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Anti-Dumping and  
Countervailing Measures  
- What Are the Differences?

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>ABBREVIATIONS</b>	<b>2</b>
1.1 Purpose and Questions at Issue	4
1.2 Method, Material and Outline	4
2.1 Article I– Most Favoured Nation Treatment	6
2.2 Article III– National Treatment	6
2.3 Like Products	7
3.1 Anti-Dumping under the WTO	10
<b>3.1.1 The AD Agreement</b>	<b>10</b>
3.1.1.1 Procedural Requirements	11
3.1.1.2 Substantive Rules	12
3.1.1.2.1 Determination of Dumping	12
3.1.1.2.2 The Margin of Dumping	14
3.1.1.2.3 Determination of Injury	14
3.1.1.3 Application of Measures	16
<b>3.1.2 Case Law under the WTO</b>	<b>17</b>
3.1.2.1 Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico	18
3.1.2.2 United States – Anti-Dumping Act of 1916	18
3.1.2.3 United States – Continued Dumping and Subsidy Offset Act of 2000 (the Byrd Amendment)	20
3.1.2.3.1 Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement	21
3.1.2.3.2 Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement	21
3.1.2.3.3 Comments	22
3.1.2.4 Comparison between the United States – 1916 Act and the ‘Byrd Amendment’	22
3.2 Anti-Dumping under the EC Law	24
<b>3.2.1 AD Regulation</b>	<b>25</b>
3.2.1.1 Procedural Requirements	25
3.2.1.2 Imposition of Anti-Dumping Duties	27
3.2.1.3 Circumvention	28
<b>3.2.2 Case Law under EC</b>	<b>30</b>
3.2.2.1 Case C- 113/77 – the Ball Bearing Case	30
3.2.2.2 Case C-358/89, Extramet Case	32

<b>4.1</b>	<b>Subsidies and Countervailing Measures under the WTO</b>	<b>35</b>
<b>4.1.1</b>	<b>SCM Agreement</b>	<b>36</b>
4.1.1.1	Categories of Subsidies	37
4.1.1.1.1	<i>Prohibited Subsidies</i>	37
4.1.1.1.2	<i>Actionable Subsidies</i>	38
4.1.1.2	Countervailing Measures	38
4.1.1.3	Procedural Requirements	39
4.1.1.4	Special and Different Treatment	39
<b>4.1.2</b>	<b>The Case Law under the WTO</b>	<b>40</b>
4.1.2.1	Brazil – Aircraft	41
4.1.2.1.1	<i>Burden of Proof under Article 27.4 (Special and Differential Treatment of Developing Country Member) of the SCM Agreement</i>	41
4.1.2.1.2	<i>Had Brazil Increased the Level of its Export Subsidies?</i>	42
4.1.2.1.3	<i>Were PROEX Interest Rate Equalisation Payments Used “To Secure a Material Advantage in the Field of Export Credit Terms”?</i>	43
4.1.2.1.4	<i>Comments</i>	44
4.1.2.2	Canada – Aircraft	44
4.1.2.2.1	<i>Interpretation of “Benefit” in Article 1.1(b) of the SCM Agreement</i>	44
4.1.2.2.2	<i>Contingent in Fact Upon Export Performance</i>	45
4.1.2.2.3	<i>Drawing Adverse Inferences from Certain Facts</i>	46
4.1.2.3	Comparison between Brazil – Aircraft and Canada – Aircraft	47
<b>4.2</b>	<b>Subsidies and Countervailing Measures under the EC Law</b>	<b>49</b>
<b>4.2.1</b>	<b>SCM Regulation</b>	<b>49</b>
4.2.1.1	Relief	50
4.2.1.2	National Authorities and Subsidies	52
4.2.1.3	Procedure	53
<b>4.2.2</b>	<b>Case Law under EC</b>	<b>53</b>
4.2.2.1	Case 409/00 Spain v. Commission	53
<b>5.1</b>	<b>Principal Differences between WTO and EC Regarding Anti-Dumping and Countervailing Measures</b>	<b>55</b>
<b>5.2</b>	<b>Cumulation of Anti-Dumping and Countervailing Measures</b>	<b>57</b>
<b>5.2.1</b>	<b><i>The Differences between Anti-Dumping and Competition Law</i></b>	<b>58</b>
<b>5.2.2</b>	<b><i>Developing and Third Countries</i></b>	<b>59</b>
<b>5.3</b>	<b>What Are Other Reasons to Dump Prices than Unfair Trade?</b>	<b>60</b>
<b>5.4</b>	<b>Why Has Anti-Subsidy Activity Remained at Low Levels in Comparison to Anti-Dumping?</b>	<b>62</b>
<b>5.5</b>	<b>Court Practice</b>	<b>64</b>
<b>BIBLIOGRAPHY</b>		<b>70</b>



# Summary

Trade remedies – anti-dumping, anti-subsidy and safeguard – are controversial, provoking much argument and differences of opinion.

The differences in law between anti-dumping and countervailing measures are marginal. The laws regulating countervailing duties require more sufficient proof (e.g. the existence of subsidy must be shown) than anti-dumping law, and the procedure is often quicker. This is because governments perform the subsidisation. It is politically sensitive to bring a claim against another state; therefore, the requirements of evidence are more demanding than those for anti-dumping.

In terms of the substantial rules of anti-dumping and countervailing measures, the differences between WTO and EC law are few. Indeed, they are almost insignificant, except that WTO law lacks provisions regulating circumvention and EC law contains such provisions. The EC law must comply with the WTO law. The differences in this area depend on the EC authorities' practice.

Obviously, unfair trade, subsidisation and dumping do exist and cannot be condoned. However, plain protectionism under the guise of the fight against unfair trade is also a reality that is all the more unexpected because it emanates from countries proclaiming themselves to be liberal. This protectionism has become all the more subtle and difficult to identify as dumping and subsidy calculation methods have become more complex and the standards of evidence almost unattainable. The matter requires a return to a more common-sense approach. A change can be brought about only by simplification, greater transparency and, as far as the EC is concerned, giving judges access to full fact and authority to review the AD and the SCM Regulations.

It is essential to ensure transparency of anti-dumping and countervailing proceedings and measures, not only in interests of the EC, but also elsewhere to assure that these measures are used only when unfair trade occurs. The lack of transparency in anti-dumping and countervailing proceedings is by no means unique to the EC authorities and this deficiency makes it easy to use anti-dumping and countervailing measures for protectionist aims.

The importance of anti-dumping and countervailing measures must be evaluated in light of the WTO dispute settlement mechanism's features.

# Abbreviations

AD Agreement	Uruguay Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AD Regulation	Council Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community
CFI	Court of First Instance (EC)
DSB	Dispute Settlement Body
DSU	Uruguay Round Dispute Settlement Understanding
EC	European Communities
ECJ	European Court of Justice
EU	European Union
GATT	The General Agreement on Tariffs and Trade 1947
GATT 1994	The General Agreement on Tariffs and Trade 1994
LDC	Least developed countries
MFN	Most-favoured-nation treatment
NAFTA	North America Free Trade Agreement
NT	National treatment
OECD	Organisation for Economic Co-operation and Development
O.J.	Official Journal of the European Communities
SCM Agreement	Uruguay Round Agreement on Subsidies and Countervailing Measures.
SCM Regulation	Council Regulation (EC) No 2026/97 on protection against subsidized imports from countries not members of the European Community
WTO	World Trade Organization

# 1 Introduction

I would like to begin with explaining why I chose to compare anti-dumping measures with countervailing measures under the law of the WTO. I am interested in the contradiction between free market access and protectionism. Many insist that trade remedies such as anti-dumping and countervailing measures are often used for protectionist purposes instead of hindering unfair trade. Developing countries that are subject to such measures often make this claim. Developing countries can often offer lower labour costs, which makes production much cheaper and results in cheaper products. It is more common that developed countries impose measures against developing countries than the other way around, even if developing countries are given special regard by developed countries when considering the application of anti-dumping or countervailing measures.

Whether or not a measure will be imposed is a highly political decision since many of the parties involved (like domestic producers, consumers, importers and exporters) are lobbying for their interests, and can sometimes have a strong influence in the case.

Strategic trade policy is an instrument designed to strengthen a country's competition and economy by giving subsidies, for example to domestic producers. The effect can be that lower prices for products can be offered on the market than would otherwise be possible. The same effect is achieved as when a company dumps its prices on an export market. The allowance for both subsidies and countervailing measures is under the jurisdiction of the WTO. Only the allowance of anti-dumping measures can be examined in the WTO, and not the dumping itself, since a company – a private party – performs the action. Only states can bring a dispute to the Dispute Settlement Body (DSB) of the WTO, not private parties. These two trade remedies usually have the same effect on an import market and are regulated in a similar way, but there are differences. These differences are what I want to point out, examine, and analyse in this thesis.

The overall goal of the WTO is trade without discrimination to achieve equal market access. Members often prevent realisation of this goal through trade remedies, like anti-dumping and countervailing measures. Almost every country advocates trade liberalisation, especially the developed countries, while at the same time the scent of protectionism is strong. One of the purposes with the free trade principle is to eliminate anti-dumping and countervailing measures, but as international trade increases, so does the number of users of anti-dumping measures and countervailing measures.

## 1.1 Purpose and Questions at Issue

What I intend to do in this thesis is to describe, compare and analyse the differences between anti-dumping and countervailing measures in general, primarily under the GATT 1994 with an EC perspective. I will presume that the reader of this thesis already has at least a basic understanding of WTO and EC law.

The main question at issue is what differences there are between anti-dumping and countervailing measures. I will attempt to answer this question through the following sub-questions:

- Does the law differ between anti-dumping and countervailing measures, and if it does, what are the differences and why?
- What differences are there between WTO and EC law regarding anti-dumping and countervailing measures?
- What is the logic behind low prices on dumped and subsidised products? Are there other reasons to dump prices than unfair trade?
- Does the one trade remedy (anti-dumping measure or countervailing measure) consume the other?
- Why has countervailing activity remained at low levels in comparison to anti-dumping?
- Is there a difference between the dispute settlement practice of the WTO and the case law of ECJ regarding anti-dumping and countervailing measures?
- Are anti-dumping and countervailing measures used against competitive imports from abroad?

## 1.2 Method, Material and Outline

The thesis begins by presenting the main principles of the WTO (Most-Favoured-Nation treatment and National treatment) to give the reader an understanding of the purposes of the WTO. These main principles are followed by two exceptions. The first exception is anti-dumping measures. First, the thesis provides an explanation of the background and development of anti-dumping from a general perspective. An introduction to the system of anti-dumping regulation in the WTO and EC as well as the case law on anti-dumping is presented. The second exception is countervailing measures. The thesis also provides explanation of the background and development of subsidy from a general perspective, as well as an introduction to the system of countervailing measures (the trade remedy against subsidy) regulation and case law in the WTO and the EC. Anti-dumping measures and countervailing measures are compared and analysed, as are WTO and EC law. It is important to remember that the EC also has an internal legislation, which regulates internal dumping and subsidisation through its competition law, of which the state aid rules are part. A brief description of parallels to the competition law are provided when appropriate, but focus is on the GATT 1994, the AD Agreement, the SCM



Agreement, AD Regulation and the SCM Regulation.<sup>1</sup> The conclusion section summarises the findings of this thesis, and provides some personal comments.

The material used in this thesis, which is comparative, is the following:

- agreements and case law of the WTO,
- regulations, decisions and case law of the EC, and
- doctrine.

A final note on terminology: the EC initiates and conducts anti-dumping and countervailing proceedings within the EU. In the international context, it is the EU, and not the EC, which is perceived by third countries as a counterpart, in terms of trade and trade relations.

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<sup>1</sup> There is no general name for the Council Regulation 2026/97, on protection against subsidized import from countries which are not members of the European Community, but in this thesis the Regulation will be called SCM Regulation.

## 2 The Main Principles of the WTO

The purpose of GATT 1994 is to reduce trade barriers and to strengthen the rules for the conduct of international trade. Therefore, Articles I and III of the GATT 1994 state two of the most important principles of the WTO; namely, Most-Favoured-Nation treatment and National treatment.

### 2.1 Article I– Most Favoured Nation Treatment

Under the WTO Agreements, countries cannot normally discriminate between their trading partners. If a country grants someone a special favour (such as a lower customs duty rate for one of their products), then the country must do the same for all other WTO Members. This principle is known as Most-Favoured-Nation treatment (MFN). It is so important that it is the first article of the GATT 1994, which governs trade in goods. Some exceptions are allowed. For example, countries within a region can set up a free trade agreement that does not apply to goods outside the group (e.g. NAFTA). Another exception is that a country can raise barriers against products from specific countries when these products are considered to be traded unfairly; it is in this case, for example, that anti-dumping measures and countervailing measures come into play. The Agreement permits these exceptions only under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it must do so for the same goods from all its trading partners, whether rich or poor, weak or strong.<sup>2</sup>

Extract from Article I of the GATT 1994:

“any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product” of any other Member.”

### 2.2 Article III– National Treatment

Imported and locally produced goods should be treated equally, at least after the foreign goods have entered the market. This principle of ‘national treatment’ means giving other countries the same treatment as is practiced domestically. National treatment applies only once a product has entered the market. Therefore, charging customs duty on an import is not a violation of

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<sup>2</sup> The principle is upheld e.g. in the Shrimp – Turtle case (WT/DS/58/AB/R).

national treatment, even if locally produced products are not charged an equivalent tax.

The purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures are “not applied to imported or domestic products so as to afford protection to domestic production”.<sup>3</sup>

## 2.3 Like Products

‘Like products’ appears in both Articles I and III, and is a term of great importance. In order to determine compliance with Articles I and III of the GATT 1994, it is often necessary to compare the treatment of two ‘like products’. A complaining Member must establish that the measure accords to the group of ‘like’ imported products ‘less favourable treatment’ than it accords to the group of ‘like’ domestic products. The term ‘less favourable treatment’ expresses the general principle, in Article III:1, that the internal regulations “should not be applied... so as to afford protection to domestic production”.<sup>4</sup> Two dimensions of discriminate treatment are required: first, like products must be treated differently; and second, foreign like products as a class must be treated differently from, and less favourably than, domestic products.<sup>5</sup>

The interpretation of the term ‘like products’ should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a ‘similar’ product. The criteria suggested for determining, on a case-by-case basis, whether a product is ‘similar’, are the following:

- the product’s end-uses in a given market;
- consumers’ tastes and habits, which change from country to country;
- the product’s properties, nature and quality; and
- tariff classification can be a helpful sign of product similarity.

These criteria are set out e.g. in the Asbestos case and in Japan – Taxes on Alcoholic Beverages case.<sup>6</sup> It is also necessary to examine the competitive relationship in the marketplace. This will always involve an unavoidable

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<sup>3</sup> The principle is upheld e.g. the Japan – Taxes on Alcoholic Beverages (WT/DS8/AB/R, WT/DS10//AB/R, WT/DS11/AB/R) and the Asbestos case (WT/DS/135/AB/R).

<sup>4</sup> Asbestos case (WT/DS135/AB/R), paragraph 100.

<sup>5</sup> Trachtman, *EC – Asbestos, Report of the Appellate Body*, [www.ejil.org/journal/curdevs/sr13.htm](http://www.ejil.org/journal/curdevs/sr13.htm), page 6.

<sup>6</sup> Asbestos case (WT/DS/135/AB/R) and Japan - Taxes on Alcoholic Beverages (WT/DS8/AB/R, WT/DS10//AB/R and WT/DS11/AB/R).

element of individual, discretionary judgement. Keep in mind that the range of 'like products' can differ from article to article in the GATT 1994.<sup>7</sup>

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<sup>7</sup> For example, 'like products' is a broader concept in Article III:4 of the GATT 1994 than in Article III:2 of the GATT 1994.

### 3 Anti-Dumping

According to economic theory, dumping is a form of price discrimination between national markets; i.e., the practice of selling goods abroad at a lower price than on the home market. This phenomenon of international trade has been the subject of legislation providing for counter-measures since the beginning of the 20<sup>th</sup> century. The introduction of anti-dumping legislation resulted from the experience of a number of countries that their industries had suffered damage from foreign competition selling products at prices below cost of production. Dumping was considered a trade practice which left domestic producers defenceless, and which could ultimately lead to disappearance of domestic production of the merchandise altogether.<sup>8</sup>

Early law provided for the levy of a special ‘dumping duty’ on imported goods, which were sold below their ‘fair value’ or ‘current domestic value’, provided a domestic industry had been injured by such imports. In 1947, these principles formed the basis of the definition of dumping and anti-dumping measures in Article IV of the GATT.

Anti-dumping action had been essentially applied by countries with developed economies, low external tariffs and relatively few non-tariff barriers, which as a result had become prime targets of dumping practices because of their easily accessible markets and their considerable purchasing power. Recent years have witnessed an increasing number of newly industrialised and developing countries resorting to anti-dumping actions. This development generally marks the transition from global import restriction in these countries to a more selective approach of trade defence. This situation has led to concern that anti-dumping measures could be abused as a surrogate for general import restrictions.<sup>9</sup>

A number of economists submit that there is no justification for these measures according to free trade principles, and that they merely amount to instruments of protectionism and misallocate resources.<sup>10</sup> A survey of the economic literature shows that there is no consensus among economists on the question of whether dumping constitutes an economically objectionable practice.

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<sup>8</sup> Müller, Khan & Neuman, *EC Anti-Dumping Law – A Commentary on Regulation 384/96* (hereafter Müller, Khan & Neuman), page 3.

<sup>9</sup> Müller, Khan & Neuman, page 4.

<sup>10</sup> Van Bael & Bellis, *Anti-Dumping and Other Trade Protection Laws of the EC*, (hereafter Van Bael & Bellis), page 34, and Müller, Khan & Neuman, page 6.

## **3.1 Anti-Dumping under the WTO**

Dumping, where it causes ‘material injury’ to a domestic industry, is condemned under Article VI of the GATT 1994, and anti-dumping measures may be imposed. This derogation from the free trade principles of the GATT 1994 is said to be justified on the ground that anti-dumping constitutes an unfair trade practice. This explains why anti-dumping measures do not give rise to right of retaliation or right to concession of equivalent value in the exporting country.

When conducting anti-dumping proceedings regarding imports of products originating from a WTO Member, the other Member is subject to the rights and obligations provided in the WTO Agreement. The framework is set forth in Article VI of the GATT 1994. This Article, entitled ‘Anti-dumping and Countervailing duties’, defines the notion of dumping and establishes the general rules governing the imposition of anti-dumping measures. The provisions of Article VI are supplemented by the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, commonly referred to as the AD Agreement. The AD Agreement expands and clarifies Article VI by providing detailed rules regarding the application of anti-dumping measures that WTO Members may employ.

Article 16 of the AD Agreement establishes the Committee on Anti-dumping Practices, whose function is to carry out the responsibilities assigned to it under the AD Agreement or by the Members. The Committee oversees the administrative and regulatory actions of the Members, and the Members are required to report to the Committee all preliminary or final anti-dumping measures taken.

The WTO Secretariat recently reported on 27 November 2006 that the number of initiations of new anti-dumping investigations continues to decline, while the number of new final measures has increased compared with 2005.

Members must ensure that their basic anti-dumping regulation is consistent with Article VI of the GATT 1994 and the AD Agreement.<sup>11</sup>

### **3.1.1 The AD Agreement**

The AD Agreement contains precise and detailed rules on the conditions under which anti-dumping measures can be imposed. It constitutes a narrow framework for anti-dumping authorities and, therefore, it is not suitable for the achievement of broader import policy objectives. The anti-dumping instrument is generally activated only following a request from the domestic industry whose products compete with foreign imports.

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<sup>11</sup> United States – Anti-dumping Act of 1916 (WT/DS 136/AB/R, WT/DS162/AB/R).

The criteria to be taken into account when deciding whether dumped imports cause injury to a domestic industry are provided in the AD Agreement; this agreement also describes procedures for initiating and conducting anti-dumping investigations, and the implementation and duration of anti-dumping measures.

The AD Agreement adds relatively specific provisions for determining whether a product is exported at a dumped price, as criteria for allocating costs when the export price is compared with a ‘constructed’ normal value. The AD Agreement stipulates rules to ensure that a fair comparison is made between the export price and the normal value of a product, so as not to arbitrarily create or inflate margins of dumping.

The AD Agreement was signed in 1994, following the Uruguay Round of negotiations, and entered into force in 1995. The AD Agreement supersedes the anti-dumping codes agreed upon in 1967 (Kennedy Round Anti-dumping Code) and 1979 (Tokyo Round Anti-dumping Code).

The AD Agreement does not address anti-circumvention.<sup>12</sup>

### 3.1.1.1 Procedural Requirements

Rules governing the initiation and investigation of anti-dumping proceedings are provided in Article 5 of the AD Agreement. Any investigation into alleged dumping practices must be initiated through a written application *by or on behalf of the domestic industry*.<sup>13</sup> The application must be supported with evidence of *dumping, injury*, and a *causal link* between the dumped imports and the alleged injury.<sup>14</sup> An application must also contain sufficient information regarding the industry, domestic production, the product, importers and exporters.<sup>15</sup>

At any time during an investigation, if the authorities are satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the case, the application must be rejected or the investigation terminated immediately.<sup>16</sup> An investigation shall also be terminated in cases where authorities determine that the margin of dumping is *de minimis* or the volume of dumped imports, actual or potential, or the injury is negligible.<sup>17</sup>

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<sup>12</sup> Compare with the EC regulation, which addresses anti-circumvention.

<sup>13</sup> Article 5.4 of the AD Agreement. In United States – Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment) (WT/DS217/AB/R, WT/DS234/AB/R), the Appellate Body reversed the Panel’s conclusion and noted that Article 5.4 does not require investigating authorities to “examine the motives of producers that elect to support an application”.

<sup>14</sup> Articles 5.2 and 5.6 of the AD Agreement.

<sup>15</sup> Article 5.2 of the AD Agreement.

<sup>16</sup> Article 5.8 of the AD Agreement.

<sup>17</sup> Article 5.8 of the AD Agreement provides that the margin of dumping shall be considered *de minimis* if this margin is less than two percent, expressed as a percentage of the export price. The volume of the dumped import from an individual country shall normally be considered negligible if it accounts for less than three percent of imports of like products in the importing Member country, unless there is more than one country importing

As for time limits, Article 5.10 of the AD Agreement provides that investigating authorities must complete their investigations within a year; in some cases, the time limit can be extended to eighteen months after initiation.

Article 6 of the AD Agreement provides rules regarding the submissions of evidence. All interested parties<sup>18</sup> must be given notice of the information that the authorities require. During the course of an investigation, investigating authorities must ensure themselves of the accuracy of the information submitted by interested parties. In order to do so, investigating authorities may perform investigations in the territory of another WTO Member. Throughout an anti-dumping proceeding, the investigating authorities are required to notify the exporting WTO Member, interested parties, and the Committee on Anti-Dumping Practices of their determinations, and of the elements which they took into account to reach these determinations.

Article 13 of the AD Agreement provides that each Member whose national legislation contains anti-dumping provisions must maintain independent judicial, arbitral or administrative mechanisms to ensure the review of administrative actions and determinations. Article 13 guarantees interested parties the right to challenge anti-dumping determinations. See Chapter 3.1.2 concerning the dispute settlement mechanism.

### **3.1.1.2 Substantive Rules**

Article 1 of the AD Agreement establishes the basic principle that a Member may impose an anti-dumping measure if this Member determines, pursuant to an investigation conducted in conformity with the provisions of the AD Agreement, that the products are:

- dumped;
- cause material injury or threat thereof to a domestic industry; and
- a causal link exists between the dumped imports and the injury or threat thereof.

#### **3.1.1.2.1 Determination of Dumping**

According to Article VI of the GATT 1994 and Article 2.1 of the AD Agreement, a product is dumped when it is introduced into the domestic market of another country at a price less than its *normal value* (the price of the imported product in the 'ordinary course of trade' in the country of origin or export). Dumping is generally calculated on the basis of *fair*

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and their imports collectively account for more than seven percent of the like products in the importing Member country.

<sup>18</sup> Interested parties include: exporters or foreign producers or the importers of a product subject to investigation; the government of the exporting country; and producers of the like product in the importing country.



*comparison* between *normal value* and *export price* (the price of the product in the country of import). The calculation of normal value and export price, and elements of the fair comparison must be made according to Article 2 in the AD Agreement. However, some sales do not permit a proper comparison; the normal value can then be a ‘third country price’ or may be constructed by investigating authorities.<sup>19</sup> Examples of such sales are:

- (i) when there are no sales of the product in question in the ordinary course of trade in the domestic market of the exporting Member, or
- (ii) when there are sales of the product in the ordinary course of trade in the domestic market of the exporting country, but the particular market situation or the low volume of sales does not permit a proper comparison.

The phrase “in the ordinary course of trade” is not defined in the AD Agreement, but Article 2.2.1 provides one method for determining whether sales have occurred in the ordinary course of trade. Sales of the like product in the domestic market of the exporting WTO Member at prices below costs<sup>20</sup> of production may be treated as not being in the ordinary course of trade, and can be disregarded in determining normal value.

Where domestic sales in the exporting WTO Member do not allow for a proper price comparison, the investigating authorities may use a ‘constructed’ normal value. A constructed normal value is the cost of production in the country of origin plus a reasonable amount of selling, general and administrative costs (SGA) and profit. Article 2.2.2 of the AD Agreement specifies that reasonable SGA and profit may be determined.

Where the export price is deemed unreliable in view of the relationship between the exporter and the importer, the investigating authorities may determine a reasonable export price according to Article 2.4 of the AD Agreement. The methodology set forth in Article 2.4 of the AD Agreement provides that the constructed export value must include the costs incurred between importation and resale and profits accrued.

In all cases, Article 2.4 of the AD Agreement provides that a fair comparison shall be made between export price and normal value. The basic requirements for a fair comparison are that the prices being compared are those of sales made at the *same level of trade during the same time*. Investigating authorities must take into account all factors evidenced as affecting the comparability of the normal value and the export price.

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<sup>19</sup> Article 2.2 of the AD Agreement.

<sup>20</sup> Costs shall normally be calculated on the basis of records kept by the exporter under investigation, provided that such records are in accordance with generally accepted accounting principles. Van Bael & Bellis, page 518.

### 3.1.1.2.2 The Margin of Dumping

The margin of dumping shall normally be determined by a comparison of the following:

- the weighted average *normal value* to the weighted average of all comparable *export prices*; or
- a transaction-to-transaction comparison of normal and export prices.<sup>21</sup>

The *margin of dumping* is the amount of dumping expressed as a percentage of the export price. The same method must be applied to both the normal value and the export price, and all transactions must be taken into account when calculating the dumping margin. A different basis of comparison can be used ‘targeted dumping’ is identified. An example of targeted dumping is when a pattern exists of export prices differing significantly among different purchasers, regions or time periods.<sup>22</sup> As an general rule, an individual dumping margin must be determined for each known exporter or producer. Sampling methods are allowed if the number of exporters or producers is too large to determine margins individually.

### 3.1.1.2.3 Determination of Injury

Article 3 of the AD Agreement contains rules regarding the determination of material injury caused by dumped imports. There are three types of material injury:

- a) material injury itself to a domestic industry;
- b) threat of material injury to a domestic industry; or
- c) material retardation of the establishment of a domestic industry.<sup>23</sup>

An important factor of the injury determination is the definition of the ‘like product’ (see Chapter 2.3). The like product definition determines the scope of the investigation and is closely linked to the notion of ‘domestic industry’. Article 2.6 of the AD Agreement defines ‘like product’ as “a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration”.<sup>24</sup>

‘Material injury’ is not defined as such in the AD Agreement. The basic requirement for determination of injury is an objective examination, based on positive evidence of the volume and price effects of dumped imports and

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<sup>21</sup> Article 2.4.2 of the AD Agreement.

<sup>22</sup> Van Bael & Bellis, page 521.

<sup>23</sup> Unlike material injury or threat thereof, the AD Agreement is silent on the evaluation of material retardation of the establishment of a domestic industry.

<sup>24</sup> Compare the criteria of ‘like product’ under chapter 2.3 which was established in the Japan Liqueur case (WT/DS8/AB/R, WT/DS10//AB/R, WT/DS11/AB/R).

the consequent impact of dumped imports on the domestic industry.<sup>25</sup> The factors listed and any relevant factors in Article 3 of the AD Agreement regarding the volume and price effects of dumped imports must be jointly considered. One or several of these factors cannot necessarily give decisive guidance in the determination of injury.

Article 3.4 of the AD Agreement governs the examination of the impact of the dumped imports on a domestic industry. Article 3.4 provides that all relevant economic factors and indices having a bearing on the state of the industry must be examined. The list provided in Article 3.4 is not exhaustive.

For determination of threat of material injury, Article 3.7 of the AD Agreement sets forth the following additional criteria:

- rate of increase of dumped imports;
- capacity of the exporter(s);
- likely effects of prices of dumped imports; and
- inventories of the product investigated.

A determination of threat of material injury must be based on facts, and not merely on allegation, conjecture, or remote possibility. A situation where dumped imports would cause injury must be clearly foreseen and imminent.

Article 3.3 establishes the conditions in which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. Authorities must determine the following:

- the margin of dumping from each country is not *de minimis*;
- the volume of imports from each country is not negligible; and
- a cumulative assessment is appropriate in light of the conditions of competition among the imports and between imports and the domestic like product.

Article 4 of the AD Agreement sets forth a definition of the domestic industry, for the purposes of assessing injury and causation. A domestic industry refers to the domestic producers as a whole of the like products, or to those whose collective output of products constitutes a major proportion of the total domestic production of those products. In certain cases where dumping and the resulting injury are confined to a certain region, the AD Agreement provides that the importing country may be divided into two or more competitive markets with producers in each market considered as a separate industry.<sup>26</sup>

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<sup>25</sup> In the US-Lamb Safeguard case (WT/DS177/AB/, WT/DS178/AB/R), the Appellate Body found that, under the anti-dumping regime, the term material injury connotes a lower standard than the term serious injury under the regime for safeguard measures.

<sup>26</sup> Special rules apply with respect to duties in the case of regional dumping. See Article 4.2 of the AD Agreement.

In order to impose anti-dumping duties, the causal link between dumped imports and material injury to a domestic industry must be established. According to Article 3.5 of the AD Agreement, the demonstration of a causal link between the dumped imports and the injury must be based on an examination by the authorities of all relevant evidence. Known factors other than dumped imports that may be causing injury must be examined, and injury caused by these factors must not be attributed to dumped imports.

### 3.1.1.3 Application of Measures

Two types of measures can be imposed: provisional and definitive measures (definitive measures include price undertakings).

Article 7 of the AD Agreement governs the application of **provisional** measures. Provisional measures may be imposed while the investigation is proceeding, before a final determination has been made. Provisional measures must be based on a positive preliminary determination, and are necessary to prevent injury to the domestic industry during the investigation. Public notice must also have been given and sufficient opportunity provided for interested parties to comment. Provisional measures may take the form of a duty or a security deposit not greater than the provisionally estimated dumping. Normally, provisional measures should not exceed four months, but they can be extended to a period of six months. The measure may not be imposed sooner than 60 days from the date of initiation.

Anti-dumping duties on the imported product may be imposed if a positive **definitive** determination with respect to dumping and injury has been made in accordance with the AD Agreement. Such duties must be assessed on a non-discriminatory basis.<sup>27</sup> Dumped imports from all sources must be considered in the imposition of the duty, except those that have entered into price undertakings. The amount of the duty is left to the discretion of the authorities. The duty cannot exceed the margin of dumping that has been found to exist, and should be less than the dumping margin, if that action is adequate.

Article 8 of the AD Agreement provides that proceedings may be suspended or terminated without the imposition of measures upon receipt of a satisfactory voluntary **price undertaking**. A satisfactory voluntary price undertaking usually involves a commitment by the exporter to increase the price or to cease exports at dumped prices to the area in question. A price undertaking cannot be sought or accepted from an exporter unless a preliminary determination of dumping and injury has been made. Any price increase cannot be higher than necessary to eliminate the margin of dumping. A refusal to enter into a price undertaking on the part of the exporter shall not prejudice the outcome of the proceedings, and the authorities need not accept undertakings offered by the exporter.<sup>28</sup>

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<sup>27</sup> Article 9.2 of the AD Agreement.

<sup>28</sup> See Article 8.3 and Byrd Amendment (WT/DS217/AB/R), panel report paragraph 7.82.

According to Article 8.5 of the AD Agreement, the authorities are free to determine that a threat of injury is more likely to be realised without offer or acceptance of a price undertaking.

The general rule is that an anti-dumping duty or price undertaking shall remain in force only as long as necessary to counteract the dumping causing the injury. The authorities may review the need for the continued duty on their own initiative or upon request by an interested party. If the result of the review determines that the anti-dumping duty is no longer warranted, this duty must be terminated immediately.<sup>29</sup> An anti-dumping duty shall expire after five years after the date of imposition, unless a determination is made that, in the event of termination of the measure, dumping and injury would be likely to continue or recur.

The main principle is that duties may be applied only as of the date on which the determinations of dumping, injury and causality have been made. Definite duties may be levied retrospectively for the period during which provisional measures were imposed and a final determination of injury has been made.

### **3.1.2 Case Law under the WTO**

A central objective of the WTO dispute settlement system is to provide security and predictability to the multilateral trading system.<sup>30</sup>

In the event that a WTO Member considers that another Member has failed to comply with the obligations imposed upon it by the AD Agreement, it can request consultations with that Member.<sup>31</sup> Unless otherwise provided in the AD Agreement, the provisions of the WTO Dispute Settlement Understanding apply to consultations and the dispute that may ensue.<sup>32</sup> If no mutually satisfactory agreement can be found during consultations, an establishment of a panel to challenge the definite or provisional anti-dumping measure or the price undertaking at issue can be requested.<sup>33</sup> The panel's report can be appealed to the Appellate Body. The Member States can only appeal issues of law covered in the panel report and the legal interpretations developed by the panel.<sup>34</sup>

The AD Agreement sets out a special standard of review, Article 17.6. This special provision is intended to give a greater margin of discretion to the Member's anti-dumping determination than Article 11 of the DSU.<sup>35</sup> In its assessment of the fact of the matter in an anti-dumping dispute, a panel must determine whether the establishment of the facts by the anti-dumping

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<sup>29</sup> Article 11.2 of the AD Agreement.

<sup>30</sup> Article 3.2 of the DSU.

<sup>31</sup> Article 17.2 and 17.3 of the AD Agreement.

<sup>32</sup> Article 17.1 of the AD Agreement.

<sup>33</sup> Article 17.4 of the AD Agreement.

<sup>34</sup> Article 17.6 of the DSU.

<sup>35</sup> WTO, *A Handbook on the WTO Dispute Settlement System*, page 104.

authorities was proper, and whether their evaluation of those facts was unbiased and objective. If that is the case, the panel must accept the anti-dumping determination, even though the panel itself might have reached a different conclusion about those facts.

Since the establishment of WTO in 1995, there have been approximately 60 disputes in the DSB regarding anti-dumping measures.<sup>36</sup>

### **3.1.2.1 Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico**

This case (WT/DS60/AB/R) was the first Appellate Body decision regarding the AD Agreement. The case deals largely with procedure and jurisdiction.

Mexico requested an establishment of a panel after failed consultations with Guatemala with respect to an anti-dumping investigation commenced by Guatemala regarding imports of Portland cement from Mexico. Mexico alleged that the investigation was in violation of Guatemala's obligations under Articles 2, 3, 5 and 7.1 of the AD Agreement.

The Panel found that Guatemala had failed to comply with the requirements of Article 5.3 of the AD Agreement by initiating the investigation on the basis of evidence of dumping, injury and causal link, because this evidence was not 'sufficient' as a justification for initiation.

Guatemala appealed certain issues and legal interpretations developed by the Panel. The Appellate Body reversed the Panel's findings that the dispute was properly before the Panel, on the grounds that Mexico did not comply with Article 6.2 of the DSU in its request for a panel, since Mexico did not identify the measure against which it was complaining.

The Appellate Body also pointed out that the AD Agreement and the DSU must be read together. Article 17 of the AD Agreement does not replace the DSU system; it only limits the types of measures that may be referred as part of a 'matter' to the DSB. When read together with Article 6.2 of the DSU this provision requires a panel request in a dispute brought under the AD Agreement to identify, as the specific measure at issue, a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure.<sup>37</sup>

### **3.1.2.2 United States – Anti-Dumping Act of 1916**

Two panels were established to consider claims by the EC and Japan that the '1916 Act' was inconsistent with United States' obligations under the WTO. The 1916 Act allowed, under certain conditions, civil actions and criminal proceedings to be brought against importers who had sold foreign-

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<sup>36</sup> [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm) (070102).

<sup>37</sup> Article 17.4 of the AD Agreement.

produced goods in the United States at prices which were ‘substantially less’ than the prices at which the same products were sold in a relevant foreign market.

The Panel concluded that it had jurisdiction to hear the case and found that that the United States violated Article VI of the GATT 1994 and the AD Agreement. The violation originated in the United States’ use of civil actions and criminal proceedings, when Article VI of the GATT and the AD Agreement set forth the exclusive remedies for dumping.<sup>38</sup> The Appellate Body upheld the Panel’s findings and recommended the DSB to request the United States to bring the 1916 Act into conformity with its obligations under the WTO.

The United States appealed certain issues of law and legal interpretations developed by the Panel to the Appellate Body (WT/DS136/AB/R, WT/DS162/AB/R).

The United States argued that the 1916 Act is an internal measure, and therefore is not subject to either Article VI of the GATT 1994 or the AD Agreement. The EC, on the other hand, argued that Article VI and the AD Agreement establish an exclusive discipline for WTO Members to use in dealing with dumping and an exclusive remedy: anti-dumping duties. The United States also argued that Article 17.4 of the AD Agreement is the exclusive basis for dispute settlement jurisdiction under the AD Agreement, and that the AD Agreement requires that at least one of the three measures provided therein is in place to be able to bring the case to the DSB. These measures were not in place in this case according to the United States, and the 1916 Act did not cover these types of remedies, which were associated with anti-dumping measures. Therefore, the 1916 Act could not be challenged in the DSB according to the United States.

The Appellate Body confirmed that the Panel had the power to deal with claims against legislation as such, if the legislation was ‘mandatory’, and rejected the arguments of the United States on this issue.

The Appellate Body found that the intent of Article 17.4 in the AD Agreement is to limit interim review of national anti-dumping measures, not to prohibit review of anti-dumping legislation as such. This is confirmed by Article 18.4, which imposes an affirmative obligation on each Member to bring its legislation into conformity with the provisions of the AD Agreement. Article 18.1 contains a prohibition on “specific action against dumping” when such action is not taken in accordance with the provision of the GATT 1994, as interpreted by the AD Agreement. If specific action against dumping is taken in a form other than that authorised under Article VI of the GATT 1994, as interpreted by the AD Agreement, such action will violate Article 18.1. According to Articles 18.1 and 18.4, a Member may

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<sup>38</sup> The remedies are provisional measures, definitive measures and price undertakings. See Chapter 3.1.1.3 for more detailed information about the measures.

challenge the consistency of legislation as such with the provisions of the AD Agreement.

In light of the definition of ‘dumping’ set out in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the AD Agreement, the civil and criminal proceeding and penalties contemplated by the 1916 Act require the presence of the constituent elements of ‘dumping’ according to the Panel and Appellate Body. The United States appealed the Panel’s finding without success, arguing that Article VI applies only to laws that impose anti-dumping duties.<sup>39</sup>

The applicability of Article VI of the GATT 1994 implies the applicability of the AD Agreement. Article VI, in particular Article VI:2, read in conjunction with the AD Agreement, limits the permissible responses to dumping to definitive anti-dumping measures, provisional measures and price undertakings. Therefore, the 1916 Act was inconsistent with Article VI:2 and the AD Agreement to the extent that it provided for “specific action against dumping” in the form of civil and criminal proceedings and penalties. The United States was requested by the DSB to bring the 1916 Act into conformity with its obligations under Article VI of the GATT 1994 and AD Agreement.

Given the language of Article 18.1 of the AD Agreement, it was difficult for the United States to argue convincingly that the remedies for dumping permitted under Article VI of GATT 1994 and under the AD Agreement are not exclusive.<sup>40</sup>

### **3.1.2.3 United States – Continued Dumping and Subsidy Offset Act of 2000 (the Byrd Amendment)**

This case involved the ‘Byrd Amendment’, the United States Continued Dumping and Subsidy Offset Act of 2000 (WT/DS234/AB/R). The complaining states claimed that the measure imposed by the United States violated the provisions of the AD Agreement and SCM Agreement prohibiting ‘specific action against’ dumping or subsidies.

By operation of the Byrd Amendment, the customs authorities collected the anti-dumping and countervailing duties from foreign producers and deposited them into a special account. After determining which domestic producers were eligible, the funds were distributed. The fees were distributed only to the producers that had participated in filing for investigation of dumping for qualifying expenditures. According to the statute, only domestic producers that had filed the petition were eligible.

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<sup>39</sup> Appellate Body Report (WT/DS136/AB/R, WT/DS162/AB/R), paragraph 16 to 17.

<sup>40</sup> Trachtman, *Decisions of the Appellate Body of the World Trade Organization, United States – Anti-Dumping Act of 1916*, [www.ejil.org/journal/curdevs/sr12.html](http://www.ejil.org/journal/curdevs/sr12.html) (06/11/06).



This measure ensured that the Byrd Amendment benefited domestic producers and their employees.

The Appellate Body found that the Byrd Amendment was a specific action against dumping and subsidies, as it provided disincentives for exporters to dump or receive subsidies.

### **3.1.2.3.1 Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement**

This decision of the Appellate Body referred extensively to the United States – 1916 Act.<sup>41</sup> The Panel determined that ‘specific’ in this context requires that the measure is conditional on a finding of dumping or subsidisation, and ‘against’ means that the measure has an adverse effect on the dumping or subsidisation. The Panel found that the Byrd Amendment was specific because the offset of payments follows automatically from the collection of anti-dumping or countervailing duties. In other words, the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy. The Appellate Body agreed with the Panel on this finding.

It was more difficult to find that the Byrd Amendment was ‘against’ dumping or subsidisation. This parameter had not been at issue in the United States – 1916 Act decision, where it was clear that the United States measure was ‘against’ dumping. Here the offsets did not operate directly against dumping or subsidisation. The Panel found that they operated indirectly against dumping or subsidy by (i) providing subsidies to the domestic producers competing with the producer of the dumped or subsidised import, and (ii) by providing financial incentive for domestic producers to file or support applications for anti-dumping or countervailing duties. The Appellate Body agreed with the first rationale, but disagreed with the second. The Appellate Body found that the United States did not take action ‘against’ dumping or subsidy simply by facilitating or providing incentives for domestic producers to take action under rights consistent with WTO law.

### **3.1.2.3.2 Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement**

The Appellate Body reviewed the argument that the Byrd Amendment violated the provisions of the AD Agreement and the SCM Agreement by providing incentives for domestic producers to join in support of an application for remedies. Interpreting Article 5.4 of the AD Agreement and 11.4 of the SCM Agreement involves an inquiry into the object and purpose of those Agreements. The Appellate Body found no basis in the text of these provisions for examining the motives behind industry support.

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<sup>41</sup> Appellate Body Report, United States – Anti-dumping Act of 1916 (WT/DS136/AB/R, WT/DS/162/AB/R), see chapter 3.1.2.2.

The Panel found that the United States failed to act in good faith in respect to its obligations under Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement. The Appellate Body found that the Panel had insufficient evidence to reach its conclusion that the United States had failed to act in good faith.

Referring to Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement, the Appellate Body agreed with a rather broad understanding of ‘against dumping’ and ‘against a subsidy’ to include measures that are only ‘against’ in an indirect way.<sup>42</sup>

### **3.1.2.3.3 Comments**

I disagree with the Appellate Body that the Byrd Amendment did not violate the standing requirements of Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement by providing an artificial ‘financial incentive’ to file or support dumping or countervail petitions. It must be against the ‘objective’ and ‘purpose’ of the AD Agreement and SCM Agreement to give the filing producer incentive which gives the domestic producer twice as much benefit than if the duties were merely deposited in the special account. Under the AD Agreement, the importing country may impose a duty equal to or less than the margin of dumping found. In practice, authorities usually impose the full margin of dumping found. In this case, the Byrd Amendment gave a double remedy. The anti-dumping action in itself reduced the number of sellers in a market, and increased the concentration ratio; the Byrd Amendment doubled this effect. The Byrd Amendment distorted international trade and domestic production so the invisible hand would ensure that enough domestic producers would support additional trade barriers – which is against the principles of the WTO.<sup>43</sup> The fact that the fees distributed overcompensate the domestic producers involved is particularly relevant, because such distribution then proceeds to distort competition in the market. I assert that the compensation given by the Byrd Amendment is in reality a subsidy to domestic producers.

### **3.1.2.4 Comparison between the United States – 1916 Act and the ‘Byrd Amendment’**

The Appellate Body struck down the 1916 Act not long before the Byrd Amendment became an issue before the WTO. The statute allowed for civil and criminal litigation concerning ‘dumping’ practices. Under the 1916 Act, plaintiffs cannot be sure whether they would benefit from their efforts at all if they sue. Because of the costs, delays, and the uncertainty of the outcome, a producer would not sue unless there was a high probability of winning. However, under the Byrd Amendment, the producers that have filed are

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<sup>42</sup> These are measures that create adverse competitive effects for dumpers and companies benefiting from subsidies.

<sup>43</sup> Youngjin Jung & Sun Hyeong Lee, *The Legacy of the Byrd Amendment Controversies: Rethinking the Principle of Good Faith*, (hereafter Youngjin Jung & Sun Hyeong Lee, page 938).

doubly compensated. First, the imposition of duties on the foreign exporter will ensure a certain level of trade. Then, the distribution of fees will reimburse the domestic producers for costs they have incurred in the production process. In terms of favouring domestic producers, the Byrd Amendment is in fact even more discriminatory than the 1916 Act. The 1916 Act was not restricted to domestic producers. The Byrd Amendment, in contrast, automatically eliminated foreign producers, even those that had not been found to be dumping.<sup>44</sup> Not only does this discriminate, it also violates the national treatment principle, which is one of the main principles of WTO law.

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<sup>44</sup> Youngjin Jung and Sun Hyeong Lee, page 956.

## 3.2 Anti-Dumping under the EC Law

The EU is the only regional trade bloc that is a Member of the WTO in its own right. The EU was not formally a party to the old GATT, but is now a Member of the WTO and represents all EU Member States in trade negotiations. However, all Member States of the EU are also Members of the WTO.

Three levels of hierarchy of norms exist in relation to EC anti-dumping law. The first consists of Article 133 of the EC Treaty, which establishes EC competence for anti-dumping. Paragraph 1 of Article 133 of the EC Treaty specifies that protection against dumping is a component of the EC's common commercial policy. Since the EC competence for commercial policy is exclusive, there is no room for anti-dumping action by Member States. The second level is secondary legislation, like the AD Regulation. The third level is formed by the legal acts taken by the institutions in individual cases, adopted pursuant to the AD Regulation.

As part of the common commercial policy, anti-dumping legislation applies only in relation to third countries. 'Dumping' in trade between EC Member States cannot be subject to anti-dumping measures because of the common market without duties, but it may be sanctioned through EC competition law.<sup>45</sup> This follows logically from the concept of the EC as a customs union with an integrated internal market. Materially, the possibility of levying duties at intra-Community frontiers no longer exists following the completion of the internal market on 1 January 1993, which witnessed the elimination of internal customs borders. Following the principle of the unitary nature of the EC market, anti-dumping protection can, generally, only be applied to the EC as a whole.

EC anti-dumping measures imposed on imports of products originating in a WTO Member country must meet all the applicable procedural and substantive requirements set forth in both Article VI and the AD Agreement. In addition, the EC must also ensure that its basic anti-dumping regulation is consistent with Article VI and the AD Agreement.<sup>46</sup> The Council Regulation 384/96 on protection against dumped imports from countries not members of the European Community (hereafter called the AD Regulation) gives effect to the obligations of the EC under WTO law, and addresses additional issues such as circumvention of anti-dumping measures and Community interest. Only the circumvention and the Community interest will be addressed specifically here, since the other requirements are considered identical with the AD Agreement.<sup>47</sup>

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<sup>45</sup> Article 82 of the EC Treaty.

<sup>46</sup> United States – Antidumping Act of 1916 (WT/DS136/AB/R, WT/DS/162/AB/R) and Van Beal & Bellis, page 511.

<sup>47</sup> For requirements that are identical under WTO and EC law, see the chapters about the Anti-Dumping under WTO law.

### 3.2.1 AD Regulation

The scope for the Member States to initiate anti-dumping investigations against third countries is set forth in AD Regulation. The Regulation applies to “any dumped product”, including agricultural products, but not to services.

The regulation addresses the dumping of products from all countries that are not members of the EC, and does not distinguish between third countries that are members or not members of the WTO. Anti-dumping action against non-WTO members is therefore bound to follow the rules of the AD Regulation.

Anti-dumping measures can be taken only in the framework of a formal proceeding. The AD Regulation establishes the conditions under which a case is investigated and the decision on possible anti-dumping action might be taken. The AD Regulation closely follows the structure, and largely uses the wording of the AD Agreement.

The substantive rules concerning the determination of dumping and injury and the assessment of Community interest are contained in Articles 2, 3 and 21 respectively.

Through the AD Regulation, anti-dumping legislation was completely separated from the countervailing legislation for the first time.<sup>48</sup>

#### 3.2.1.1 Procedural Requirements

The initiation of the proceeding requires a ‘complaint’ to be lodged with the Commission on behalf of the EC industry manufacturing a product which is alike to the dumped product.<sup>49</sup> However, *ex officio* initiations by the Commission without a complaint are possible.<sup>50</sup> ‘Community industry’ means either all Community producers or a major proportion thereof.<sup>51</sup> The complaint must contain evidence of dumping, injury and a causal link between both; the question of Community interest is not considered at the initiation stage. The initiation relates to all imports from a given third country, and not to imports of products manufactured by specific companies.

The European Commission is responsible for the investigations normally performed by the national anti-dumping authorities, and has the power to

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<sup>48</sup> The previous regulations were 3283/94 (dumped imports) and 3284/94 (subsidised imports), which both contained errors and were quickly replaced with the AD and SCM Regulation. Before that, the Council Regulation (EC) 2423/88 was in place, in which the Council adopted common rules for protection against dumped or subsidised imports from countries not members of the EC.

<sup>49</sup> Article 5(1) of the AD Regulation.

<sup>50</sup> Article 5(6) of the AD Regulation.

<sup>51</sup> Article 4(1) and 5(4) of the AD Regulation.

impose provisional measures, accept price undertakings, and terminate proceedings. While the Commission investigates and recommends the anti-dumping duties to be imposed based on its investigations, the Council of the EU has the power to impose definitive anti-dumping duties. In reality, the Council endorses the recommendations of the Commission.<sup>52</sup> The decisions to impose provisional or definitive anti-dumping duties are adopted in the form of a regulation. Such regulations, adopted by the Community institutions, are subject to review by the European Court of Justice (ECJ),<sup>53</sup> though the Court of First Instance (CFI) has had jurisdiction over anti-dumping and anti-subsidy cases since 1993.<sup>54</sup> The ECJ is the court of appeal for cases falling within the jurisdiction of the CFI.

Anti-dumping measures serve to eliminate the injury caused by dumping and are not intended to provide compensation for injury suffered in the past. Provisional duties are destined to prevent injury for the remaining duration of the investigation.<sup>55</sup> Definitive measures can consist of duties (Article 9) or undertakings (Article 8). The choice between duties and undertakings is normally left to the discretion of the institutions. Measures (provisional or definitive) are set at the margin of dumping or the amount necessary to eliminate injury, whichever is lower ('lesser duty rule'). Duties must be fixed at the 'appropriate amounts' and without discrimination between exporters for which injurious dumping has been established.<sup>56</sup> Duties can take different forms (ad valorem, variable or specific), depending on the specifics of the case.

Interested parties have complained about the overall length of investigation, and that a complaint cannot be made until injury has occurred for at least a year or perhaps longer, and therefore injury can be suffered for several years before protection is obtained.<sup>57</sup> Another problem regarding investigations is that with regard to calculation of injury margins in the EC. EC institutions have retained much discretion and adopted ad hoc methodologies so that it is impossible to predict what method will be used. Interested parties should be given an opportunity to challenge the representativeness of the Commission's choice.<sup>58</sup> However, the Commission has adopted a Green Paper on Trade Defence Instruments, which allow the public and interested parties to evaluate the use of trade remedies.<sup>59</sup>

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<sup>52</sup> Egelund Olsen, Steinicke & Engsig Sørensen, *WTO Law – from a European perspective*, (hereafter Egelund Olsen, Steinicke, & Engsig Sørensen), page 385.

<sup>53</sup> Article 230 of the EC Treaty.

<sup>54</sup> Evaluation of EC Trade Defence Instrument, Final Report, December 2005, annex 1, page 5.

<sup>55</sup> Müller, Khan & Neuman, page 283.

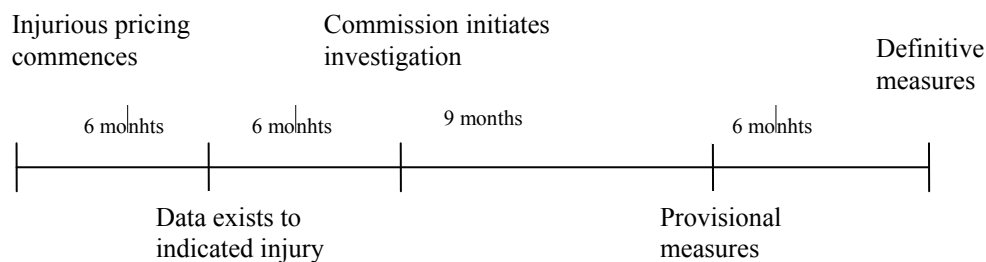
<sup>56</sup> Article 9(5) of the AD Regulation.

<sup>57</sup> Evaluation of EC Trade Defence Instruments, Final Report December 2005, Annex 2, page 11.

<sup>58</sup> Vermulst & Waer, *E.C. Anti-Dumping Law and Practice*, (hereafter Vermulst & Waer), page 359-360.

<sup>59</sup> Replies should reach the Commission by 31 March 2007, [http://ec.europa.eu/trade/issues/respectrules/anti\\_dumping/comu061206\\_en.htm](http://ec.europa.eu/trade/issues/respectrules/anti_dumping/comu061206_en.htm).

Figure 1 illustrates a typical timeline for an anti-dumping investigation.



**Figure 1** Typical Timeline for an Anti-Dumping Investigation

The typical time period from the emergence of an anti-dumping problem to granting of protection for EC industry is 2 years and 3 months.

### 3.2.1.2 Imposition of Anti-Dumping Duties

The imposition of anti-dumping duties under EC law not only requires the fulfilment of criteria corresponding to those established under WTO law,<sup>60</sup> i.e. the product under investigation must be dumped, must cause injury to the domestic industry and a causal link must exist between the dumping and injury. EC law adds a fourth criterion; definitive anti-dumping duties may be imposed if it is clearly in the *interest of the Community* to do so.<sup>61</sup>

The term *Community interest* means that account must be taken to various interests, such as the interests of domestic industry, users and consumers, before taking a decision on anti-dumping duties. Under WTO law, the only interests to be considered are those of domestic producers injured by the dumping of a product. By adding such public interest criteria, on the one hand, the EC anti-dumping regime seems to be less protective, and more the enforcement of an economic theory.<sup>62</sup> On the other hand, the Community interest has also been considered subjective and allowing room for much discretion, which significantly reduces the concrete impact of this provision.<sup>63</sup> The EC anti-dumping regulation emphasises that special consideration should be given to the need for eliminating the trade-distorting effects of injurious dumping, and the need to restore effective competition.<sup>64</sup> In some cases, Community authorities further elaborated upon their reasons and stressed the importance of maintaining viable Community production with a view to, for example, safeguarding employment, avoiding dependency on imports, protecting the environment, or keeping up with technological innovations.<sup>65</sup>

<sup>60</sup> Article 1, 2 and 3 of the AD Regulation.

<sup>61</sup> Article 21.1 of the AD Regulation.

<sup>62</sup> Egelund Olsen, Steinicke & Engsig Sørensen, page 416.

<sup>63</sup> Vermulst, *The 10 Major Problems With the Anti-Dumping Instrument in the European Community*, *Journal of World Trade* 39(1): 105-113, 2005, p112.

<sup>64</sup> Article 21 of the AD Regulation.

<sup>65</sup> Van Bael & Bellis, page 296.

In practice, the possibility of choosing not to impose anti-dumping duties because of Community interest is rarely used. In many cases, the Community interest criterion is used merely to support a finding that injury has occurred or that protective action would alleviate the injury.<sup>66</sup> There are very few cases in which Community authorities have concluded that it would not be in the interest of the Community to impose any measures.<sup>67</sup> In other words, the practice of the Commission shows that the Community interest requirement has played only a minor role so far. Another factor that weakens Community interest as a criterion is that it can be invoked only after, rather than during, the determination of dumping.

Normally the relevant territory for a domestic industry is the territory of a single importing Member country. Where two or more countries have a level of integration, which exhibits the characteristics of a single unified market, the industry in the entire area of integration is considered the domestic industry.<sup>68</sup> A consequence of this provision is that the EC must assess the effect of the dumped imports in relation to production of like products in the entire area of the EC. However, this will only be the starting point, owing to the terms of Article 4.1 of the AD Agreement.<sup>69</sup>

At present, the EC applies approximately 140 anti-dumping measures.<sup>70</sup>

### **3.2.1.3 Circumvention**

Producers of products subject to an anti-dumping duty imposed by national dumping authorities may try to circumvent such measures, for example by redirecting their exports through an intermediate country or by assembling the product in the country of import. Such circumvention deprives the anti-dumping duties of any effect on these products, and violates the imposing Member State's legitimate expectations of compliance with WTO law.

The questions of what constitutes circumvention and to what extent circumvention can be addressed are not clearly defined. For example, the situations referred to may constitute normal business behaviour without involving any attempt to circumvent anti-dumping duties imposed by the importing Member State. Because of this, the WTO Members have not been able to agree on how to address circumvention. However, the issue of circumvention has been addressed under EC law. The current provision on circumvention is Article 13 of the AD Regulation. The general definition reads as follows:

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<sup>66</sup> Van Bael & Bellis, chapter §5.3.

<sup>67</sup> An example of such a case is O.J. 2003 (L133/1), about farmed Atlantic salmon, where the Commission concluded that it was not in the interest of the Community to apply measures and terminated the proceeding.

<sup>68</sup> Article 4.3 AD Agreement and Article XXIV:8(a) of the GATT 1994.

<sup>69</sup> Egelund Olsen, Steinicke & Engsig Sørensen, page 402.

<sup>70</sup> [www.kommers.se/templates/standard2\\_726.aspx](http://www.kommers.se/templates/standard2_726.aspx) (070102).



“...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 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.”

Change in the pattern of trade is not defined in the AD Regulation. Therefore, the Commission has a considerable margin of discretion when determining whether this condition has been fulfilled. Normally a change in the pattern of trade will mean the following:

- a) imports of the product from the country in question will decrease,
- b) an increase in imports of the product from a third country not subject to anti-dumping measures, or an increase in imports of a slightly different product from either a third country or the country in question, or
- c) the product in question may be imported into the EC via a third country with a false origin declaration.<sup>71</sup>

Article 13 of the AD Regulation describes an assembly of operations performed within the Community or in a third country that is considered as circumvention. However, Article 13 does not apply to single actors on the market.<sup>72</sup> If a transaction amounts to circumvention in the manner referred to, it is possible to extend the application of an anti-dumping duty to products or parts of products imported from third countries.<sup>73</sup> The extension of the anti-dumping duty will have retroactive effect from the date on which registration was imposed, or on which guarantees were requested.

The purpose of anti-circumvention measures is to provide relatively quick and effective relief to the industry suffering injury if exporters evade the anti-dumping duties imposed. Anti-dumping circumvention measures are a means of ensuring that imports which should be subject to an anti-dumping duty are indeed subject to such duty. Article 13 of the AD Regulation is an attempt to deal with circumventions, not through a time-consuming and costly new anti-dumping proceeding or a series of ad hoc origin investigations, but with a more simplified procedure allowing for results in a comparatively short period.<sup>74</sup>

Article 13 does not cover undertakings accepted pursuant to Article 8, because the Community institutions can withdraw such undertakings.

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<sup>71</sup> Müller, Khan & Neuman, page 386.

<sup>72</sup> Circumvention by single/individual actors is regulated by the Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.

<sup>73</sup> Article 13(1) of the AD Regulation.

<sup>74</sup> Müller, Khan & Neuman, page 382.

### 3.2.2 Case Law under EC

It should be emphasised that the role of the Court is not to perform the investigation a second time. In anti-dumping matters, the Court essentially makes a review of law, not of facts. In practice, the Court's role in reviewing the legality of anti-dumping measures translates into control by the Court of procedural requirements, particularly those guaranteeing the rights of the defence, and verification of primary facts, while allowing Community institutions a large degree of discretion in their evaluation of primary facts.<sup>75</sup>

The scope of review under Article 230 (4) of the EC Treaty is limited. Most anti-dumping cases are brought before the Court based on Article 230 (4) of the EC Treaty.<sup>76</sup> Measures can be annulled only on the following grounds:

1. lack of competence;
2. infringement of an essential procedural requirement;
3. infringement of the Treaty or of any rule relating to its application (including implementing legislation and since the Nakajima case,<sup>77</sup> the GATT 1994 and AD Agreement); or
4. misuse of powers.

The right to seek a remedy is open to any natural or legal person taking part in institute proceedings. The applicant is not required to be a national of the Community, or to have a domicile or usual residence there.

During 1970-2005, 112 cases regarding anti-dumping have been brought before the CFI and ECJ.<sup>78</sup> Most proceedings have involved action of annulment.

#### 3.2.2.1 Case C- 113/77 – the Ball Bearing Case

NTN TOYO Bearing Company Ltd (Japan; hereafter NTN) brought before the Court under Article 173 (now known as Article 230 of the EC Treaty) of the Treaty, an action against the Council for the annulment of Article 3 of the Council Regulation (EEC) 1778/77 regarding the application of anti-dumping duty on ball bearings and tapered roller bearings originating in Japan. Article 3 provided, with respect to the products manufactured by the major producers, for the collection of the amounts secured by provisional duty.

The Commission introduced a provisional anti-dumping duty for ball bearings, tapered roller bearings and parts thereof originating in Japan. During the procedure initiated by the Commission, the four major Japanese

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<sup>75</sup> Müller, Khan & Neuman, page 543ff.

<sup>76</sup> Vermulst & Waer, page 160.

<sup>77</sup> Case C-69/89, Nakajima All Precision Co. Ltd v. Council of the European Communities.

<sup>78</sup> Evaluation of EC Trade Defence Instruments, Final Report December 2005, annex 7, page 36.

producers, including NTN, gave voluntary undertakings to revise their prices so that the margin of dumping might be eliminated.

A definitive duty was introduced on the products in question and the application regarding the undertakings was suspended. Secured amounts of provisional duty were collected.

The applicants based their application on the claim that Regulation 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community,<sup>79</sup> did not permit the definitive anti-dumping duty to be imposed at the same time that undertakings to revise prices by the producers involved were accepted. They claimed that collection of the amounts secured by provisional duty was possible only within the context of the introduction of a definitive anti-dumping duty.

The court ruled that on the one hand, it is unlawful for one and the same anti-dumping procedure to be terminated through the Commission's acceptance of an undertaking from the exporter or exporters to revise prices at the same time as, on the other, through imposition by the Council, at proposal of the Commission, of a definitive anti-dumping duty. Such a combination of measures, which are by nature contradictory, would in fact be incompatible with the system laid down in the regulation. Therefore, the Court annulled Article 3 of the Regulation (EEC) 1778/77. The annulment did not affect the undertakings given.

Following the Court's decision, the EC's legislation was changed in order to enable separate decisions on the imposition of definitive duty and the collection of provisional duty imposed previously, even when no definitive duty was applied.<sup>80</sup> Article 10(2) of the AD Regulation specifically provides that termination of the investigation without imposition of definitive duties does not preclude the definitive collection of amounts secured by way of provisional duties. However, Article 10(2) requires that dumping and injury are established to collect the provisional duty. In my view, this means that the Ball Bearing case has lost its meaning in this matter, since Article 10(2) overrules the findings in the case. However, the Court justifies the opportunity for exporters and importers to challenge the contested Regulation for collecting provisional duties.

The Court also made it clear that when deciding on definitive anti-dumping duties, the Council has a margin of discretion only to the extent that the Basic Regulation allows for such discretion. Relatively new cases show that the Commission's discretion is rather extensive, especially when determining Community interest. This is shown in Case T-132/01, *Euroalliages and Others v. Commission*. The Court of First Instance found the pleas unfounded and pointed out the extensive discretion of the

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<sup>79</sup> Regulation 459/68 was the current regulation dealing with anti-dumping and countervailing measures at that time.

<sup>80</sup> Beseler & Williams, *Anti-Dumping and Anti-Subsidy Law: The European Communities*, (hereafter Beseler & Williams), page 224.

Commission. The Commission is required to state the reasons for its assessment in a manner sufficiently precise and detailed as to enable the CFI to conduct an effective judicial review of determination. The CFI also confirmed that the Community interest criterion should be taken into account in the framework of an expiry review investigation. In other words, a finding of both dumping and injury does not automatically give rise to the imposition or maintenance of anti-dumping duties.

### **3.2.2.2 Case C-358/89, Extramet Case**

Extramet Industrie SA brought an action against the Council of EC under the second paragraph of Article 173 of the EEC Treaty (now known as Article 230 of the EC Treaty) for the annulment of Council Regulation 2808/89, imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union, and definitively collecting the provisional anti-dumping duty imposed on such products.

Earlier, importers not involved in the proceedings did not have standing to bring an action for annulment under Article 230 of the EC Treaty.<sup>81</sup> However, in this case, the Court allowed an independent importer, Extramet, in very special circumstances to bring an action. The reasons were the following:

- Extramet was individually affected by the Regulation imposing duty, because it was the largest importer of the product and also processed the product; and
- Extramet was heavily dependent on those importing and processing activities; and
- The main Community producer was Extramet's main competitor.

Extramet put forward four pleas in law, alleging errors in the definition of the like products taken into consideration, the determination of normal value, the determination of the injury suffered by Community industry, and the assessment of the Community interest. The Court examined only the determination of injury suffered by Community industry. Since the Community institutions did not follow the proper procedure in determining the injury, the Regulation was annulled by the Court. One of the reasons for the Court's ruling was that the Community institutions did not consider whether refusal from one of the major suppliers to sell contributed to the injury suffered. In those circumstances, if the imposition of anti-dumping duties had eliminated the imported source of supply, Extramet would have great difficulty in obtaining other supplies of the product in question.

The Extramet case signals a shift in the Court's view toward more willingness to acknowledge admissibility of actions brought by certain

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<sup>81</sup> See e.g. Case C-307/81, *Alusuisse Italia SpA v. Council and Commission of the EC*, where the Court ruled that an independent importer did not have the right to bring a claim.

unrelated importers.<sup>82</sup> However, the Court will only do so under very special circumstances.<sup>83</sup>

The Extramet case showed that the application of a trade remedy for goods produced by a subsidiary in a third country of a Europe-based, multinational company was in the interest of the EC. Application of preferential treatment of certain entities, based on the nationality of the company or on the location of the capital, might not be consistent with MFN and National Treatment.

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<sup>82</sup> Vermulst & Waer, page 155.

<sup>83</sup> Farr, *EU Anti-Dumping Law – Pursuing and Defending Investigations*, page 96.

## 4 Subsidies and Countervailing Measures

When a government gives subsidy to a company that exports its products, there will be different consequences for the interested parties on the import market. The consumers on the import market get lower prices on behalf of the taxpayers in the export country. For the producers on the import market, the consequence can be that they will be “injured” because of the competition. In other words, subsidies can be dangerous for the domestic industry on the import market.

A subsidy is not a direct trade barrier in the sense that it does not prevent trade between countries. Export subsidy can increase international trade, which is in line with the objectives of the WTO, but but can also cause a less negative effect: the subsidy can ‘out-compete’ the domestic production.

A subsidy to a company that sells only on its own home market is not a trade barrier in the sense that it directly hinders a company from a foreign country to sell its products in that country. In reality, the foreign company will have difficulties in competing with the domestic company that gets a subsidy, which will make international trade more difficult. **Export subsidy** (subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on *export performance*) is a more tangible threat to foreign companies, while **local content subsidy** (subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon the *use of domestic over imported goods*) hinders trade between countries. These two categories of subsidies are prohibited because they are designed to directly affect trade, and thus are most likely to have adverse effects on the interest of other Members.<sup>84</sup>

A countervailing duty against a subsidy can be imposed in only one situation, namely when there is an export from the subsidising country to the ‘damaged’ country. Subsidies can, however, injure the industry in a country in two situations where the countervailing duty has no effect. The first situation is when a subsidy makes it harder for foreign companies to compete on the subsidising country’s market. The second situation is when a subsidised company, through the subsidy, gains a competitive advantage on a third country’s market. In these situations, the countervailing duty would not give any effect at all. The damaged country could balance the competition by giving subsidies to its company, but this is not allowed for the same reasons that the second country’s subsidies are not allowed.<sup>85</sup>

From the international trade perspective, subsidy is a problem because it hinders competition on equal conditions. Another important view is that

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<sup>84</sup> Article 3 of the SCM Agreement.

<sup>85</sup> Seth, *WTO och den internationella handelsordningen*, (hereafter Seth), page 261.

countries' ability to give subsidy differs tremendously. Developed countries have greater economic capability to give subsidies to domestic industry, while Least Developed Countries (LDC) and developing countries might not have that ability. From a national perspective, it is often a political objective to give subsidy, for example to help a domestic industry avoid unemployment.

A subsidy can allow a company to offer a lower price than would otherwise be possible. The effect is the same as when a company dumps its prices on the import market. A company's possibility to dump the price on the market can depend on the fact that the company has been given a subsidy. This is the reason why regulation of subsidy and regulation of anti-dumping can be applied to the same phenomena. An important difference between dumping and subsidy is that private parties perform the former action, and governments perform the latter.

In the theory of strategic trade policy, subsidy is an instrument a government uses to strengthen its country's economy and competitiveness.

## **4.1 Subsidies and Countervailing Measures under the WTO**

The WTO rules on subsidies and countervailing measures regulate both the provision of subsidies by WTO Members and the actions Members can take to counter subsidy effects. Under the GATT 1994, subsidies are dealt with under Article VI and XVI, and the imposition of countervailing duties is addressed in Article VI. Detailed rules regulating the conditions of subsidy use are provided for in the Agreement on Subsidies and Countervailing Measures (hereafter called SCM Agreement). The SCM Agreement sets forth the rules, so-called multilateral disciplines, regarding whether or not a Member may provide a subsidy. These rules are enforced through invocation of the WTO dispute settlement mechanism. Countervailing measures consist of duties imposed by a Member as a unilateral instrument, which may be applied by a Member after an investigation by that Member and a determination that the criteria set forth in the SCM Agreement are satisfied.

The SCM Agreement also establishes the Committee on Subsidies and Countervailing Measures, which provides a forum for consultation for Members on any matter relating to the operation of the SCM Agreement.<sup>86</sup> One of the main responsibilities of the Committee on Subsidies and Countervailing Measures is perform surveillance, by examining notifications provided by Members relating to subsidies granted and countervailing actions taken.

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<sup>86</sup> Article 24 of the SCM Agreement.

The SCM Agreement and Article VI and XVI of the GATT 1994 apply together, and represent the legal framework applicable to imported products subsidised by a WTO Member.

### 4.1.1 SCM Agreement

The SCM Agreement – the Agreement on Subsidies and Countervailing Measures – contains a definition of the term ‘subsidy’. The definition contains the following three basic prerequisites:

- a) a **financial contribution**,
- b) by a **government** or any public body within the territory of a Member,
- c) which confers a **benefit**.

All three of these prerequisites must be satisfied in order for a subsidy to exist.

The concept of ‘financial contribution’ was included in the SCM Agreement only after protracted negotiations. The approach that won the debate was that there could be no subsidy unless there was a charge on the public account. The SCM Agreement requires a financial contribution and contains a list of the types of measures that represent a financial contribution, e.g. grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services, and the purchase of goods. A subsidy can also be any form of income or price support according to Article XVI:1 of the GATT 1994, which gives rise to a benefit. This cross-reference between Article 1 of the SCM Agreement and the GATT 1994 means that the case law originating prior to the SCM Agreement is still valid.

In order for a financial contribution to be a subsidy, it must be made by or at the direction of a government or any public body within the territory of a Member. Thus, the SCM Agreement applies not only to measures of national governments, but also to measures of sub-national governments and of such public bodies as state-owned companies.

A financial contribution by a government is not a subsidy unless it confers a ‘benefit’. In many cases, as in the case of a cash grant, the existence of a benefit and its valuation will be clear. In some cases, however, the issue of benefit will be more complex. Although the SCM Agreement does not provide complete guidance on these issues, the Appellate Body has ruled that the existence of a benefit is to be determined by comparison with the market place (i.e., on the basis of what the recipient could have received in the market).<sup>87</sup> In the context of countervailing duties, Article 14 of the SCM Agreement provides some guidance with respect to determining whether certain types of measures confer a benefit. However, in the context of

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<sup>87</sup> See the Canadian Aircraft case (WT/DS70/AB/R), paragraph 157.



multilateral disciplines, the issue of the meaning of ‘benefit’ is not fully resolved. The concept of ‘benefit’ is discussed in the Canadian Aircraft case.<sup>88</sup>

The basic principle is that a subsidy that distorts allocation of resources within an economy (it can be either the exporting country’s economy or the importing country’s) should be subject to discipline. Thus, only ‘specific’ subsidies are subject to the SCM Agreement disciplines. A subsidy within the meaning of the SCM Agreement is not subject to the Agreement, unless it has been specifically provided to an enterprise or industry, or group of enterprises or industries. There are four types of ‘specificity’ within the meaning of the SCM Agreement:

- Enterprise-specificity. A government targets a particular company or companies for subsidisation;
- Industry-specificity. A government targets a particular sector or sectors for subsidisation;
- Regional specificity. A government targets producers in specified part of its territory for subsidisation;
- Prohibited subsidies. A government targets export goods or goods using domestic inputs for subsidisation.

Where a subsidy is widely available within an economy, such distortion in the allocation of resources is presumed not to occur and the subsidy is not subject to discipline.

#### **4.1.1.1 Categories of Subsidies**

The fact that a specific subsidy exists under the SCM Agreement does not necessarily imply that it is an illegal subsidy. Accordingly, the SCM Agreement differentiates between two categories of subsidies: those that are **prohibited**, and are not allowed in any circumstances, and those that are **actionable**, and can be challenged under the SCM Agreement if the complaining Member can demonstrate the existence of adverse effects. All specific subsidies fall into one of these categories.

##### **4.1.1.1.1 Prohibited Subsidies**

Article 3 of the SCM Agreement prohibits two categories of subsidies. The first category consists of subsidies contingent in law or in fact, whether wholly or as one of several conditions, on export performance (so-called **export subsidies**). A detailed list of export subsidies is annexed to the SCM Agreement.<sup>89</sup> The second category consists of subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods (so-called **local content subsidies**). These two categories of subsidies are prohibited because they are designed to directly affect trade,

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<sup>88</sup> See Chapter 4.1.2.2.

<sup>89</sup> This is in contrast to the WTO’s Agreement on Agriculture, which does not completely prohibit the use of export subsidies on agricultural products, but instead regulate their use.

and thus are most likely to have adverse effects on the interest of the other Members.

If a subsidy is found to be prohibited by a panel under the SCM Agreement, the panel will recommend that the country giving the subsidy withdraw the subsidy immediately.<sup>90</sup>

The scope of these prohibitions is relatively narrow. Developed countries had already accepted the prohibition on export subsidies under the Tokyo Round SCM Agreement, and local content subsidies of the type prohibited by the SCM Agreement were already inconsistent with Article III (national treatment) of the GATT 1947. What is most significant about the new SCM Agreement is the extension of the obligations to developing countries.

#### 4.1.1.1.2 Actionable Subsidies

If a subsidy is not prohibited under the SCM Agreement, Article 5 of the SCM Agreement provides that the subsidy may be actionable if it is a subsidy that meets the requirements of specificity and causes ‘**adverse effects**’ on the interests of the other Members. Unlike prohibited subsidies, the complaining Member must show that the subsidy in question has an adverse effect on its interests; otherwise, the subsidy will be considered permissible. Most subsidies, such as production subsidies, fall in the ‘actionable’ category. The actionable subsidies can be challenged either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interest of another Member. There are three types of adverse effects. First, there is **injury**<sup>91</sup> to the domestic industry caused by subsidised imports in the territory of the complaining Member. This is the sole basis for countervailing action. Second, there is **serious prejudice**<sup>92</sup>. Serious prejudice usually arises because of adverse effects (e.g., export displacement) in the market of the subsidising Member or in a third country market. Thus, unlike injury, it can serve as the basis for a complaint related to harm to a Member’s export interests. Finally, there is **nullification or impairment**<sup>93</sup> of benefits accruing under the GATT 1994. Nullification or impairment arises most typically where the improved market access presumed to flow from a bound tariff reduction is undercut by a subsidisation.

#### 4.1.1.2 Countervailing Measures

Part V of the SCM Agreement sets forth certain substantive requirements that must be fulfilled in order to impose a countervailing measure, as well as in-depth procedural requirements regarding the conduct of a countervailing investigation and the imposition and maintenance of countervailing measures. Failure to respect either the substantive or the procedural

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<sup>90</sup> Article 4.7 of the SCM Agreement.

<sup>91</sup> Article 5 of the SCM Agreement. Note also that injury is defined as material injury, a threat of material injury or material retardation to the establishment of an industry.

<sup>92</sup> Articles 6.1 and 31 of the SCM Agreement.

<sup>93</sup> Article 5(b) of the SCM Agreement.

requirements of Part V can be taken to dispute settlement and may be the basis for invalidation of the measure.

A member may not impose a countervailing measure unless it determines that the following conditions exist:

1. **subsidised imports;**
2. **injury to a domestic industry;** and
3. **a causal link** between the subsidised imports and the injury.

As previously noted, the existence of a specific subsidy must be determined in accordance with the criteria in Part I of the SCM Agreement. The criteria regarding injury and causation are found in Part V.<sup>94</sup> One significant development of the new SCM Agreement in this area is the explicit authorisation of accumulation of effects of subsidised imports from more than one Member, where specified criteria are fulfilled. Part V contains rules regarding determination of the existence of and amount of a benefit. Generally, the existence of a benefit is calculated in terms of commercial benchmarks. The calculation of the amount of a subsidy serves to establish the level of countervailing measure, since no countervailing duty can be levied in excess of the amount of subsidy found to exist.

#### **4.1.1.3 Procedural Requirements**

The SCM Agreement requires that WTO Members notify the Committee on Subsidies and Countervailing Measures on an annual basis of any ‘specific’ subsidy granted or maintained.<sup>95</sup> The notification must be sufficiently detailed to enable other Members to evaluate the trade effects of the subsidy schemes notified and understand their operation. The notification must contain information on the form of the subsidy in question, e.g., whether it is a grant, loan or tax concession; the amount of the subsidy; the policy objective or purpose of the subsidy; the duration of the subsidy; and statistical data to demonstrate that the WTO subsidising member has assessed the trade effects of the subsidy in question.

#### **4.1.1.4 Special and Different Treatment**

The SCM Agreement recognises three categories of developing country Members: least-developed Members (LDC), Members with a GNP per capita of less than \$1000 per year and which are listed in Annex VII to the SCM Agreement, and other developing countries. The lower a Member’s level of development, the more favourable treatment it receives with respect to subsidies disciplines. The two first categories are exempted from the prohibition on export subsidies. Other developing countries have an eight-year period to phase out their export subsidies (they cannot increase the

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<sup>94</sup> In this respect, the substantive elements relating to the determination of injury and a causal link in the SCM Agreement are nearly identical to those under Article 3 of the AD Agreement.

<sup>95</sup> Article 25.2 of the SCM Agreement.

level of their export subsidies during this period). With respect to import-substitution subsidies (so-called local content subsidy, Article 3 (1b) of the SCM Agreement), LDCs have eight years and other developing countries five years, to phase out such subsidies. There is also more favourable treatment with respect to actionable subsidies. For example, certain subsidies related to developing country Members' privatisation programmes are not actionable multilaterally. With respect to countervailing measures, developing country Members' exporters are entitled to more favourable treatment with respect to the termination of investigations, where the level of subsidisation or volume of imports is small. In the Brazil Aircraft case (WT/DS46/AB/R), special treatment for developing countries under Article 27 of the SCM Agreement was discussed.<sup>96</sup>

Article 29 of the SCM Agreement contains specific rules for countries with a plan economy that are moving toward a market economy with free competition, such as China. The SCM Agreement application on countries dominated by state-owned trade and industry is a specific area. This thesis will not examine this area.

## 4.1.2 The Case Law under the WTO

The SCM Agreement is probably the agreement Members violate the most.<sup>97</sup> Subsidies given by the government are part of the economic commercial policy. It is likely that if a country remarks on subsidies given by another country, the first country will be questioned about its own subsidies. Therefore, observance of the Agreement can be compared with the 'glass house problem', and the low number of complaints does not reflect reality.<sup>98</sup>

The SCM Agreement generally relies on the dispute settlement rules of the DSU. The Agreement contains extensive special or additional dispute settlement rules and procedures providing, inter alia, for expedited procedures, particularly in the case of prohibited subsidy allegations. It also provides special mechanisms for the gathering of information necessary to assess the existence of serious prejudice in actionable subsidy cases.

Special rules also exist in the area of prohibited subsidies. When the respondent has not followed the DSB's recommendation within the time period specified by the panel for the withdrawal of the subsidy, the DSB grants authorisation to the complaining Member to take 'appropriate countermeasures'.<sup>99</sup> It is beyond the scope of this thesis to examine such special rules and the rules of the DSU.

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<sup>96</sup> See Chapter 4.1.2.1.

<sup>97</sup> Seth, page 260.

<sup>98</sup> Seth, page 260.

<sup>99</sup> Article 4.10 of the SCM Agreement.

The EU has recently requested the establishment of a panel (WT/DS330) against Mexico on countervailing duties on olive oil imports from the EU. The main legal flaws in the Olive oil case involve the definition and proof of existence of a domestic olive oil industry, the absence of evidence on material injury and causation, and failure to disclose information.

Since the establishment of the WTO in 1995, there have been approximately 20 disputes in the DSB regarding countervailing measures.<sup>100</sup>

#### **4.1.2.1 Brazil – Aircraft**

This case (WT/DS46/AB/R) involved a complaint by Canada regarding certain export subsidies granted under the Brazilian government's Programa de Financiamento às Exportações (PROEX) on sales of aircraft to foreign purchasers of Empresa Brasileira de Aeronáutica S.A. ("Embraer"), a Brazilian manufacturer of regional aircraft. The subsidies, known as 'interest equalization subsidies', involved payments by PROEX of part of the interest charged in connection with financing of sales by Embraer. The payments were made in the form of bonds issued by PROEX to the financing institution (NTN-I bonds). The parties agreed that the PROEX payments were subsidies within the meaning of Article 1 of the SCM Agreement, contingent on export performance within Article 3.1 of the Agreement.

In the case, Brazil argued that it benefited from the special exception for developing countries under Article 27.4 of the SCM Agreement. The Panel and Appellate Body found that Brazil did not comply with the conditions for that exception, since Canada was able to satisfy the burden of proof that Brazil had increased the amount of its export subsidies. Brazil also argued that its subsidy programme was exempted under item (k) of the Illustrative List of Export Subsidies annexed to the SCM Agreement. The Appellate Body found that Brazil's measure did not comply with the conditions of any possible exemption, because it was "used to secure a material advantage in the field of export credit terms" within item (k).

##### **4.1.2.1.1 Burden of Proof under Article 27.4 (Special and Differential Treatment of Developing Country Member) of the SCM Agreement**

Canada appealed the Panel's finding that the complaining party has the burden of demonstrating that the developing country Member has not complied with at least one of the elements in Article 27.4. Canada asserted that Article 27.4 is in the nature of a conditional exception or an affirmative defence for a developing country Member, and therefore the burden of proof rests with the respondent developing country Member – in this case Brazil. Brazil, on the other hand, argued that the complaining party has the burden of proving that the developing country Member does not comply with

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<sup>100</sup> [www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_subjects\\_index\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_subjects_index_e.htm) (070102).

Article 27.4.<sup>101</sup> The developing country Member must fulfil certain obligations under Article 27.4 to benefit from this special and differential treatment during the transitional period. On reading paragraphs 2 (b) and 4 of Article 27 together, it is clear that the conditions set forth in paragraph 4 are *positive obligations* for developing country Members, *not* affirmative defence.<sup>102</sup> If a developing country Member complies with the obligation in Article 27.4, the prohibition on export subsidies in Article 3.1 (a) simply does not apply. If the developing country Member does not comply with those obligations, Article 3.1 (a) does apply.

For these reasons, the Appellate Body agreed with the Panel that the burden was on the complaining party (in this case Canada) to demonstrate that the developing country Member (in this case Brazil) was not in compliance with at least one of the elements set forth in Article 27.4. If such non-compliance was demonstrated, the prohibition of Article 3.1 (a) applies to that developing country Member.

#### **4.1.2.1.2 Had Brazil Increased the Level of its Export Subsidies?**

Brazil appealed the Panel's finding that actual expenditures, rather than budgeted amounts, make up the 'proper point of reference' for determining whether Brazil has increased the level of export subsidies. Brazil also appealed the Panel's finding that PROEX subsidies for regional aircraft were 'granted' when the NTN-I bond was issued, not when the letter of commitment was issued.

In the Appellate Body's view, the Panel reached the correct conclusion, but based it on faulty reasoning.<sup>103</sup> For the purpose of Article 27.4, the Appellate Body concluded that the export subsidies for regional aircraft under PROEX were 'granted' when all the legal conditions that entitle the beneficiary to receive the subsidy had been fulfilled. The Appellate Body shared the Panel's view that such an unconditional legal right existed when the NTN-I bond was issued. The export subsidies under PROEX had not been 'granted' when the letter of commitment was issued because at that point, the export sales contract had not yet been concluded, as the Brazilian government argued.

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<sup>101</sup> In *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R), the Appellate Body stated that "the burden of proof rests upon the party...who asserts the affirmative of a particular claim or defence".

<sup>102</sup> Appellate Body's Report, paragraph 140.

<sup>103</sup> The Panel tried the issue of whether and when there is a 'subsidy' within the meaning of Article 1.1 of the SCM Agreement. According to the Appellate Body, this was unnecessary since both parties had already agreed that export subsidies existed.

#### 4.1.2.1.3 Were PROEX Interest Rate Equalisation Payments Used “To Secure a Material Advantage in the Field of Export Credit Terms”?

Brazil appealed the Panel’s conclusion that Brazil had failed to demonstrate that PROEX payments were not “used to secure a material advantage in the field of export credit terms”.

Having determined that Brazil did not comply with the provisions of Article 27.4, the Appellate Body concluded that the prohibition of Article 3.1 (a) applied to Brazil in this case. The Appellate Body therefore had to examine Brazil’s appeal of the finding of the Panel relating to Brazil’s alleged ‘affirmative defence’ under item (k) of the Illustrative List.<sup>104</sup>

The issue here was whether the export subsidies for regional aircraft under PROEX were “used to secure” for Brazil “a material advantage in the field of export credit terms”. The OECD Arrangement establishes minimum interest rate **guidelines** for export credits supported by its participants (‘officially-supported export credits’). The Appellate Body used the OECD Arrangement as an appropriate comparison to determine whether a payment was ‘used to secure a material advantage’, within the meaning of item (k). The comparison was made between the actual interest rate applicable in a particular export sales transaction after deduction of government payment (the ‘net interest rate’) and the relevant CIRR.<sup>105</sup> The fact that a particular net interest rate is below the relevant CIRR is a positive indication that the government payment in that case has been ‘used to secure a material advantage in the field of export credit terms’. Brazil had to establish a prima facie case that the export subsidies for regional aircraft under PROEX did not result in net interest rates below the relevant CIRR. However, Brazil did not provide any information to the Panel on this point. The Appellate Body found that Brazil failed to meet its burden of proving that export subsidies for regional aircraft under PROEX were not “used to secure a material advantage in the field of export credit terms” within the meaning of item (k) of the Illustrative List.

The Appellate Body recommended the DSB to request Brazil to bring its measures found in this Report into conformity with the provisions in the SCM Agreement. Brazil was also recommended to withdraw its export subsidies for regional aircraft under PROEX. Brazil did not fully do so, and Canada requested an establishment of a panel under Article 21.5 of the DSU. The subsequent Panel and the Appellate Body under Article 21.5 of the DSU found that Brazil failed to implement the recommendation of the DSB given in Brazil – Aircraft, and that Canada was allowed appropriate countermeasures.<sup>106</sup>

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<sup>104</sup> Appellate Body Report (WT/DS/46/AB/R), paragraph 165.

<sup>105</sup> CIRR is the minimum commercial rate available in that range of a particular currency under the OECD Arrangement.

<sup>106</sup> Brazil – Export Financing Programme for Aircraft Recourse by Canada to Article 21.5 of the DSU (WT/DS46/AB/RW).

#### 4.1.2.1.4 Comments

This decision engages a deep interpretation of the SCM Agreement. It elaborates upon the allocation of the burden of proof as to matters that are not necessarily clear exceptions, or affirmative defences. It explores the understanding of the definition of subsidies, by comparing export credits to other export credits under item (k) of the Illustrative List, rather than comparing export credits to unsubsidised financing.<sup>107</sup>

This case also gives rise to the issue of the nature of the relationship between the Illustrative List and Article 3.1(a) of the SCM Agreement. An *illustrative example*: at present, the subsidising country A will claim that a practice not fully satisfying certain criteria included in the Illustrative List of export subsidies are not prohibited. As for affected country B, it will counter-claim that the fact that a measure does not fully satisfy these criteria does not mean that the measure is allowed.<sup>108</sup>

The Appellate Body refrained from determining the relationship between the Illustrative List and the prohibition of Article 3.1 of the SCM Agreement. Therefore, we do not know which argument – A or B – is correct.

#### 4.1.2.2 Canada – Aircraft

A panel was established by the DSB to examine certain allegations by Brazil that Canada or its provinces had granted subsidies to support the export of civilian aircraft, inconsistent with Canada's obligation under Article 3.1(a) and 3.2 of the SCM Agreement. Some of the subsidies alleged involved the following: activities of the Export Development Corporation (the EDC); the operation of Canada Account; Technology Partnership Canada (TPC); and Ontario Aerospace Corporation. The Panel found that the measures given by Canada Account and TPC constituted prohibited export subsidies, inconsistent with Article 3.1 (a) and 3.2 of the SCM Agreement. The Panel rejected all of Brazil's other claims. The Appellate Body upheld these findings.

Canada and Brazil both appealed certain issues of law and legal interpretations developed in the Panel Report.

##### 4.1.2.2.1 Interpretation of “Benefit” in Article 1.1(b) of the SCM Agreement

Canada appealed the Panel's legal interpretation of the term 'benefit' in Article 1.1(b) of the SCM Agreement. In Canada's view, the Panel erred by failing to consider the level of contribution by the government (so-called

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<sup>107</sup> Trachtman, *Decisions of the Appellate Body of the World Trade Organization, Brazil – Export Financing Programme for Aircraft*, [www.ejil.org/journals/curdevs/sr2.html](http://www.ejil.org/journals/curdevs/sr2.html). (061106).

<sup>108</sup> Benitah, *The Law of Subsidies under the GATT/WTO System*, (hereafter Benitah), page 141.



‘cost to government’) in connection with its evaluation of the benefit to the recipient. The definition of ‘subsidy’ in Article 1.1 requires both a financial contribution by a government or any public body, and a benefit to the recipient. The Appellate Body started by referring to the ordinary meaning of ‘benefit’. As did the Panel, the Appellate Body confirmed that ‘benefit’ means some form of advantage to the recipient. The Appellate Body confirmed its reading by reference to Article 14 of the SCM Agreement, and although Article 14 by its terms does not apply directly to Article 1.1 of the SCM Agreement, it forms part of the context thereof and suggests that the calculation of the benefit must refer to the recipient. The structure of Article 1.1 as a whole also confirms this interpretation.

The Appellate Body also found the marketplace an appropriate basis for comparison in determining whether a ‘benefit’ had been conferred. The trade-distorting potential of a ‘financial contribution’ can be identified by determining whether the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient on the market. Article 14 of the SCM Agreement supports the Appellate Body’s view that the marketplace is an appropriate basis for comparison.

The Appellate Body therefore found that the Panel did not err in its interpretation of the word ‘benefit’, as used in Article 1.1 (b) of the SCM Agreement.

#### **4.1.2.2.2 Contingent in Fact Upon Export Performance**

Export subsidies as defined in Article 3.1 of the SCM Agreement are prohibited under Article 3.2 of the SCM Agreement. The Panel found that “TPC” assistance to the Canadian regional aircraft industry was “contingent... in fact... upon export performance” within the meaning of Article 3.1 (a) of the SCM Agreement. Canada appealed this finding with motivation that the export orientation of the recipient shall be taken into account as decisive. However, the treaty obligation is imposed on the granting Member and not the recipient. Therefore, focus should not be on the reasonable knowledge of the recipient, as Canada alleged.

Article 3.1 (a) prohibits any subsidy that is contingent upon export performance, whether that subsidy is contingent “in law or in fact”. In the Appellate Body’s view, the legal standard expressed by the word ‘contingent’ is the same for both *de jure* and *de facto* contingency.<sup>109</sup> There is a difference in what evidence may be employed to prove that a subsidy is export contingent. *De jure* export contingency is demonstrated on the basis of the words of the relevant legislation. Proving *de facto* export contingency is a much more difficult task. In the *de facto* case, there is no legal text to rely on. Instead, the existence of this relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the

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<sup>109</sup> Appellate Body Report (WT/DS/46/AB/R), paragraph 167.

subsidy.<sup>110</sup> Recognising the difficulties in demonstrating *de facto* export contingency, the Uruguay Round negotiators provided a standard, set out in footnote 4 of the SCM Agreement, for determining when a subsidy is “contingent ... in fact... upon export performance”. Footnote 4 makes it clear that *de facto* export contingency must be demonstrated by the facts, which depend on the circumstances of that case. Three different substantive elements must be satisfied for determining *de facto* export contingency: first, the “granting of a subsidy”; second, “is...tied to...” and third, “actual or anticipated exportation or export earnings”.<sup>111</sup>

The Appellate Body upheld the Panel’s legal finding that TPC assistance to the Canadian regional aircraft industry was “contingent...in fact...upon export performance” within the meaning of Article 3.1 (a) of the SCM Agreement.

#### **4.1.2.2.3 Drawing Adverse Inferences from Certain Facts**

The issue is whether the Panel erred in law by declining to draw adverse inference from Canada’s refusal to provide information to the Panel, for example about EDC’s debt financing activities.<sup>112</sup>

Brazil alleged that in refusing to comply with the Panel’s request for information about the EDC’s financing of the ASA transactions, Canada acted in disregard of its duties under Articles 3.10 and 13.1 of the DSU. Canada rejected this allegation and submitted two justifications for its failure to provide the requested information. Canada’s first justification was that when the Panel issued its request for information on the EDC’s financing for the ASA transaction, Brazil had not established by other evidence, a *prima facie* case that such financing constituted a prohibited export subsidy under Article 3.1 (a) of the SCM Agreement. The second justification pleaded by Canada was that the information requested by the Panel constituted “business confidential information” and that the Business Confidential Information Procedure adopted by the Panel was not adequate to ensure the protection of such information.<sup>113</sup>

The parties’ arguments and counter-arguments on this issue raise a number of questions with fundamental and far-reaching implications for the entire WTO dispute settlement system. These questions relate to several issues: first, the authority of a panel to request a party to a dispute to submit information about that dispute; second, the duty of a party to submit information requested by a panel; and third, the authority of a panel to draw adverse inference from the refusal by a party to provide requested information.

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<sup>110</sup> Appellate Body Report (WT/DS/46/AB/R), paragraph 167.

<sup>111</sup> Appellate Body Report (WT/DS/46/AB/R), paragraph 170.

<sup>112</sup> This case raised important issues regarding the obligation of parties to provide information requested by the Panel, and the protection of business confidential information. These issues will not be discussed in the thesis since they are beyond its scope.

<sup>113</sup> Appellate Body Report, paragraph 191.

Article 13 of the DSU gives each panel the right to seek information and technical advice it deems appropriate. However, the panel must inform the authorities of that Member country, and the Member shall respond promptly and fully to any request by a panel for such information, the panel considers necessary and appropriate.<sup>114</sup>

An important part of Brazil's appeal with respect to the issue of adverse inference was Brazil's contention that Canada was under a duty to comply with the Panel's request to provide information relating to the EDC's financing of the ASA transaction. Canada denied that it was legally burdened with such a duty. If Members that were requested by a panel to provide information had no legal duty to respond by providing such information, that panel's legal right to seek information under the first sentence of Article 13.1 of the DSU would be rendered meaningless according to the Appellate Body. No Member is free to determine for itself whether the other party has established a prima facie case or defence. That competence is vested in the panel under the DSU.

In the Appellate Body's view, the Panel had the legal authority and the discretion to draw inference from the facts before it – including the fact that Canada had refused to provide information sought by the Panel.<sup>115</sup> The Panel acknowledged that it had the authority to draw such inference, but it declined nonetheless to draw the inference that EDC's financing conferred a 'benefit'. The Panel stated that it did not believe that there was sufficient basis for such an inference. The Appellate Body upheld the Panel's decision and declined Brazil's appeal on this issue.

This decision is important, not only as a contribution to the law of export subsidies, but also for the authorization to the panel to draw adverse inferences from failure to provide requested evidence.

#### **4.1.2.3 Comparison between Brazil – Aircraft and Canada – Aircraft**

These two cases were decided at the same time and involved competition export subsidies provided by the governments of Brazil and Canada. It is important to note that these cases were considered independently, and neither state's export subsidies were considered to counterbalance the subsidies of the other: two wrongs were not permitted to make a right.

A 'counter-subsidy' is a method of ending disputes without using the case law process. It provides short-term political relief for governments subjected

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<sup>114</sup> In *European Communities – Hormones* (WT/DS26/AB/R and WT/DS48/AB/R), the Appellate Body observed that Article 13 of the DSU enables panels to seek information and advice, as they deem appropriate in a particular case. Moreover, in the *Shrimp/Turtle* case (WT/DS58/AB/R), the Appellate Body underscored the comprehensive nature of the authority of a panel to seek information and technical advice from any individual body it may consider appropriate, or from any relevant source.

<sup>115</sup> Appellate Body Report (WT/DS46/AB/R), paragraph 203.

to criticism in their own country, but in the long term, the economic cost of this ‘solution’ is indeed heavy for taxpayers.<sup>116</sup> A ‘counter-subsidy’ justification is based on the supposed political necessity to retaliate. From a legal perspective, the counter-subsidy is as vulnerable as the subsidy it seeks to counteract. A counter-subsidy cannot be justified by arguing that it is a reply to an allegedly illegal subsidy. Article 23 of the DSU states clearly that the legitimate way for a Member dissatisfied with the existence of a subsidy is to have recourse to, and abide by, the rules and procedures of this Understanding. The Brazil – Aircraft case confirmed this view. The only way for a Member to justify the granting of subsidies is to prove that they conform to the SCM Agreement.

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<sup>116</sup> Benitah, page 351.

## 4.2 Subsidies and Countervailing Measures under the EC Law

The intervention powers of Community authorities against ‘unfair trade’ are not restricted to dumped imports. They also encompass subsidised imports. Council Regulation 2026/97 on protection against subsidized imports from countries not members of the European Community (hereafter called the SCM Regulation) currently regulates EC anti-subsidy legislation. The SCM Regulation closely follows the wording of the SCM Agreement, but covers all products. However, subsidies given by EC Member States within the EC market are regulated under the competition law regime of the EC.<sup>117</sup>

The sections in which the SCM Regulation is consistent with the SCM Agreement are not presented here; see Chapter 4.1.1 for more detailed information.

At present, the EC applies approximately 20 countervailing measures.<sup>118</sup>

### 4.2.1 SCM Regulation

Article 2 of the SCM Regulation defines what is meant by a ‘subsidy’. As provided for in Article 3(1), subsidies, as defined in Article 2, may be subject to countervailing measures only if they are ‘specific’ as this term is defined in paragraphs 2 to 4.

The application of countervailing measures requires the following:

1. a product exported from a country outside the EC to a EC Member country is subsidised,
2. the subsidy must cause injury to the domestic industry of the EC,
3. a causal link has been established between the subsidy and the injury, and
4. imposition of countervailing duties must be in the interest of the Community.<sup>119</sup> This fourth requirement is a requirement only under EC law and not WTO law.

Article 5 of the SCM Regulation lays down the general principle, also set out in Article 14 of the SCM Agreement, that the amount of countervailable subsidies shall be calculated ‘in terms of the benefit to the recipient’ which is found to exist during the period of investigation. This provision reversed the approach traditionally applied by the EC institutions, which previously adhered to the ‘cost to the government’ principle.<sup>120</sup> Detailed rules

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<sup>117</sup> Articles 87-89 of the EC Treaty (often referred to as ‘state aid’).

<sup>118</sup> [www.kommers.se/templates/standard2\\_724.aspx](http://www.kommers.se/templates/standard2_724.aspx) (070102).

<sup>119</sup> Article 31 of the SCM Regulation. See also Chapter 3.2.1.2 for information about the community interest.

<sup>120</sup> Compare with the Canada –Aircraft case (WT/DS70/AB/R), see chapter 4.1.2.2.

concerning the calculation of benefit to the recipient are set out in Articles 6 and 7 of the SCM Regulation.

Action may be taken against a subsidy under the SCM Regulation only insofar as the release of the subsidised product for free circulation in the Community causes injury. Article 8 of the SCM Regulation governs the determination of injury in anti-subsidy cases. Injury generally plays the same role in anti-subsidy proceedings as in anti-dumping proceedings. This provision largely corresponds to Article 15 of the SCM Agreement with a few exceptions. The exceptions are the following:

- SCM Regulation includes that ‘past subsidisation or dumping’ may be taken into account, which means that regard may be taken to ‘the fact that an industry is still in the process of recovering from the effects of past subsidization or dumping’;<sup>121</sup>
- SCM Regulation also includes the ‘extent of countervailable subsidisation’, i.e. ‘the magnitude of the amount of countervailable subsidies’;
- duty of care in imposing countervailing measures is not a provision in the Regulation as it is in the SCM Agreement; and
- SCM Regulation provides for special thresholds (de minimis subsidies) for developing countries, while the SCM Agreement does not.

As in the case of anti-dumping proceedings, the imposition of provisional and definitive countervailing duties is warranted under the SCM Regulation only when ‘the Community interest calls for intervention’.<sup>122</sup> So far, there has been only one case where the Commission determined that imposition of a countervailing duty would not be in the interest of the Community despite the existence of subsidisation and injury resulting thereof.<sup>123</sup>

#### **4.2.1.1 Relief**

There are two basic types of relief in anti-subsidy proceedings:

1. imposition of countervailing duties; or
2. acceptance of undertakings.

The SCM Regulation provides for the imposition of two types of countervailing duties:

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<sup>121</sup> This wording seems to allow the authorities to take into account the effects of dumped imports in assessing the injury caused by subsidised imports. This would be a contradiction with Article 15(1) of the SCM Agreement. Van Beal & Bellis, page 556.

<sup>122</sup> Article 31 of the SCM Regulation.

<sup>123</sup> Soya meal (Brazil), 1985 O.J. (L106) 19. This decision indicates that the EC authorities are willing to forsake protective action against subsidies where such subsidies are formally discontinued.

- provisional duties;<sup>124</sup>
- definitive duties.<sup>125</sup>

The principles governing the imposition of countervailing duties are almost the same as those that apply to anti-dumping duties. However, provisional countervailing duties have a maximum period of validity of four months without any possibility of extension (unlike provisional anti-dumping duties which have a maximum period of validity of six months with a possibility of extension to nine months).

Countervailing duties may not exceed the total amount of countervailable subsidies provisionally or finally established. The countervailing duties should be less if a lower duty would be sufficient to remove the injury to the Community interest ('lesser duty rule').<sup>126</sup> The Community Institutions calculate an 'injury margin' in each case.<sup>127</sup> The injury margin will put a cap on the level of the countervailing duty calculated based on the countervailable subsidies. The technique applied by the Commission in anti-subsidy proceedings is the same as that applied in anti-dumping cases. The injury is determined by comparing the export price of the subsidised products with the production costs of the Community production of the like product plus a reasonable profit margin.

Article 16(4) gives the opportunity for a definitive countervailing duty to be imposed with retroactive effect (with a maximum of 90 days prior to the date of application of provisional duties, but not prior to the initiation of the investigation). The wording of Article 16(4) corresponds to Article 20(6) of the SCM Agreement. So far, no retroactive countervailing duty has been imposed by the EC Institutions.

Article 24(1) of the SCM Regulation provides that no product is to be subject to both anti-dumping and countervailing duties to compensate for the same situation arising from dumping or export subsidisation. This issue is of practical importance as a number of anti-subsidy proceedings have covered products which were subject to anti-dumping measures.<sup>128</sup>

Article 32 of the SCM Regulation provides that imposed countervailing duties be immediately suspended or repealed if the imported product becomes subject to any countermeasures imposed by following recourse to the dispute settlement procedures of the SCM Agreement.

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<sup>124</sup> Article 12(1) of the SCM Regulation.

<sup>125</sup> Article 15(1) of the SCM Regulation.

<sup>126</sup> Article 12(1) and 15(1) of the SCM Regulation.

<sup>127</sup> See the Guidelines for the Calculation of the amount of subsidy in countervailing duty investigation, O.J. C 394/6. The Guidelines add to the transparency of the calculation methods, but unfortunately the introductory statement in the Guidelines states that it is not binding for the institutions, which leaves an obvious discretion to the EC authorities to develop ad hoc calculation methods.

<sup>128</sup> See Polyester Fibres Case, O.J. 1991 (L137/8), where an extensive discussion of how to apply the principle set out in Article 24(1) can be found, and Chapter 5.2.

Article 13 of the SCM Regulation offers rules applicable to undertakings in anti-subsidy proceedings. The rules are the same as those governing undertakings offered in anti-dumping proceedings with one important exception. The SCM Regulation provides for undertakings offered by the government of the foreign country in question. Article 13(1) offers the following two types of undertakings:

- the government of the country of origin and/or export agrees to eliminate or limit the subsidy or take other measures regarding its effects; or
- any exporter undertakes to revise its prices or to cease exports to the area in question, as long as such exports benefit from countervailable subsidies, so that the Commission, after consultation, is satisfied that the injurious effect of the subsidies is eliminated. Price increases under such undertakings shall not be higher than necessary to offset the amount of countervailable subsidies, and should be less than the amount of countervailable subsidies as such increases would be adequate to remove the injury to the Community industry.

No country or exporter shall be obliged to enter into such an undertaking.<sup>129</sup>

The restraint placed on a subsidy depends of course on its impact on competition and international trade.

#### **4.2.1.2 National Authorities and Subsidies**

EC Member States have assigned exclusive power to take action against subsidised imports to the Community's institutions.<sup>130</sup> Thus, the Community's institutions have the right to impose countervailing measures on subsidised imports that would cause injury to Community industry if allowed to circulate freely within the Community.

The EC conducts anti-subsidy investigations in co-operation with the Member States,<sup>131</sup> and has the power to impose provisional measures after consulting with or, in case of extreme urgency, after informing the Member States.<sup>132</sup> While the Commission investigates and recommends the measures to be imposed on the basis of its investigations, it is the Council of the European Community which has the power to order the imposition of definitive countervailing duties and to order the definitive collection of provisional duties, after consulting the Advisory Committee.<sup>133</sup>

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<sup>129</sup> Undertakings offered by the government of a third country have been accepted by the Commission in a few proceedings, e.g., Women's shoes, O.J. 1981 (L327).

<sup>130</sup> See the SCM Regulation reference to Article 133 of the EC Treaty.

<sup>131</sup> Article 11(1) of the SCM Regulation.

<sup>132</sup> Article 12(3) of the SCM Regulation.

<sup>133</sup> Article 15(1) of the SCM Regulation.



The imposition of a countervailing duty is adopted in the form of a regulation. Such regulation adopted by the EC institutions is subject to the judicial review of the CFI and ECJ.<sup>134</sup>

The EC Member States play a role in the application and enforcement of EC countervailing measures. First, the Member States are represented in the Advisory Committee, which is consulted by the Commission during the anti-subsidy investigations,<sup>135</sup> and secondly, the customs authorities of the Member States collect the provisional and definitive countervailing duties imposed by the Commission and the Council.

#### **4.2.1.3 Procedure**

Once again, the essential procedural rules applicable to anti-subsidy and anti-dumping proceedings are the same. This chapter will be restricted to those rules that differ from the AD Regulation.

The overall difference is that the provisions in the AD Regulation and SCM Regulation relate to two different natures of practice. Reflecting the nature of anti-subsidy proceedings, the anti-subsidy proceeding involves the policies of foreign governments. Therefore, the SCM Regulation provides for a consultation proceeding prior to the initiation of any investigation, which has no equivalent in the AD Regulation. The SCM Regulation requires the complaint to include evidence with regard to the existence, amount, nature and countervailability of the subsidies in question.

Article 23 of the SCM Regulation, dealing with circumvention, is identical to Article 13 of the AD Regulation, except that it does not contain the equivalent of Article 13(2) regarding the particular issue of assembly operations in the Community or a third country.

### **4.2.2 Case Law under EC**

During the period 1970-2005, only four cases involving countervailing measures have been brought before the Court of First Instance and Court of Justice.<sup>136</sup> The Court's ruling in anti-dumping proceedings can be compared to anti-dumping proceedings since the proceedings are so similar.<sup>137</sup>

#### **4.2.2.1 Case 409/00 Spain v. Commission**

This case between Spain and the Commission concerned state aid. EC law treats state aid as a matter subject to the rules on competition in the EC

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<sup>134</sup> Article 230 of the EC Treaty.

<sup>135</sup> Article 25 of the Regulation 2026/97.

<sup>136</sup> Evaluation of EC Trade Defence Instruments, Final Report December 2005, annex 7, page 36.

<sup>137</sup> See Chapter 3.2.2.

Treaty. Article 87(1) of the EC Treaty prohibits aid granted by a Member State or out of State resources for the benefit of specific companies, which distorts competition and affects trade between the Member States.

The EC and WTO have different approaches to the question of whether a charge on the public account is required for an aid/subsidy to exist. In the Canada – Aircraft case, the Appellate Body denied the relevance of the concept of net-cost-to-government in interpreting the term ‘financial contribution’,<sup>138</sup> whereas in PreussenElektra, the ECJ stated that State resources must be involved in order to claim that state aid exists.<sup>139</sup>

Spain sought under Article 230 of the EC Treaty the annulment of Commission Decision 2001/605/EC on the aid scheme implemented by Spain for the purchase of commercial vehicles under the Cooperation Agreement between the Ministry for Industry and Energy and the Instituto de Crédito Oficial. The Commission argued that the aid was selective as to the scope and beneficiaries, that it distorted competition and affected trade between Member States, and that it was discriminatory. Spain argued that the aid was compatible with Article 87(3c) of the EC Treaty. In arguing that the government measure in question was not selective, Spain claimed that account should be taken to the concept of specific subsidy adopted by the SCM Agreement. The ECJ rejected the argument that the fact that the contested aid might not be considered to be a specific subsidy under the SCM Agreement could narrow the scope of the definition of aid in Article 87(1) of the EC Treaty. According to the Court, the selectivity criteria under EC State aid law have a broader scope than the specificity test under the WTO law on subsidies, and include measures that would not be considered specific under WTO law.

In the application of 87(3c) of the EC Treaty, the Commission has a large degree of discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context. However, the Commission must set out the circumstances in the statement of reasons for its decision, including decisions refusing to declare aid compatible with the common market under Article 87(3c), according to Article 253 of the EC Treaty. The Commission failed to do so. Therefore, Articles 2 and 4 of the Council Decision 2001/605/EC were annulled.

This case corresponds to the findings of the Court in anti-dumping and countervailing decisions by the Court. Once again, the discretion of the Commission is considered to be very broad.

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<sup>138</sup> Canada – Aircraft case (WT/DS/70/AB/R) and chapter 4.1.2.2.

<sup>139</sup> Case C-379/98 PreussenElektra.

# **5 The Relationship between Anti-Dumping Measures and Countervailing Measures**

This chapter will elucidate the difference between anti-dumping and countervailing measures, as well as the differences between WTO and EC law. The effects dumping and subsidy have on the market will be summarised and how the anti-dumping and countervailing measures cumulate with each other and the dispute settlement/court practice in WTO and EC will be reviewed.

People sometimes refer to anti-dumping and countervailing measures as synonymous. Many countries handle the two under a single law, apply a similar process to deal with them, and give a single authority responsibility for investigations. The EC had a single law for both trade remedies until the middle of 1990, when the AD and SCM Regulations were introduced. The Commission investigates both anti-dumping and countervailing proceedings. However, there are differences, though they share a number of similarities. The nature of anti-dumping and countervailing measures is the most obvious difference. Dumping is an action performed by a private party. Subsidy is given by the government or a government agency, by paying out subsidies directly or by requiring companies to subsidise customers.

The provisions governing anti-subsidy proceedings are basically the same as those governing anti-dumping proceedings; for example, the rules in Part V of the SCM Agreement are essentially the same as the rules on imposition of anti-dumping duties in the AD Agreement. The same is true for the AD Regulation and SCM Regulation.

## **5.1 Principal Differences between WTO and EC Regarding Anti-Dumping and Countervailing Measures**

The rules concerning dumping and subsidy under WTO are similar in that they allow a Member State, on its own responsibility, to impose an anti-dumping or countervailing measure against another Member State. The decision to impose a trade remedy does not need to be preceded by a decision from WTO. The law of WTO merely sets out the framework for what is required to impose an anti-dumping or countervailing measure.

The decision to impose an anti-dumping or countervailing measure is made by the affected country, and this might raise questions of the objectivity in the investigation. Even if the decision can be examined afterwards by the

WTO, the injury might already have occurred. The mere threat of imposing an anti-dumping or countervailing duty might affect in particular a smaller country, compelling this country to refrain from giving a permissible subsidy.

In the EC, the Commission imposes provisional measures (both for anti-dumping and countervailing measures), and the Council decides whether the measures shall be definitive. The Member Countries of the EC do not decide whether an anti-dumping or countervailing measure shall be imposed. A decision must first be taken by the Commission or Council.

The application of WTO law presupposes that both countries involved in a dispute are Members to the WTO Agreements. Accordingly, dumping or subsidy occurring between a Member of the WTO and a non-Member country will not be subject to the WTO anti-dumping or anti-subsidy regime. However, nothing prevents WTO Members from adopting similar national anti-dumping and anti-subsidy rules that may be applicable to non-Members. For example, the AD and SCM Regulations apply to all countries that are not Members of the EC, including both WTO Members and non-Members.

The EC is the only WTO Member (at least among the major trading partners) that systematically the principle of a public interest – the Community interest – by taking into consideration the effects of trade remedies on the other affected interested parties operating in the internal market. The community interest test aims ultimately at balancing the economic interests of the different operators on a given market, namely exporters, importers, users and consumers; therefore, it would be more appropriate to call it ‘economic balancing’.<sup>140</sup> Moreover, the calculation of the economic effects of trade remedies is quite complex, and the result is highly questionable for many reasons. In case T-132/01, *Euroalliances and Others v. Commission*, the Court of First Instance stated that an evaluation must include a list of likely consequences both of applying and of not applying the measure proposed both for the interest of the Community industry and for the other interests at stake. The evaluation involves a forecast based on hypotheses regarding future developments, which includes an appraisal of complex economic situations. The Community interest should not focus only on quantitative economic analysis, but should also be based on choices of economic policy in light of the proportionality principle. The WTO anti-dumping and countervailing regime does not require its members to apply a public interest before imposing a measure.

The EC has a special relation to the WTO, since the EC is considered a customs union, and as such shall be treated as a single contracting party. This means that dumping or subsidy between EC Member States is not subject to the WTO anti-dumping or countervailing regime.<sup>141</sup>

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<sup>140</sup> Dordi, *Trade Defence Instruments and Globalizations*, [http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc\\_129811.pdf](http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc_129811.pdf), (001129).

<sup>141</sup> See Article XXIV:1 of the GATT 1994.

## 5.2 Cumulation of Anti-Dumping and Countervailing Measures

No product can be subject to both anti-dumping and countervailing measures, in order to deal with the same situation arising from dumping and subsidisation. Both the WTO and EC law have this approach.

Article VI:5 of the GATT 1994 states that “ No product... shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization”.

The last sentence of Article 14(1) of the AD Regulation states that no product shall be subject to both anti-dumping and countervailing duties for dealing with “one and the same situation arising from dumping or from export subsidization.” If a countervailing duty is already imposed, and if it is also envisaged to impose an anti-dumping duty or vice versa, the authorities must consider whether the imposition of such additional duty is in conflict with these provisions; i.e. whether there is double-counting of the margins on which the countervailing and the anti-dumping duty are based.

Article 24(1) of the SCM Regulation also provides that no product is to be subject to both anti-dumping and countervailing duties to compensate for the same situation arising from dumping or export subsidisation. This issue is of practical relevance, as a number of countervailing proceedings have covered products which were the subject of anti-dumping measures. An extensive discussion of how to apply the principle described in Article 24(1) can be found in Polyester Fibres,<sup>142</sup> where the Commission established a distinction between domestic production subsidies and export subsidies. It is usually the anti-dumping duty that has been adjusted to avoid cumulation with a countervailing duty resulting for export subsidies.<sup>143</sup>

In this context, a distinction must be drawn between subsidies that reduce overall prices on the one hand, i.e. both domestic and export prices, and the export subsidies, which will normally reduce the export price while leaving the normal value unchanged. Countervailing duties against production subsidies (subsidies reducing both domestic and export prices) do not preclude the imposition of anti-dumping duties because the reduction in production costs resulting from such subsidy allows an equal drop in domestic prices and export prices. Such subsidies are therefore neutral in their effect on the dumping margin, because the latter represents the

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<sup>142</sup> O.J. 1991 (L137/8), Commission Regulation (EEC) 1432/91 of 27 May 1991, imposing a provisional countervailing duty on imports of polyester fibres and polyester yarns originating in Turkey (hereafter O.J. 1991 (L137/8)) and O.J. 1991 (L272/3), Council Regulation (EEC) 2834/91 of 23 September 1991, collecting definitively the provisional countervailing duty on imports of polyester fibres and polyester yarns originating in Turkey (hereafter O.J. 1991 (L272/3)).

<sup>143</sup> Van Beal & Bellis, page 563.

difference between normal value and export price.<sup>144</sup> However, the cumulative effect of an anti-dumping duty and a countervailing duty must not exceed the margin necessary to eliminate the injury caused to the Community industry, which will be the result of both dumping and subsidies.

This situation is different with regard to export subsidies because export subsidies will reduce the export price while leaving the normal value unchanged. It is therefore appropriate to impose an anti-dumping duty in conjunction with a countervailing duty only to the extent that the dumping margin exceeds the countervailing margin, and only where the rate of export subsidy does not exceed the injury threshold. An analysis must be performed, by comparing the situations prevailing during the two investigation periods in question. A subsidy, which was only introduced subsequent to the investigation period on which the anti-dumping duty is based, could not, however, have influenced the dumping margin. The duty to countervail such an export subsidy does not need to take into consideration the anti-dumping duty.<sup>145</sup>

To summarise, the logic of this is that an export subsidy has the effect of reducing the export price. If the export price, as a result, is reduced below the level of the normal value, it will create dumping. Thus, applying countervailing and anti-dumping measures in such a situation would be dealing twice with the same issue. While the anti-dumping duties are in force, that part of the countervailing duty which corresponds to the export subsidies which will have influenced the dumping margin, should only be imposed to the extent that it exceeds the anti-dumping duty. This reasoning can be found in the Commission's and Council's Regulation about Polyester fibres and polyester yarns originating in Turkey.<sup>146</sup>

## 5.2.1 The Differences between Anti-Dumping and Competition Law

To determine the existence of dumping according to Article 2.1 of the AD Agreement, it is necessary to 1) determine the *normal value* of the product; 2) determine the *export price* of the product; and 3) compare the normal value and the export price, thereby calculating the *margin of dumping*. If these investigations are made and the conditions are fulfilled, dumping will be found to exist under WTO and EC law. When deciding whether a product is dumped, no reference is made to the reasons why a company chooses to dump its products. This means that a company cannot defend its dumping of a product on the grounds of the underlying causes, such as downturn in the business cycle.

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<sup>144</sup> O.J. 1991 (L137/16), paragraph 67 to 70. Müller, Khan & Neuman, page 430.

<sup>145</sup> O.J. 1991 (L137/16), paragraph 70. O.J. 1991 (L272/9), paragraph 52. Müller, Khan & Neuman, page 430.

<sup>146</sup> O.J. 1991 (L 137/8) and O.J. 1991 (L272/3).

The diverging approaches of EC competition law on the one hand, and WTO law and EC anti-dumping law on the other, also mean that the scope for imposing sanctions for the competitive consequences of price discrimination differs. If export prices are below domestic prices, dumping may be found to exist under anti-dumping law and may be subject to anti-dumping measures. Under EC competition law, such pricing may be prohibited under Article 82, but not because it is characterised as dumping.<sup>147</sup>

While the EC takes a similar approach as the WTO to anti-dumping law directed at third countries, the approach is different under EC competition law. In accordance with Article 82 of the EC Treaty, EC competition law does not penalise dumping unless it is carried out by a company in a dominant position and is characterised as predatory.<sup>148</sup> The intention of the company also plays an important role in determining whether dumping is predatory. EC competition law allows a dominant company to justify dumping a product, provided it proves that the underlying intention is to neither eliminate a competitor nor prevent market access.

Anti-dumping investigations do not look at the nature of the market, as do competition investigations. In competition policy, it is the nature and activities of a company that may be a problem for efficiency or welfare.

The SCM Agreement and the SCM Regulation have divided subsidies into two categories: prohibited and actionable. This differentiation shows an awareness of legislators that the intention of the subsidy given might be conclusive, regardless of whether or not the subsidy should be prohibited. This is different from anti-dumping measures, where the intention of the parties is not reflected at all when imposing a measure.

It is my opinion that some kind of awareness of the intention of the actors on the market should be introduced to the anti-dumping procedure.

## **5.2.2 Developing and Third Countries**

According to Article 15 of the AD Agreement and Article 27 of the SCM Agreement the specific situation of developing countries must be given special regard by developed countries when considering the application of anti-dumping or countervailing measures. This provision is not reflected in the EC's anti-dumping or countervailing legislation, and it is not provided for in conventional EC trade policy. The question is examined in relevant cases on an ad hoc basis. For example, in the Commission Regulation

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<sup>147</sup> Egelund Olsen, Steinicke, & Engsig Sørensen, page 389.

<sup>148</sup> Under Article 82 of the EC Treaty, predatory pricing is presumed to exist when the price of the product is less than the total average variable costs, and is deemed to exist if the price is below average costs, unless the dumping can be objectively justified. Article 82 also requires trade between Member States to be affected. Egelund Olsen, Steinicke, & Engsig Sørensen, page 389.

(EEC) 1432/91 of 27 May 1991, imposing a provisional countervailing duty on imports of polyester fibres and polyester yarns originating in Turkey (O.J. 1991 (L137/8)), Turkey did not fulfil the conditions for the provisions of special and different treatment according to Association Agreement between EEC and Turkey (O.J. 1964, L217). In practice, alternatives to the immediate application of duties against exports from developing countries have rarely been explored. On the contrary, resorting to anti-dumping measures has increased in recent years. Thus, the well-intended provisions of Article 15 became practically obsolete, owing to the absence of precision.<sup>149</sup>

The EC development policy is aimed at increasing the competitiveness of developing countries. There is also the question of hypocrisy, since many investigations and impositions of anti-dumping and countervailing measures are directed at developing countries. The EC provides third countries with aid programmes (some of which assist in the development of manufacturing industries). Is it then acceptable practice to punish those countries by imposing trade remedies when their industries use their competitive advantage over EC companies and export low-cost products to the EC?

In the future, EC trade policy will need to make a clearer distinction between action against illicit dumping and protectionist action. Trade remedies such as anti-dumping and countervailing measures must be strictly limited to unfair practices; otherwise, the EC will act against its international and internal obligations to promote free trade.

### **5.3 What Are Other Reasons to Dump Prices than Unfair Trade?**

Private enterprises often dump products as part of their competition on prices. At the United Nations Conference on Trade and Development in 2003, a list of some of the reasons why companies dump their products was made. The reasons were the following:

- Predatory dumping: “dumping in order to drive competitors out of business to establish a monopoly”;
- Cyclical dumping: “Selling at low prices because of over-capacity due to a downturn in demand”;
- Market expansion dumping: “Selling at a lower price for export than domestically in order to gain market share”;
- State trading dumping: “Selling at low prices in order to earn hard currency”;
- Strategic dumping: “Dumping by benefiting from an overall strategy which includes both low export pricing and

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<sup>149</sup> Fatemi, *Globalization and TDI – A Presentation*, [http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc\\_129813.pdf](http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc_129813.pdf), (061129).



maintaining a closed home market in order to reap monopoly or oligopoly profits”.<sup>150</sup>

As we can see, not all of the reasons result in unfair trade – some are considered normal business behaviour. Nevertheless, occasionally, a subsidy allows a company to dump its prices on the import market.

As WTO law addresses the conduct of its Members and not the conduct of private companies, the WTO anti-dumping regime does not contain any direct prohibition on dumping. The WTO anti-dumping regime merely condemns dumping and focuses on the reaction to dumping by establishing a framework that sets out how and under what circumstances its Members are allowed to react to dumping. Some future multilateral framework on competition policy in the WTO may allow for the introduction of rules directly prohibiting companies from dumping. Within the EC, such a prohibition already exists under Article 82 of the EC Treaty, which prohibits enterprises from abusing a dominant position by means of predatory pricing.

Since price discrimination is so important to the question of dumping, this implies that neither Article VI of the GATT 1994 nor the AD Agreement authorises the application of anti-dumping measures where low export prices are a consequence of social dumping,<sup>151</sup> environmental dumping<sup>152</sup> or exchange rate dumping. The dumping that is condemned under WTO law encompasses all kinds of price discrimination between export markets and domestic markets involving the sale of a product at an export price that is lower than the domestic price. Thus, predatory pricing, international price competition, and intermittent dumping all fall within the scope of the anti-dumping regime and risk being met with measures.<sup>153</sup>

The lower price caused by dumping or subsidy of products will benefit consumers and manufacturers who use the products, as the products can be bought at a lower price. These positive effects are eliminated by the imposition of anti-dumping and countervailing measures. In the same way that competition law aims to protect competition and consumers, it would seem more reasonable to limit the scope of the anti-dumping rules to cases where products are sold at below cost, thus only making it possible to counteract dumping which (in the longer term) has negative economic effects for the consumers. As it stands today, the WTO anti-dumping regime seems more like an instrument for protecting domestic industry than an instrument for securing competition.

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<sup>150</sup> Egelund Olsen, Steinicke & Engsig Sørensen, page 389. I did not manage to find the primary source to the United Nations Conference on Trade and Development, Dispute Settlement, World Trade Organization 2003.

<sup>151</sup> This arises when the product is exported from a country with extremely low wages or poor working conditions compared to those of advanced countries.

<sup>152</sup> This involves the question of applying the concepts of dumping and subsidies to imports produced under inferior environmental standards.

<sup>153</sup> Egelund Olsen, Steinicke & Engsig Sørensen, page 383.

Dumping which is potentially subject to anti-dumping under WTO and EC law presupposes the introduction of a product from one country into the commerce of another country at an export price lower than its domestic price. This means that reverse dumping, where a company sells its products at a lower price in its domestic market than in its export markets, does not fall within the scope of the AD Agreement; within the EC, the situation will fall under Article 82 of the EC Treaty.

Statistical data shows that trade remedies, and in particular anti-dumping, are often applied to goods originating from ‘low wage cost’ developing countries with low competition standards that often result in lower prices.<sup>154</sup>

As we can expect, with manufacturing costs in the EC being higher than outside the EC, many European retailers source products from outside the EC. Imposing punitive duties on these retailers and importers in order to compensate European manufacturers is not the answer, yet that is what the Commission does via its anti-dumping regulation. It seems that rather than utilising anti-dumping measures to combat offensive pricing tactics by companies exporting consumer products to the EC, these measures are instead being used to protect European manufacturers from competitive non-European companies. This can be shown by the increase in anti-dumping cases against products whose import levels have increased.<sup>155</sup>

Dumping can occur only if two conditions are fulfilled. First, the industry must be imperfectly competitive, so that firms have market power. That is, firms must be able to set prices in the domestic or foreign market rather than take prices as given in both markets. Second, markets must be segmented, so that domestic customers cannot easily purchase products sold at a lower price in foreign markets. The “fair price” rule can interfere with normal business practices: a firm may well be willing to sell a product for a loss while it is lowering its costs through experience or breaking into a new market.<sup>156</sup>

## **5.4 Why Has Anti-Subsidy Activity Remained at Low Levels in Comparison to Anti-Dumping?**

The following reasons are given for the relatively low level of countervailing measures activity:

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<sup>154</sup> See the statistical data provided in the Evaluation of EC Trade Defence Instruments, Final Report December 2005.

<sup>155</sup> Eggert, *Observations on the EU Anti-Dumping Regulation FTA Position for the Expert Meeting*, [http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc\\_129812.pdf](http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc_129812.pdf), (001129).

<sup>156</sup> Sapir, *Some Ideas for Reforming the Community Anti-Dumping Instrument*, [http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc\\_129815.pdf](http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc_129815.pdf), (hereafter Sapir) (061129).

- difficulty in making anti-subsidy complaints owing to problems with getting data/information on subsidies in third markets;
- generally low margins, which mean that countervailing duties are low and not worth the trouble of making the complaint and going through the investigation;
- politically sensitive situations within companies, for example where they themselves are receiving subsidies; and
- politically sensitive situations in which “accusations’ are made against a government rather than a competitor, as in anti-dumping.<sup>157</sup>

Even though the level of anti-dumping is higher than the level of imposed countervailing measures the anti-dumping level fluctuates. This owing e.g. the business cycle, general economic recession and trends in distortions in overseas markets. The level of EC anti-dumping activities does appear to have decreased in the past five years. This is probably because the Commission is being careful in order to avoid being challenged in the WTO, and because the use of anti-dumping might facilitate other countries’ anti-dumping actions against EC exports.

The low number of anti-subsidy cases suggests that Community industry has found the relief possibilities offered by anti-dumping actions to be more attractive than those offered by anti-subsidy actions. A large number of anti-subsidy proceedings initiated by the Commission have been coupled with anti-dumping proceedings. The fact that precise information on subsidies offered by foreign countries may be more difficult to gather than information on foreign market prices and the relatively low level of duties imposed may have played a part in the relative lack of popularity of anti-subsidy actions.

Anti-dumping has become the main instrument for dealing with troublesome imports owing to its attractive features: (1) particular exporters can be singled out since WTO rules do not require multilateral application; (2) the action is unilateral, with no compensation nor renegotiation required by WTO rules; (3) the injury test for anti-dumping action tends to be softer than the injury test for safeguard action under Article XIX of the GATT 1994; (4) the rhetoric of the foreign investigation process itself tends to curb imports because of the administrative costs and uncertainty borne by traders.<sup>158</sup>

Nevertheless, in recent years the Commission has experienced increasing difficulties in imposing anti-dumping duties because of persistent pressure from domestic users and consumers.<sup>159</sup>

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<sup>157</sup> Evaluation of EC Trade Defence Instruments, Final Report December 2005, Annex 2, page 3.

<sup>158</sup> Sapir, [http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc\\_129815.pdf](http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc_129815.pdf), (061129).

<sup>159</sup> Sapir, [http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc\\_129815.pdf](http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc_129815.pdf), (061129).

## 5.5 Court Practice

The WTO requires its Members to maintain judicial procedure relating to final determinations and reviews of determinations of imposition of anti-dumping measures and countervailing measures (Article 13 of the AD Agreement and Article 23 of the SCM Agreement). The EC provides judicial review according to WTO obligations through the CFI and the ECJ.

An important difference between the DSB and the CFI/ECJ is that the DSB can examine the EC's application of EC law if it complies with the WTO obligations – not the other way around. This has been done in some cases, for example in EC - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,<sup>160</sup> where the EC sought to defend its practice of 'zeroing'. 'Zeroing' means that the calculation of the average dumping margin includes negative dumping margins at zero, instead of at actual negative amounts. This practice results in artificially high average dumping margins. The Appellate Body found that zeroing is inconsistent with Article 2.4.2 of the AD Agreement, and the EC was requested to bring its practice into conformity with its obligations under the WTO.

Another difference is that the parties in the disputes in the DSB can only be states, since states are Members of the WTO. In practice, it is often private parties lobbying for the state who intervene. In the CFI/ECJ, the parties can be natural or legal persons. Often when it concerns anti-dumping cases, a company claims the annulment of a Commission regulation (provisional measures) or Council regulation (definitive measures).

The nature of the WTO dispute settlement procedure is fundamentally different from court judgements: the WTO is essentially a system of law by consensus. According to the CFI in Case T-162/94,<sup>161</sup> if such a settlement procedure were to be commenced, its results would not be decisive in character but would merely be recommendations to the Community which would not be binding on the Community judicature. CFI is bound only by the judgements of the ECJ.

Some criticism raised against the EC involves the excessive defence exhibited by the CFI when it was asked to verify whether rules had been properly applied or not, in decisions adopted by organs charged with anti-dumping procedures. The cases reviewed in this thesis also show the reluctance of the CFI and ECJ to verify rules. It seems as if the Court is prepared to double-check the work of the Commission and Council in the anti-dumping field, as far as observance of procedural rules is concerned. On the other hand, the Court has shown marked reluctance to check the Commission's interpretations of substantive rules.<sup>162</sup> The Community

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<sup>160</sup> EC – Bed Linen (WT/DS141/AB/R).

<sup>161</sup> Case T-162/94 NMB France SARL, NMB-Minebea-GmbH, NMB UK Ltd and NMB Italia Srl v. Commission of the European Community.

<sup>162</sup> See Chapters 3.2.2 and 4.2.2.

authorities' view of anti-dumping measures as a matter of trade policy, a view endorsed by the Court, automatically entails an additional amount of discretion which further limits review.<sup>163</sup>

The CFI and the ECJ acknowledge the Community institutions' wide margin of discretion, (in particular, that of the Commission) in the framework of anti-dumping and countervailing investigations. Hence, it is rather difficult to win a case against anti-dumping or countervailing regulations unless the Commission has committed a manifest error of appreciation or a procedural mistake.<sup>164</sup>

From the judgement by the Court in Nakajima case,<sup>165</sup> we can draw the conclusion that measures taken by the EC institutions in applying the SCM Regulation and the AD Regulation must comply with the SCM Agreement and AD Agreement. Nevertheless, the applicant, Nakajima, did not manage to prove that the Community institutions did not comply with the provisions under WTO. In the Portuguese Textile case,<sup>166</sup> the Court of Justice clarified the possibility to invoke GATT 1994 provisions in order to claim illegality of Community legislation. In the case, Portugal had brought an action for annulment against a Council decision, approving two Memoranda of Understanding negotiated with India and Pakistan. Portugal relied on the WTO agreements for the annulment of the decision. The Court held that, having regarded the nature and structure of the WTO Agreements, the WTO Agreements could not in principle be used to review the legality of Community acts. However, WTO Agreements could serve as a ground of review if the contested Community measure was intended to implement a particular obligation assumed in the context of the WTO Agreements, or if a Community measure referred to the exact provision of the WTO Agreements.

The importance of anti-dumping and countervailing measures must be evaluated in light of the WTO dispute settlement mechanism's features. In fact, disputes brought before the DSB last quite a long time, and do not satisfy the speed requirements stipulated by international trade (though disputes concerning some subsidies take considerably less time). The disputes do not provide for provisional measures when there are sufficient elements to prove the violation of a WTO rule. Instead, the DSB requests the responsible State to bring its legislation or practice into conformity with the WTO obligations, and to nullify the trade advantages gained by the damaged State from WTO agreements.<sup>167</sup> If the responsible state does not bring its legislation or practice into conformity with the WTO obligations, the damaged State is allowed to take appropriate countermeasures.

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<sup>163</sup> Vermulst & Waer, page 161.

<sup>164</sup> Adamantopoulos & Pereyra-Friedrichsen, *EU Anti-Subsidy Law & Practice*, page 233.

<sup>165</sup> Case C-69/89 Nakajima All Precision. See also chapter 3.2.2.

<sup>166</sup> Case C-149/96, Portuguese Republic v. Council.

<sup>167</sup> WTO, *A Handbook on the WTO Dispute Settlement System*, page 74-80.

## 6 Conclusion

Trade remedies (anti-dumping, anti-subsidy and safeguard) are areas that provoke strong opinion and lively discussion. A wide range of views exist on anti-dumping and countervailing measures. At one end of the spectrum, some people see trade remedies as a critical defence against unfair trade practices and distortions to trade. Others think that trade remedies can be justified only on rare occasions and, to this end, propose that trade remedies should be abolished.

Based on the economic criteria, assessing the economic justification of anti-dumping action would necessitate an analysis of a number of specific circumstances surrounding each case. Such analysis is not required by Article VI of the GATT 1994 or by the rules implementing it. This has been criticised. One should bear in mind that the application of trade remedies is a matter of controversy worldwide, among both economists and policy decision-makers, so it would be unrealistic to expect that dumping and admissible counter-action could be defined in a generally accepted way. In addition, the application of rules governing trade remedies must remain practical.

For policy decision-makers, the discussion on the economic rationale of anti-dumping and anti-subsidy involves only one aspect of the issue. In focusing on the criterion of economic efficiency, there is a danger of losing sight of the political and social dimension of the problem as well as of the key question of fairness.

In the introduction to this thesis, I declared my intention to answer some questions regarding anti-dumping and countervailing measures. I will not repeat all the possible conclusions right here. However, I will briefly summarise the answers and add some personal comments.

The first question was whether the law differs between anti-dumping and countervailing measures. The laws are different, but differences in the nature of the measures is marginal. The laws regulating countervailing duties require more sufficient proof (e.g. the existence of subsidy must be shown) than anti-dumping law, and the procedure is often quicker. This is because the governments perform the subsidisation. It is politically sensitive to bring a claim against another state, and therefore the requirements of evidence are more stringent than those for anti-dumping, an action performed by private parties.

The differences between WTO law and EC law are not many in terms of the substantial rules of anti-dumping and countervailing measures. The differences are almost insignificant, except that WTO law lacks provisions regulating circumvention and the EC law contains such provisions. The EC law must comply with the WTO law. The differences in this area depend on

the EC practice – how the EC authorities interpret the regulations and apply them. As we have seen in case law, the authorities are given extensive discretion, and this makes it difficult to challenge their decisions since the CFI/ECJ is reluctant to examine substantive rules and concentrates mostly on procedural rules.

The third question, what is the logic behind low prices on dumped and subsidised products, are there other reasons to dump prices than unfair trade, is not answered easily; in fact, none of the questions have easy answers, since there are so many perspectives and trade remedies are a politically sensitive area. Nevertheless, the third question dealt with the low price of the products dumped or subsidised. Some of the answers include the following:

- selling at a lower prices for export than domestically in order to gain market share;
- selling at low prices because of over-capacity due to a downturn in demand;
- to drive competitors out of business to establish a monopoly; and
- benefiting from an overall strategy which includes both low export pricing and maintaining a closed home market in order to reap monopoly or oligopoly profits.

When deciding whether a product is dumped, no reference is made to the reasons why a company chooses to dump its products. This means that a company cannot defend its dumping of a product on the grounds of underlying causes, such as a downturn in the business cycle. To balance the imposition of anti-dumping and countervailing measures it would be a good idea to look at the competition law where the intention of the company also plays an important role in determining whether dumping is predatory. EC competition law allows a dominant company to justify dumping a product, provided the company proves that the underlying intention is neither to eliminate a competitor nor prevent market access.

The answer is no to the question of whether one trade remedy consumes the other. Both anti-dumping and countervailing measures can be imposed but only to the extent required to eliminate the injury, and they do not consume another.

The question of why countervailing activities remain at low levels in comparison to anti-dumping activities has already been touched on. Subsidies given by the government are part of the economic commercial policy. One is inclined to believe that if a country remarks on subsidies given by another country, that country will be questioned about its own subsidies. It is also more difficult to initiate a countervailing investigation than an anti-dumping investigation, since the requirement on evidence is higher and it is more difficult to gather evidence against subsidy.

There are a number of differences in court practice between WTO and EC. First, only states can be part of a dispute in the WTO, while natural and legal persons can be part of a dispute in CFI/ECJ. Second, in my opinion, an important difference is that the CFI/ECJ examines the decisions made between the EC and a third country, while WTO examines its Members. This might make the objectivity greater in a dispute in the WTO, since the panel and the Appellate Body do not have any interest in the matter; the ECJ might have an interest, since the CFI/ECJ and the institutions are part of the EC, and therefore their impartiality can be brought into question. The panel also has an extensive authority to gather information needed to make a decision in a case, and is not reluctant to examine substantive rules. The panel and the Appellate Body must interpret the substantial provisions if the provisions are questioned or unclear, since the Members of the WTO are obliged to follow them, and the goal is that the Members interpret and use the provisions in the same way. As we have seen in the case law of the CFI/ECJ, the Court scrupulously checks whether the EC institutions have observed the procedural requirements of the AD Regulation and SCM Regulation. On the other hand, the Court is reluctant to try the substantive rules, and gives the institutions extensive discretion to impose measures. The EC institutions' view of anti-dumping and countervailing measures as matter of trade policy, a view endorsed by the Court, automatically entails an additional amount of discretion, which further limits the review.

The last question involved the issue of using anti-dumping and countervailing measures as tools against competitive imports from abroad. Obviously, unfair trade and dumping do clearly exist and must be condemned. However, plain protectionism under the guise of the fight against unfair trade is also a reality that is all the more unexpected because it emanates from so-called "liberal" countries. This protectionism has become all the more subtle and difficult to identify as dumping and subsidy calculation methods have become more complex, and the standards of evidence difficult to meet. The question demands a return to a common-sense approach. A change can be brought about only by simplification, greater transparency, and as far as the EC is concerned, giving judges access to full fact and authority to review the AD and the SCM Regulations.

It is essential to ensure transparency of anti-dumping and countervailing proceedings and measures, not only in the Community interest but also elsewhere to assure that these measures are used only when unfair trade occurs. The lack of transparency in anti-dumping and countervailing proceedings is by no means a monopoly of the EC authorities, and make it easy to use anti-dumping and countervailing measure for protectionist aims.

I would like to conclude by calling attention to the Green Paper that the European Commission released on 6 December 2006. It presents how the EC can continue to use anti-dumping, anti-subsidy measures, and safeguards to best effect in the European interest. It might be that this public review consultation can lead to a more open procedure for imposing and challenging anti-dumping and countervailing measures. Responses and



comments must be sent to the Commission by 31 March 2007 at: [trade-digreen-paper@ec.europa.eu](mailto:trade-digreen-paper@ec.europa.eu). Information about the Green Paper and public review questionnaire can be found on [http://ec.europa.eu/trade/issues/respectrules/anti\\_dumping/comu061206\\_en.htm](http://ec.europa.eu/trade/issues/respectrules/anti_dumping/comu061206_en.htm).

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