade in a short-term. Therefore, it is not an accident to the EC `s decision in this case.

¹⁰⁴ I.V. Bael and J.F. Bellis, *Anti-dumping and other Trade Protection Laws of the EC*, Bicester Third Edition, CCH Europe, 1996 , pp. 204.

¹⁰⁵ *Ibid* ,at 211.

4.5. Summary

In terms of arguments presented by Chinese exporters, the Commission might enlarge or improperly implement right of verdict regarding signification of EC anti-dumping regulations. Several factors mentioned above illustrate that there are still notable uncertainty and subjectivity in EC anti-dumping procedure. It is important to observe EC anti-dumping in the future how to make anti-dumping procedure more predictability, materiality and impartiality at the same time consolidating causality and bringing the concepts of public interest and competition into anti-dumping code in order to avoid anti-dumping becoming a tool of anti-competition.

5. Commentary of EU Anti-Dumping Policy

5.1. Comparison between EC and GATT/WTO Anti-Dumping Agreements

Evolution of international law of anti-dumping has been closely bound up with evolvement of GATT/WTO. After Second World War, GATT was signed by 23 countries in the end of 1947. The primary purpose of GATT was to facilitate free trade at the same time remove non-tariff barriers. Originally, GATT was intended to be set up as a transitional organization before the foundation of International Trade Organization (ITO), meaning that it was not an international organization but a provisional agreement. Since it was no a juridical person, signatory states were called Contracting Parties instead of Member State. However, ITO proposal was not passed by the Congress of the United States. GATT therefore became the most important international business agreement by chance.

International anti-dumping law came into existence with the adoption of Article VI of the 1947 GATT. By the 1960s, the GATT`s contracting parties has become concerned that the anti-dumping laws were being used to create new barriers to trade. The response was not to try to change the substance of the anti-dumping laws but to create standard procedures and methodologies. The Kennedy Round of the 1960s elaborated on procedures and methodologies, and the Tokyo Round of the 1970s produced a new Anti-dumping Code that provided even more elaborate procedures.¹⁰⁶

Most importantly, 1979 GATT Anti-dumping Code established new standards for the injury determination. Dumping no longer had to be the principal cause of injury; instead, it had to be isolated from other causes, and only the injury caused by dumping was to be taken into consideration. Furthermore, two elements were defined to guide the assessment of whether or not injury existed: the volume of the dumped imports as well as their effect on prices and the consequent impact of the imports on domestic producers. As an innovation, the Code

¹⁰⁶ Asif H. QURESHI 'Drafting Anti-Dumping Legislation *Issues and Tips*' Journal of World Trade 34(6): 19-32, 2000. © 2000 *Kluwer Law International*. Printed in The Netherlands.pp20

recognized that anti-dumping action against developing countries should take account of their specific situation, in particular with a view to finding “constructive remedies”(i.e. undertakings)¹⁰⁷.

The Tokyo Round Code was replaced by the 1994 GATT Anti-dumping Code¹⁰⁸ which resulted from the Uruguay Round negotiations. The EC and its partners informed the GATT of their acceptance of all Uruguay Round texts drafted by the GATT secretariat, on 15 December 1993. Formal agreement was given at Marrakech on 15 April 1994¹⁰⁹.

Concerning the standpoint of anti-dumping law in Uruguay Round negotiations, it can be divided into two parties, the ‘north’ countries and the ‘south’ countries. The former consists of the US, EC, the Nordic countries, Australia and New Zealand etc. These countries which often use anti-dumping measures consider that anti-dumping measure attribute to the in the very act of international trade since the due to setup of manufacture and sales networks in globalization. Therefore 1979 anti-dumping measures should be maintained and only some parts need to be amended (e.g. the provision of public interest). However a number of countries with a generally skeptical attitude towards anti-dumping began to voice political concern regarding what was perceived as an excessive use of the instrument. These included Japan, Korea, the Asian “tigers”, India, Brazil, Mexico (the latter despite the fact that it was becoming an important anti-dumping user itself). They tend to make structural modification in anti-dumping law, especially in ‘screw-driver operation’, calculation of price, fair comparison between normal value and export price, sales below cost of production and expiry of anti-dumping measures and “sunset reviews”.

In summary, the international anti-dumping law, under current WTO framework, mainly refers to Article VI in GATT 1994 and WTO antidumping agreement. The following part will compare the Basic Regulation to WTO Anti-dumping Agreement (hereafter WTO ADA).

A. Normal value

¹⁰⁷ John H. Jackson , “Dumping in International Trade Its Meaning and Context,” John H. Jackson , Edwin A. Vermulst and Ann Arbor eds. , *Anti-dumping Law and Practice A Comparative Study* Michigan University Press, 1989 , p. 22.

¹⁰⁸ Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* (London Routledge, 1995), p. 99.

¹⁰⁹ Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* (London Routledge, 1995), p. 99.

Determination of normal value is the same in WTO ADA as in EC Basic Regulation, which is basically including three methods, namely domestic price method, calculative price method and the price in analogue country method. The priority application of domestic price method under WTO ADA which is similar in EC Basic Regulation., nevertheless, is a not applicable in practice, sometimes to the extent of disregard. According to Article 2.2.1 of WTO ADA: 'Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value.' Under Article 2(1) of EC Basic Regulation, 'The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.'

In sales in domestic market, both WTO ADA and EC Basic Regulation accord with the condition of the ordinary course of trade, sales price no less than cost and 5% representative. There is no relevant regulation regarding the ordinary course of trade in WTO ADA, while in EC Basic Regulation, it is regarded as unordinary course of trade when there is relation between two parts or there is bilateral complementary protocol. Moreover, according to 2(1) of EC Basic Regulation 'where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.' But there is no relevant regulation in WTO ADA.

As far as the condition of sales less than product cost as concerned, Article 2.2.1 of WTO ADA and Article 2(4) of EC Basic Regulation rule that it should meet three prerequisite: (1) within a reasonable period of time (between six months and a year), (2) not less than 20 % of sales being used to determine normal value, (3) cannot get the recovery of costs within a reasonable period of time. As to calculative price method and the price in analogue country method, WTO ADA and EC Basic Regulation are quite similar with each other. Nevertheless, as to start-up operation and apportionment of cost in the special circumstance of expansion, Article 2.2.1.1 of WTO ADA rules 'Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up

operations.’¹¹⁰

However, Article 2(5) (c) of EC Basic Regulation addresses ‘the average costs for the start-up phase shall be those applicable, under the abovementioned allocation rules, at the end of such a phase, and shall be included at that level, for the period concerned, in the weighted average costs referred to in the second sub-paragraph of paragraph 4.’ Thus it can be seen that EC anti-dumping regulation is something more detailed and strict. For example, apportionment of cost in start-up operations should be much more than the added weight average cost in the investigation procedure so as to be the basis of the apportionment, whereas under WTO ADA, it should be properly adjusted so far as there is effect under set up operation in investigation period.

B. Export price

There is no formal definition regarding export price in WTO ADA, where only Article 2.3 mentions that ‘In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer’; Article 2(8) of EC Basic Regulation rules ‘The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.’

The description under Article 2(8) of EC Basic Regulation regarding construction of export price is similar with Article 2.3 of WTO ADA mentioned above. In addition, the same regulation in the same article rules that all the expenditure should be adjusted in the circumstance mentioned above including tariff in the importing period, duty and profit. Thus the adjusted part of export price should, according to Article 2.4 of WTO ADA and the comparison between two articles mentioned above, be interpreted to the calculation of export price and construction of export price. As far as export price is concerned, there is no significant distinction between WTO ADA and EC Basic Regulation.

C. Price comparison

¹¹⁰ The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

From comparison of Article 2.4 of WTO ADA to Article 2(10) of EC Basic Regulation, it could be found that there are some differences in price comparison.

- WTO ADA rules that comparison is not only based on the same transactional level, but also on ex-factory level, while EC Basic Regulation says that the comparison should be grounded on the same transactional level where there is no formal context saying it should be referred to ex-factory level, so as to be the comparative distinction in the practice.
- WTO ADA address that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties, whereas there is no similar regulation in EC Basic Regulation.
- According to 2.5 of WTO ADA, 'In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export.' However, there is no relevant regulation in EC Basic Regulation.

D. Dumping Margin

According the comparison between Article 2.4.2 of WTO regulation and Article 2(11) and 2(12) of EC Basic Regulation, it could be seen that these regulations are quite similar. The distinction could be found in the following aspects.

- ✧ WTO ADA rules that the 'existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.' Nevertheless, there is no relevant article in EC Basic Regulation, while exception method has been used in practice.
- ✧ There is an additional regulation in EC Basic Regulation which indicates that the sample test is not eliminated in the calculation of dumping margin.

- ✧ EC Basic Regulation instructs that the added weight average of dumping margin should be applied when dumping margin is different.

E. Calculation of normal value in non-market economy countries

There has been no formal regulation concerning the calculation of normal value in non-market countries. According to 1(2) of Article VI in GATT 1994, the countries of complete or part monopolization in trading and all the prices in domestic market monopolized by government, might have special difficulties when applying Article 1 regarding the determination of comparability of the prices. Therefore, the importing signatory country might find that it is necessary to consider that it is not proportionate to take the accurate comparison of domestic price in these countries. In conformity to the Council Regulation 519/94, Article 2(7) under No. 384/96, No. 905/98 and No. 2238/2000, there are elaborate regulations regarding the calculation of normal value in non-market economy countries.

F. Determination of injury and calculation of accumulation of injury

The regulations of EC Basic Regulation and WTO ADA regarding determination of injury and calculation of accumulation of injury are almost the same. Article 5.8 of WTO ADA rules ‘The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.’

In accordance with Article 5(7) of EC Basic Regulation, ‘Proceedings shall not be initiated against countries whose imports represent a market share of below 1 %, unless such countries collectively account for 3 % or more of Community consumption.’ In other words, EC takes market share instead of importing volume. This has been considered as a breakthrough in anti-dumping field.

G. Determination of causality

Article 3.5 of WTO ADA rules that ‘the demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.’

In conformity to 3(6) of EC Basic Regulation, ‘It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.’ Comparing the two regulations above, it can be said that the former regulation is more frondose and explicit, while the latter one is more abstractive where there is still some free space for judgment.

H. Determination of domestic industry and the injury of regional industry

In conformity to article 4 of WTO ADA and Article 4 of EC Basic Regulation, they are, in material, quite similar with each other in determination of domestic industry and the injury of regional industry. For example, former regulation rules that the term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

5.2. Trends in the Use of Antidumping

While the first antidumping legislation dates to Canada’s legislation in 1904, the modern history of anti-dumping begins with the 1947 GATT agreement. Largely at the insistence of the US, the original GATT agreement included provisions for the imposition of antidumping duties.¹¹¹ The 1947 GATT agreement defined dumping as the practice

¹¹¹ The inclusion was not without controversy: the United Kingdom, for example, argued that the practice of dumping was not bad in itself and that the GATT should instead prohibit the imposition of antidumping duties.

whereby the “products of one country are introduced into the commerce of another country at less than the normal value of the products,” and permitted dumping duties only if such action caused “material injury” to a domestic industry.

Despite its long history, anti-dumping disputes were relatively few and far between until 1980. However, there is no exact accounting of worldwide anti-dumping activity before 1980. The main obstacle is that prior to 1980 the GATT did not require countries to report when they initiated anti-dumping actions. To my knowledge there is no source for pre-1980 filings (e.g., GATT Annual Reports or other similar documents). In fact, there is no guarantee that some early users have any record of their pre-1980 anti-dumping use.¹¹²

5.3. Commentary of EU Anti-Dumping Policy

A. Argument of anti-circumvention provision

Provision on anti-circumvention of anti-dumping measures (so-called “screw-driver operations”) were first introduced by the Community in 1987 and aimed at covering assembly operations within the Community for which a very high proportion of components were used from the country against anti-dumping measures had been taken. From then on, anti-circumvention had been the most controversial topic for discussion during the process of the Uruguay Round negotiations. The Final Act embodying the results of the Uruguay Round of multilateral trade negotiations only contains a statement (The Ministerial Decision on Anti-Circumvention). As this declaration was made knowing that several WTO members already had their own anti-circumvention legislation, the Community interpret it as permitting individual Members to adopt or maintain unilaterally provisions in this respect, pending a multilateral solution within the framework of the WTO. The reason why countries did not come to an agreement of anti-circumvention in Uruguay Round negotiations is that provisions were proved to be the most controversial. Member

The United Kingdom’s concern, shared by other participants, was that antidumping laws could compromise the overall objectives of the agreement to liberalize the international trading regime.

¹¹² Clearly, a comprehensive study of pre-1980 use is an open area of research, and one that would shed a great deal of light on the spread of AD protection. But, given that the data sources are only available at country-level (if at all), it is a research project that could probably only be tackled as part of a large-scale research program (e.g., WTO or World Bank sponsored project).

State were divided into two camps: while the 'South' was concerned that the adoption of the rule proposed for Community interest could lead to a general paralysis of anti-dumping action, the 'North' considered this proposal biased on the grounds that it referred to the 'need to eliminate the trade distorting effects of injurious dumping' as a matter deserving 'special consideration'; the 'Northern' Member States also opposed the amended anti-circumvention provisions given the absence of GATT rules in this area.

Since Circumvention was an extremely controversial subject in the Uruguay Round, the 'Dunkel Draft' contained separate provisions for importing country circumvention and third country circumvention was announced by Arthur Dunkel. However, the USA found these draft provisions insufficient and it was impossible to find a compromise in this respect.

As to EU anti-dumping provisions, the aspects have been argued to infringe GATT/WTO anti-dumping regulations.

There has historically been following heat arguments¹¹³ of EC anti-circumvention provision in breach of WTO anti-dumping code.

- The EC anti-circumvention provision goes out of the applicable scope of GATT anti-dumping code since GATT anti-dumping code only deals with the problem regarding importing, in stead of solve the problem concerning duty on product which perhaps did not pass through importing procedure.
- The EC anti-circumvention provision makes it possible that importing scattered subassembly would be levied on anti-dumping duty in retrospect. According to anti-dumping agreement in Tokyo Round, when the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. The directly levying on anti-dumping duty under EC anti-circumvention provision is, in this point of view, breach of GATT anti-dumping code since it implements before levying the anti-dumping duty sometimes more than 90 days.

¹¹³ I.V. Bael and J.F. Bellis, *Anti-dumping and other Trade Protection Laws of the EC*, Bicester Third Edition, CCH Europe, 1996, pp. 349.

- The EC anti-circumvention provision levies duty on finished product which is made by scattered subassembly. However, no investigation regarding whether the scattered subassembly constitutes dumping is processed. This does not accord with Article 9(1) of WTO ADA which rules that the decision whether or not to impose an anti-dumping duty should be decided in cases where all requirements for the imposition have been fulfilled.
- The EC anti-circumvention provision levy duty on the manufacturers who use the scattered subassemblies that are more than certain proportion. If there is no equal duty on other like product in the Community, it would be constituted as discrimination action to the importing scattered subassembly from other countries and be contrary to national treatment under Article 3(2) of GATT.
- Condition of determination of injury is contrary to Article 3 of WTO ADA since the decreasing effect of remedy of anti-dumping duty is not equal to constitute the determination of injury under Article 3 of WTO ADA.

According to Article 13 under current Basic Regulation, the defect mentioned above has been corrected one by one, for example taking the existence of fact of dumping as a prerequisite: create the registration system and define the duty should be done from the date on which registration was imposed.

However, the arguments in recent year mainly focus on (1) the Commission levies duty on the product which is made up by importing scattered subassembly in spite of whether or not the determination of dumping and injury need take the investigation. In other words, the Commission takes the anti-circumvention provision as the expansion of anti-dumping code instead of a new regulation for granted. Thus, the Commission considers that it is not necessary to take investigation on importing scattered subassembly. (2) The definition of article is sometimes ambiguous. For example, the words of 'not long before..' and 'relevant' should not belong to juristic concepts.

In summary, I try to draw the following conclusion:

- ◆ Not only there is no provision proclaimed in writing anti-circumvention provision under WTO ADA, but also there is not common consciousness among countries concerning this topic. In conformity to Article 14(3) of the Basic Regulation, 'Special provisions, in particular with regard to the common definition of the concept of origin,

as contained in Council Regulation (EEC) No 2913/92 (6), may be adopted pursuant to this Regulation.’ However, Article 25 of EC Council Regulation 2913/92 realizingly rules that definition of the concept of origin should refer to virtual process of machining instead of the process of assembly.

- ◆ The European Court of Justice clearly figured out that no virtual transition in simplex assembly work would take place, where no new origin of product is created. However, according to Agreement on Rules of Origin under Article 9.1.4 in Uruguay Round, the determination of origin of product should refer to transitional method. And Article 6 of Tokyo Agreement also excludes the simplex assembly from virtual transition. Thus, it is sufficient for EC to deal with the problem of anti-circumvent regarding the regulation of origin.
- ◆ According to Nineteenth Annual Report from Commission to the European Parliament¹¹⁴, it can be found there was no new case regarding anti-circumvention in 2000 and there are only three cases regarding anti-circumvention, in which except that on started to investigate, one was exempted to investigate, while one was changed to halt of investigation. Based the consideration on three aspects that include respect on WTO international anti-dumping code, avoidance on imitator from the Member States in WTO and increase of dispute in international trade and the necessity of practical function, EC should, perhaps, consider the necessity of current anti-circumvention.

B. Argument of anti-absorption provision

The basic Regulation, as amended on July 11, 1988, contained a new rule which provides that exporters are required to pass on anti-dumping duties to customers¹¹⁵. The standpoint of this provision is that exporter who is levied on anti-dumping duty, when this exporter paid for this duty by itself, can be levied on additional anti-dumping duty in order to compensate the part supported by itself. The purpose is to avoid the situation in which the Community interest is injured by importer who still takes the former price before levying the anti-dumping duty to continue its dumping action. The GATT Anti-dumping Code does

¹¹⁴ COM 2001 571 final, “Nineteenth Annual Report from Commission to the European Parliament on the Community’s Anti-Dumping and Anti-Subsidy Activities” Brussels, 12.10.2001, p.104. & Annex.K.

¹¹⁵ Edwin. A Vermulst & Paul Waer, *EC Anti-dumping Law and practice* London Sweet & Maxwell, 1996, pp 421.

not contain any explicit provisions on anti-absorption. Therefore, there has been heat argument on this provision. Current Basic Regulation divided anti-absorption investigation into following two parts.¹¹⁶

- Simplified anti-absorption investigations: Article 12(2) of EC Basic Regulation rules that ‘Where it is considered that a lack of movement in the prices in the Community is due to a fall in export prices which has occurred prior to or following the imposition of measures, dumping margins may be recalculated to take account of such lower export prices.’ In other words, new dumping margin is based on the result of comparison of new export price to normal value which is supposed to be unchangeable.
- Complex anti-absorption investigations: according to Article 12(5) of EC Basic Regulation, ‘Alleged changes in normal value shall only be taken into account under this Article where complete information on revised normal values, duly substantiated by evidence, is made available to the Commission within the time limits set out in the notice of initiation of an investigation.’ This provision is very important as a new added article in current code.

Anti-absorption provision which is only presented in EC Basic Regulation is not contained in WTO ADA. Nevertheless, like EC anti-circumvention provision, it has been doubted whether it is contrary to WTO ADA. This should refer to the design of anti-dumping policy and the role of anti-absorption in WTO ADA. WTO ADA confers its Member States to choose freely prospective anti-dumping system or retrospective anti-dumping system, such as EU in former one, US in the latter one.¹¹⁷ The prospective anti-dumping system means that anti-dumping measure should apply to the prospective relevant product of dumping from the date on which anti-dumping duty is levied. Therefore, anti-absorption procedure and drawback procedure have become the important tools in order to insure rational implementation of anti-dumping measure.

In other words, import can apply drawback if there is no dumping action or the result of injury after determining to impose anti-dumping duty, while the Commission has to take a

¹¹⁶ I.V. Bael and J.F. Bellis, *Anti-dumping and other Trade Protection Laws of the EC*, Bicester Third Edition, CCH Europe, 1996, pp. 316-317.

¹¹⁷ Asif H. Qureshi, “Drafting Anti-Dumping Legislation Issues and Tips,” in 34 *Journal of World Trade* 2000, p. 60-61.

new investigation on anti-absorption duty, if exporter pays anti-dumping duty by itself. Some academicians¹¹⁸ hold that anti-absorption procedure and drawback procedure should be taken into account as relevant measures on EC anti-dumping, since Member States of WTO can freely choose the type of anti-dumping system under WTO ADA. Additionally, anti-absorption provision shall fall into the scope of free judgment since the Article 17.6 of WTO ADA about the dispute settlement rules that Member States can have lots of space of free judgment.

The most controversial part of anti-absorption provision under EC Council Regulation 2423/88 is that the additional anti-dumping duty imposed without any investigation on injury. This has been improved a lot by the Basic Regulation. Therefore, anti-absorption provision was like anti-circumvention provision which brought so many arguments. The reason is obvious because the WTO ADA allows the space of free judgment in Member States.

To conclude the EC anti-absorption provision, I personally deem that although it is not directly breach of WTO ADA, there are several faulty parts on regulations. For example, if the party claims the change of the normal value, they should forward the materials about amendment on normal value to the Commission within the investigation period. Otherwise, it will not be considered. Although remarkable improvement was made comparing this regulation to Article 13.11.3 Regulation 2423/88, the onus probandi of the party have not been changed, which is harmful to manufacturer of the case in practice. Second, although anti-absorption provision has the lesser duty principle, the rate of duty might be twice as much as the former anti-dumping duty. This should be non-proportionate since this action has gone beyond the scope of former dumping margin, if the purpose of anti-absorption provision is to exclude former dumping injury.

Furthermore, the anti-dumping duty of anti-absorption has been levied in twice on exporter since no investigation is carried on whether there is close relation on importer and exporter. The rationality and validity of EC anti-dumping regulation might be questioned. In addition, evidence similar with anti-circumvention provision, in the 2001 annual report¹¹⁹ of the

¹¹⁸ Glykeria J. Demataki, "Absorption in EC Anti-Dumping Proceedings," in 32 *Journal of World Trade* 1998, pp. 61.

¹¹⁹ COM 2001 571 final, "Nineteenth Annual Report from Commission to the European Parliament on the

Commission, was that there is only one case in 2001 and it was fewer in the former years. It could be seen that there is no high necessity in this field. Finally, in the point of view on economic globalization, this specific regulation in EC will induce the negative effect. Based on the reasons mentioned above, EC might properly consider abolishing the above clauses in order to avoid the dispute in international trade.

C. Community interest

The WTO ADA expresses a desire that imposition of anti-dumping duties be permissive even where dumping and resulting injury are found.¹²⁰ The Community has implemented this desire through its Community interest criterion: it is not enough for imposition of duties that injurious dumping has been established, the Community interests must also require intervention.¹²¹

Pursuant to Article 9.1 of WTO ADA, ‘The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member.

It is desirable that the imposition is permissive in the territory of all Members, and that the duty is less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.’

Namely, ‘the lesser duty principle’ is ‘desirable’ instead of compulsory, which means it is up to the Member state whether implementing it or not. The countries that adopt this principle at present except for EU, at least include Australia, New Zealand, India and Mexico that enforce anti-dumping measure frequently.¹²²

Moreover, pursuant to Article 3.5 of WTO ADA, ‘It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement....The authorities shall also examine any

Community’s Anti-Dumping and Anti-Subsidy Activities” Brussels, 12.10.2001, p.102-103 & Annex J.

¹²⁰ Article 8(1) under WTO Anti-dumping Agreement

¹²¹ See also Stanbrook, “The Impact of Community Interest and Injury Determinations on Anti-dumping Measures in the EEC”, in 1985 Fordham Corporate Law Institute, at 623.

¹²² Jorge Miranda Raul A. Torres and Mario Ruiz, “The International Use of Antidumping 1987-1997,” in 32 *Journal of World Trade* 1998, p. 63.

known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.’

In other words, when determining the causality, governing body in importing country should consider not only dumping action, but also the other causations which cause the injury of domestic country. The action of limiting competition caused by the competition between importing product and domestic like product should also be taken into account. Additionally, Article 6.12 of WTO ADA rules that ‘Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.’ This is because industrial user is closely related to consumer and the result of anti-dumping investigation, which are the main undertakers of the anti-dumping duty.¹²³ The provision above mentioned could be taken into account as the reference of ‘Public Interest Provision’. The Commission once stated in a Note that the ‘Community Interest’ will play a key role in the prospective evolution of anti-dumping procedure, while they emphasize that it is usually judged to accord with the Community interest if dumping, injury and causality have been determined. The Community can be applied as a correctional provision only in the situation of which the negative effect of anti-dumping measure is not proportionate with main purpose of healthiness on competition. And the following factors should be taken into account when evaluating the Community interest.¹²⁴

- ✓ User interests: user interests are routinely examined. In many cases the authorities determined that the anti-dumping measures would not have a significant impact on users¹²⁵ or the users would in the long term benefit from the restoration of fair

¹²³ David Palmeter, “A Commentary on the WTO Antidumping Code,” in 30 4 *Journal of World Trade* 1996 , p. 58.

¹²⁴ Edwin. Vermulst and Bart Driessen, “New Battle Lines in the Anti-Dumping War Recent Movements on the European Front,” in 31 3 *Journal of World Trade* 1997 , pp.154-155

¹²⁵ Ammonium nitrate from Russia, 1995 O.J. L 198/1 (definitive) (cost impact of 12 per cent)

competitive conditions on the Community market.¹²⁶In consumer electronics cases, the argument that anti-dumping measures would limit consumer choice has been rejected.

- ✓ Importers interests: importers` interests are less frequently considered. In Color Televisions case, for example, the Commission held that “any overall damage to the interests of importers in respect of profits or employment is considered unlikely or, at worst, very limited.”¹²⁷
- ✓ Maintaining competition on the EC market: the EC authorities have considered that anti-dumping measures will not have the effect of eliminating exporters from the Community market or reduce competition.
- ✓ Maintaining and developing crucial technologies in the EC: in a number of cases the importance of maintaining a viable Community industry has been motivated by reference to the need to support development of crucial technologies in the EC. Maintaining strategic industries in the EC: reference was made to the strategic importance of maintaining a Community industry.
- ✓ Political factors: factors of a more general political nature are rarely mentioned.

Pursuant to Article 21(1) of the EC Basic Regulation, ‘A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.’

In my point of view, the Community interest under Article 21 of the EC Basic Regulation should be affirmative on legislative perspective. However, paragraph 1 of the same provision clearly defines that when determining the action that measures may not be

¹²⁶ See, for example, certain magnetic disks from Hong Kong, Korea 1994, O.J . L68/5 (provisional): “to the interests of consumers and the software industry, any short-term price advantages have to be weighted against the longer-term effects of not restoring fair competition”

¹²⁷ Color Television receivers from Malaysia, China, Korea, Thailand, Malaysia 1994 O.J. L255/50 (provisional)

applied where the authorities can clearly conclude that it is not in the Community interest to apply such measures. This provision clearly tends to protection of the EC industry. From previous observation in practice, the authorities only considered the right of consumer and user in few cases. Therefore, this provision is only a negative correctional factor which is no material function.

Some Member States in EU stated that EC should adjust its anti-dumping tools under globalization in which dynamic trade policy actions was required. And some claimed the Community interest provision should be revalued in order to go beyond the interest of specific countries. In other words, the application of anti-dumping measures should be restricted and improve its transparency.¹²⁸ With gradually increasing consciousness of consumer and intensifying the competitive concept, the Community interest provision might play important role in the future.

D. Non-Market Economy Status of China¹²⁹

In April 1998 the European Council with Council Regulation (EC) No 905/98 gave individual Chinese and Russian companies the opportunity to claim that they operate in market economy conditions on a case-by-case basis. This regime was extended in 2000 and it now applies to other non-market economies such as Ukraine, Vietnam and Kazakhstan (Hong Kong Trade Development Council, Issue 14).

In order to take advantage of this special treatment, companies need to comply with the following requirements:

- Company decisions must be made without significant State influence;
- Accounts must be independently audited in line with international accounting standards;
- Production costs and the financial situation of the company are not affected by distortions carried over from the former State-led economic system, barter trade or compensation of debts;

This regulation does not grant China the status of full market economy. However, provided that Chinese companies satisfy the requirements above, dumping calculations are based on

¹²⁸ Frans Engering, Hans De Brabander and Edwin Vermulst, "EC Anti-Dumping Policy in a Globalizing World A Dutch Perspective," in 32 *Journal of World Trade* 1998, p. 120, p. 126.

¹²⁹ Nadeem M. Firoz Ramón E. García 'Antidumping War against China and the Effects of WTO Membership pp947

their own domestic price and costs and not those of a third country.

Although China has been making some progress in the past two years, the European Commission still believes there is more work to be done before it can be considered a market economy. The fact that the Commission is willing to make exceptions when dealing with Chinese companies shows its commitment to help China make a smooth accession to the WTO. The more steps China takes towards the creation of an economic environment in line with international agreements, the closer it will be to obtaining a full market economy status.

5.4. Summary

Except for anti-circumvention provision and anti-absorption provision in the EC Anti-Dumping Law, there are still several controversial provisions that are not mentioned in WTO ADA. For example, on determination of normal value, it is not compelling that the authorities unilaterally identify that the price of domestic sales is lower than product cost, or consider that there is relationship or compensatory agreement between parties which belongs to abnormal transaction.

Furthermore, the judgment on apportionment of cost and determination of profit is too subjective. The indirect expenses such as advertisement cost and salesmen's salary are not deducted so as to overvalue the normal value. On the reverse, when calculating the export price, all the expenses and profits are deducted so as to underestimate the export price. Therefore, the unfair phenomenon of artificial dumping is made when comparing the prices, while zeroing the negative dumping margin when calculating dumping margin reflects on increase of dumping margin.

In addition, as to choice on the method of price comparison, there is also no explicit definition like in WTO ADA. And regarding the determination of injury on the EC industry, the factor whether Community interest provision restricts competition has not been taken into account.

In conclusion, although the EC Anti-Dumping Law is quite similar with WTO ADA after enacting the Basic Regulation, there is no change on which authorities improperly make the judgment in practice. This regulation is more like something playing as protectionism than

former anti-dumping codes since this regulation significantly decreases the risk in breach of WTO ADA and international criterion.

6. Conclusion and Suggestions

According to study of the CTV case and previous anti-dumping cases, it can be found that there are following characteristics of implementation of EC anti-dumping codes.

1) EU institutions have wide judicial power

According to the Basic Regulation, although there is remarkable progress in technical aspect in anti-dumping investigation procedure due to amendment in conformity to WTO anti-dumping agreement, WTO anti-dumping is in the bottom, when constituting the EC anti-dumping regulations, in order to protect interest of the Community industry, the Commission was endowed with legislative, administrative, executive and judicial powers, on which there is almost no restriction. The Commission possesses two kinds of judicial powers. It will, on the one hand, be the Commission that will bring actions against Member States when they are in breach of Community law. The Commission, on the another hand, acts in certain areas as investigator and initial judge of a Treaty violation. In this case, we can see that the Commission has overly judicial power in determination of like product, calculation of normal value, selective method of the price comparison, representability of domestic sales, determination of injury and boundary of the Community interest etc.

2) Majority of EC Anti-dumping law is compatible with WTO Anti-dumping Agreement while there are some controversial places to be necessarily modified.

It could be found in table 6.1 that majority of EC anti-dumping law is compatible with (sometimes is more elaborate than) WTO Anti-dumping Agreement. Nevertheless, there are still some controversial places.

On one hand, proportionate anti-dumping law should be based on three conditions including the suitability of the measure for the attainment of the desired objective; the necessity of the disputed measure, in the sense that the agency has no other option at its disposal which is less restrictive of the individual`s freedom; the proportionality of the

measure to the restrictions which are thereby involved¹³⁰. According to former study, it is noticeable that the EC Anti-Dumping Law sometimes lacks of proportionality.

For example In the CTV case, internet-CTV was still at a development stage and was not available to the public except in very limited circumstances. The exclusion should have been warranted in view of the differences in basic physical and technical characteristics between CTVs and internet-CTVs and in light of the different consumer perceptions of both products. However, the Commission decided that anti-dumping measures should apply to this product type and that these products are alike within the meaning of Article 1(4) of the basic Regulation. The Commission did not adopt the functional similarity standard of determination of like product in light of the former printer case and the case of Video Cassette Recorders. The extended definitive scope should lack of non-proportionality in this sense

On the other hand, several EC anti-dumping regulations might be in breach of WTO anti-dumping agreement

Anti-circumvention provision has been a pending multilateral solution within the framework of the WTO since the process of the Uruguay Round negotiations. The Final Act embodying the results of the Uruguay Round of multilateral trade negotiations only contains a statement (The Ministerial Decision on Anti-Circumvention). In April, 1997, the Committee on Anti-Dumping Practice (CADP) set up informal group to discuss this statement. As far as the first topic-“Which action should be considered as circumvention?” EU and US hope to adopt loose interpretation to keep the elasticity. However, Japan and Hong Kong tend to constrict this interpretation. Thus, there is no common consciousness concerning this basic definition.

However, instead of abolishing the anti-circumvention provision, EC expand applicable scope. Since anti-circumvention provision has been the exception of the principle of non-discrimination and freedom, the purpose of this provision which actually is “an exception of the exception” is to offset the lack of anti-dumping measures. Therefore, the determination of anti-circumvention should be stricter. Otherwise, it would leave GATT/WTO purpose furtherer and furtherer.

Moreover, anti-dumping provision was deprecated, where it is incompatible with normal

¹³⁰ Paul Craig Grainne De Burca, Oxford 'EU Law -Text, Cases, and Materials, Third Edition P372

procedure that the anti-dumping measure should pass the investigation of dumping and injury, while anti-circumvention should apply directly instead of investigation. In addition, several actions of the Commission in the practice of anti-dumping law were considered to be improper. For example, the comparison between weighted average price and export price of each transaction is used when comparing the price. This action ignores the situation in which export price is higher than normal price, and might expand the dumping margin.

3) EC holds the reserved attitude regarding the amendment of EC anti-dumping policy toward the direction of more competitive policy

Although there is a “public interest” provision in Article 21 of the Basic Regulation, the last sentence in the first item of that article also said “Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.” Furthermore, as it was mentioned above that EC relevant institution and court normally think that the Community interest means the industry, instead of consumers and importers of the Community, this article is passive correctional factor. Thus, there is no so much effective function. Additionally, according to the EU `s suggestion of amendment to current WTO anti-dumping agreement in Doha negotiation, it might be found that EC only agrees the amendment of technical aspects while opposing that using competition policy replace anti-dumping policy at the same time being against the structural amendment of current anti-dumping law.

In conclusion, EC current anti-dumping policy, according to the announcement of trade policy which was delivered to WTO by EC, after comparing the practical enforcement, could basically be found that EC sustains the principle of non-discrimination and freedom of GATT/WTO. However, after roundly liberalizing and reducing tariff and trade barriers, in order to protect domestic industry, there has gradually been a tendency of increase of the enforcement of EC Anti-Dumping Law. While EC Anti-Dumping Law has no sufficient response to international competition policy, it seems be a tendency of new protectionism. Nevertheless, this situation is incapable to be changed due to actuality of politics and economy. Henceforth, except for paying more attention to EC anti-dumping regulations, this article also made following suggestions:

6.1. Some Hints for Chinese Exporter of Antidumping Charges in conformity to WTO

After paying close attention to the Commission determination in Chinese cases, some advises¹³¹ on how to deal with antidumping charges should be given to Chinese exporters.¹³²

A- Do not ignore the charges. Get involved.

According to EC antidumping regulation, if Chinese exporters do not participate and provide the information required to conduct the investigation, the Commission has not choice but to use the best information available to calculate the margin. In most cases, the only information provided is that of the petitioners, which may or may not reflect real figures.

Since 1989 the Chinese CTV manufacturing industry has been shut out of the EC market. This is the result of a 44.6% duty imposed by the Commission Chinese exporters refused to participate.

B- Do everything possible to win the initial investigation.

In order to obtain an antidumping order, EC petitioners must prove two points: high dumping margins and injury and threat of material injury with the Commission. If EC petitioners are able to get this so far, the only recourse left to Chinese defendants is to fight for a lower dumping margin in antidumping review investigations so that they can export again.

That is why it is very important to try to win the first investigation. There are three ways Chinese companies can do this: if the Commission does not find injury, if the Commission finds low antidumping margins, or by negotiating suspension agreements between the Chinese and EU government, that is lowering the quantity imported under quota and above a price floor.

By getting a no-injury determination by the Commission companies are allowed to export their products to the EC without any duties. However, they face a different problem: “free riders” (Perry). Any other Chinese company that was not involved in the investigation and did not incur any legal expenses will be able to export their products too. This will unfairly make the EC market more competitive for the company that battled and won the case.

¹³¹ See table 6.2

¹³² William E. Perry in his article “U.S. Antidumping Cases Against China-Lessons Learned” 1998 pp34 45

C- Ally with EC Importers

The same way Chinese exporters are interested in bringing their products to the EC, EC importers are interested in buying those products. Thus, it makes sense that they both work together to fight dumping charges. EC importers can bring political pressure to the Commission and Commerce because EC jobs may depend on the entrance of Chinese goods to the country.

Another way domestic importers can help Chinese companies, according is by involving end users. In a case where Chinese exporters were accused of dumping silicon carbide on the EC, domestic importers persuaded EC companies that are the user of Chinese silicon carbide, to intervene and testify in favor of the Chinese companies. This was one of the major reasons the Commission reached a negative determination of injury in the case.

Pressure from importers alone will not win the case, “but it has the effect of leveling the playing field.” When Chinese companies are not familiar with the situation in the EC market, the help from insiders is always needed.

6.2. Policy recommendations

1) Amend domestic untimely business regulations

Government should help producers set up consultative accountant system and presentiment mechanism. When producers face unfair treatment, government should help them to pull out. First, part of accountant and business codes should be duly modified lest the domestic legitimate actions become the source of foreign anti-dumping charge.

2) Integration of resource and increase of competency of product competition

With the coming globalization of produce-sales, the competition between cross-border enterprise have become more and more serious, especially in the competition of high-technology industry in which it is usually due to the change of economic situation in different countries. It could be seen that in the future, the collisions between WTO member states will keep rising, while more and more governments tend to make use of anti-dumping measure to protect domestic industry legally. Thus, government should integrate the resource of industry, government and academy in order to study out material

strategies at the same time actively teaching domestic manufacturers to improve their competitive competency.

3) Enlargement of collection on global informational consultation and business cases study

Chinese companies, comparing to western cross-border enterprises have less competitive competence. In order to avoid blindfold production under anti-dumping charge, it is extremely important to acquire global business consultation and collect the anti-dumping cases. Concerning this increasing demand, the institutions of industry and academy, except for current official organization, should be integrated to extend participant scope and establish data base to enable exporters to get the current foreign business information and tendency of business codes through internet.

4) Intensifying agitprop on the impact of anti-dumping

As far as Chinese exporters are concerned, they always focus on the market share, in which the most common measure of competition is price reducing. Nevertheless, government should invite the industrial, governmental and academic expertise to have frequently meeting in which the current problem on anti-dumping will be presented. It will, not only benefit exporters who will learn the transformation of foreign market so as to keep their powder dry, but also make the exporters understand that although price reducing can increase market share dramatically, as far as it is faced with anti-dumping charge, it will be disastrous.

5) Cultivating intellectuals and establishing data base of anti-dumping

Since government faces the challenge of currently global antidumping measure versus new competitive measure, there is no shirking the responsibility that they should consider to cultivate the intellectuals in the area of law, accountant, economics and finance in order to constitute the data base of anti-dumping in the future. Through the CTV case, it can be found that Chinese exporter neither tabled administrative review nor prosecuted judicial remedy. Except for the ingredients from EC itself, the high legal cost and relevant expenditure are the other important factors. Thus, the government should necessarily take

precautions so as to integrate anti-dumping data base, and help manufacturers answer the questionnaire in good time.

6) Taking combined action with relevant countries or participating WTO dispute settlement as the third country

Through CTV case, another apocalypse could be acquired. In the future, WTO will play more and more important role in global economic liberalization. With the removal of tariff and trade barrier, anti-dumping measure might be the new protective measure of countries in international trade. The trading dissension is ineluctability. After accession to WTO, Chinese government should consider in fair weather prepare for foul. Hereafter, if trading competitor adopts un-proportionate antidumping measure which is obviously in breach of WTO international code. The government shall consider bring WTO Dispute Settlement Mechanism to defend domestic manufacturer. In order to achieve anticipative effect, Chinese government shall consider allying relevant countries that also faced anti-dumping charges, lodging a complaint together to clamp down for necessitating termination of anti-dumping measure or suggesting WTO Dispute Settlement Group to remove it.

7) Extending regional cooperation

Although China has participated in WTO, it would be excellent operational model to decrease the enforcement of anti-dumping measure and increase practical interest of commercial come-and-go with another country through regional economic cooperation, in which the bilateral agreement is signed, such as farther economic integration agreement between Australia and New Zealand and the agreement in EEA. At the present time, there are several discuss on the aspect of advance liberalization of unconstraint in anti-dumping measure on the APEC forum. Government shall actively take part in it since it would not only decrease regional collision of anti-dumping measure, but also keep away the possibility in which Chinese manufacturers dump the product made in another low-cost country into domestic market.

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Table 2.1.1 Top 10 Chinese exports to and imports from the European Union.

Sector	2000		Chapter	Sector	2000
	1,990	Rank			
Computer/Machinery	7,753	1	85	Electrical Equipment	9,012
Electrical Equipment	6,668	2	84	Computer/Machinery	8,270
Aircraft, Spacecraft	1,239	3	87	Cars, Trucks, Autos	1,249
Optical/Medical Instruments	908	4	90	Optical/Medical Instruments	1,238
Cars, Trucks, Autos	835	5	29	Organic Chemicals	966
Organic Chemicals	810	6	39	Plastics	928
Plastics	680	7	44	Wood	660
Paper & Paper Board	473	8	48	Paper & Paper Board	520
Wood	394	9	38	Misc. Chemical Products	504
Misc. Chemical Products	393	10	88	Aircraft, Spacecraft	488

Sector	2000		Chapter	Sector	2000
	1999	Rank			
Electrical Equipment	4,258	1	85	Electrical Equipment	7,951
Computer/Machinery	3,624	2	84	Computer/Machinery	5,409
Apparel, not Knitted	1,502	3	62	Apparel, not Knitted	1,820
Toys	1,342	4	95	Toys	1,686
Articles of Leather	1,293	5	42	Articles of Leather	1,518
Organic Chemicals	1,138	6	90	Optical/Medical Instruments	1,244
Plastics	998	7	39	Plastics	1,223
Optical/Medical Instruments	946	8	29	Organic Chemicals	1,204
Articles of Iron or Steel	895	9	94	Furniture	1,174
Footwear	858	10	73	Articles of Iron or Steel	1,142

Source: 'Foreign Trade of China' international conference on "China's Economy in the 21st Century"

Table 6.1

Comparison between EC Basic Regulation (BR) and GATT/WTO Anti-Dumping Agreement (ADA)

Indicators	WTO ADA	EC BR	Findings
Normal value	Article 2.2.1	Article 2(1)	BR > ADA
Export price	Article 2.3	Article 2(8)	BR ≈ ADA
Price comparison	Article 2.4, 2.5	None	BR ≠ ADA
Dumping Margin	Article 2.4.2	Article 2(11)	BR ≈ ADA
Calculation of normal value in non-market economy countries	Article 1(2) of GATT	Article 2(7)	BR ≠ ADA
Determination of injury	Article 5.8	Article 5(7)	BR ≈ ADA
Determination of causality	Article 3.5	Article 3(6)	BR < ADA
Determination of domestic industry	Article 4	Article 4	BR ≈ ADA
Non-Market Economy	None	Article 1(2)	BR ≠ ADA
Like Product	Article 2.2	Article 1(4)	BR < ADA
Community Interest	Article 3.5	Article 21	BR ≈ ADA
Anti- circumvention provision	None	Article 13	BR ≠ ADA
Anti-absorption provision	None	Reg.2423/88	BR ≠ ADA

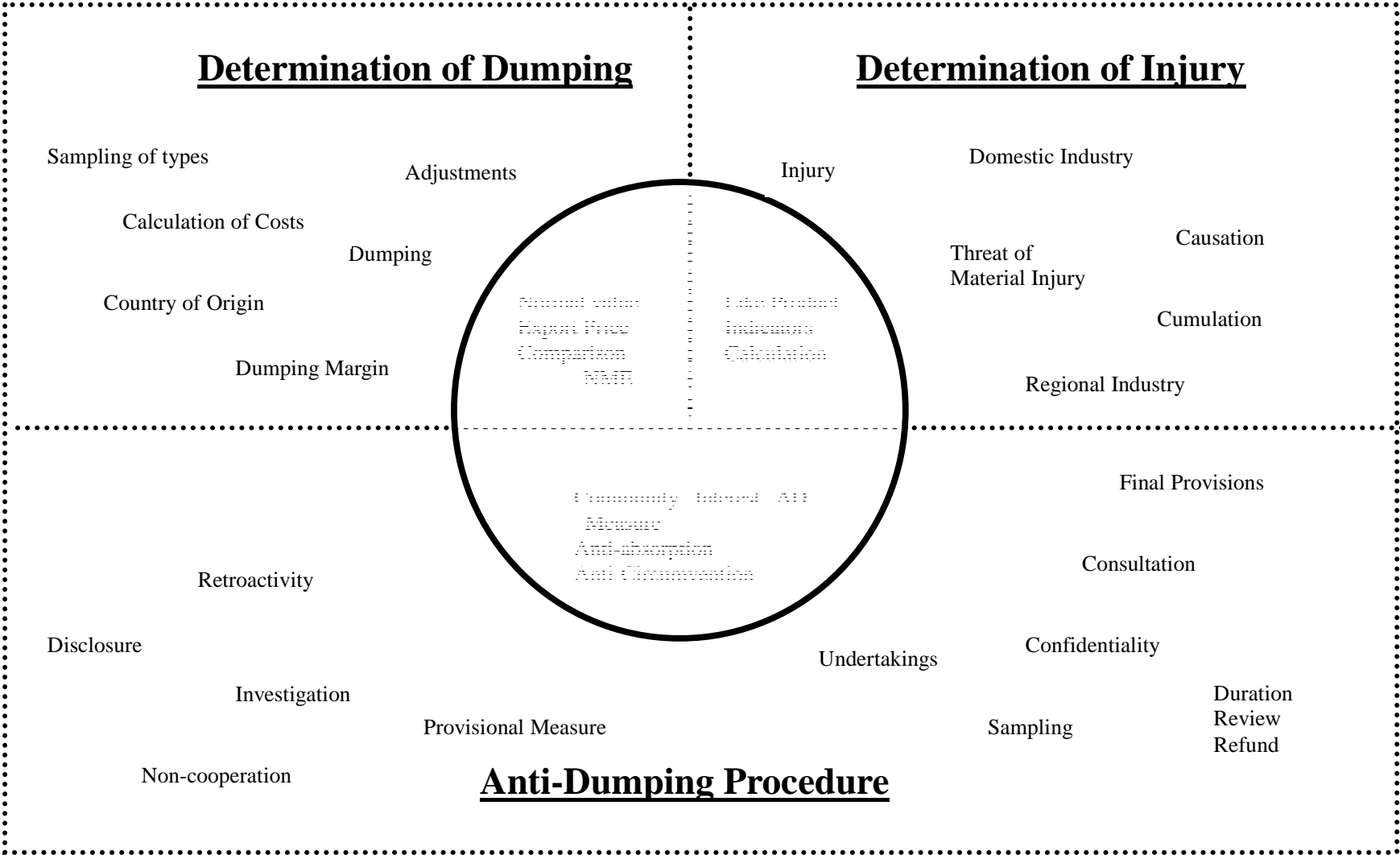
A>B A is more elaborate than B

A≈B A is similar with B

A<B A is less elaborate than B

A≠B A is different from B

Delimitations



Appendix 2

Some hindrances for Chinese Exporter and Policy Recommendations

Table 6.2

For Chinese Exporter	For Government
<ul style="list-style-type: none"> ● Do not ignore the charges. Get involved ● Do everything possible to win the initial investigation ● Ally with EC importers 	<ol style="list-style-type: none"> 1) Amend domestic untimely business regulations 2) Integrate resources and increase competency of product competition 3) Greater collection of global information consultation and business case studies 4) Intensify advertising expressing awareness of the impact of anti-dumping 5) Cultivate intellectuals and establish data base of anti-dumping 6) Take combined action with relevant countries or utilize the WTO dispute settlement service 7) Extend regional cooperation