



FACULTY OF LAW  
Lund University

Henrik Olsson

# Circumvention of EC Anti-Dumping Measures

Master thesis  
20 points

Supervisor  
Jur.dr. Carl Michael Quitzow

Field of study  
EC Law and International Trade Law

Semester  
Spring of 1999

# Table of Contents

<b>1</b>	<b>INTRODUCTION.....</b>	<b>2</b>
1.1	BACKGROUND .....	2
1.2	PURPOSE AND QUESTIONS AT ISSUE.....	3
1.3	OUTLINE.....	3
<b>2</b>	<b>THE DEVELOPMENT OF ANTI-DUMPING.....</b>	<b>5</b>
<b>3</b>	<b>THE EC REGULATION OF ANTI-DUMPING.....</b>	<b>7</b>
3.1	INTRODUCTION .....	7
3.2	ADMINISTRATION AND PROCEDURE.....	7
3.3	SUBSTANTIVE RULES.....	9
3.3.1	<i>Determination of Dumping.....</i>	<i>9</i>
3.3.2	<i>Determination of Injury.....</i>	<i>11</i>
3.3.3	<i>Community Interest.....</i>	<i>12</i>
<b>4</b>	<b>CIRCUMVENTION OF ANTI-DUMPING MEASURES .....</b>	<b>13</b>
<b>5</b>	<b>THE EC REGULATION OF ANTI-CIRCUMVENTION AND THERETO RELATED CASES .....</b>	<b>15</b>
5.1	ARTICLE 13 OF THE ANTI-DUMPING REGULATION.....	15
5.2	AN OVERVIEW OF THE CASES.....	16
5.2.1	<i>The Magnetic Discs Case – Terminated.....</i>	<i>16</i>
5.2.2	<i>The Chinese Bicycles Case – Circumvention Found.....</i>	<i>17</i>
5.2.3	<i>The Japanese and Singaporean Weighing Scales Case – Terminated.....</i>	<i>17</i>
5.2.4	<i>The Japanese Weighing Scales Case – Terminated.....</i>	<i>18</i>
5.2.5	<i>The Belarus PFT Case – Circumvention Found.....</i>	<i>18</i>
5.2.6	<i>The Chinese Pocket Flint Lighters Case – Circumvention Found.....</i>	<i>18</i>
5.2.7	<i>The Japanese Television Camera Systems Case – Terminated.....</i>	<i>19</i>
<b>6</b>	<b>PREREQUISITES FOR THE ESTABLISHMENT OF CIRCUMVENTION .....</b>	<b>20</b>
6.1	INTRODUCTION .....	20
6.2	CLASSIC CIRCUMVENTION (ARTICLE 13(2)).....	20
6.2.1	<i>Start or Substantial Increase of Operations.....</i>	<i>21</i>
6.2.2	<i>The 60%-test.....</i>	<i>22</i>
6.2.3	<i>The 25%-test.....</i>	<i>24</i>
6.3	OTHER CIRCUMVENTION (ARTICLE 13(1)).....	25
6.3.1	<i>Explanation of the Term “Like Product”.....</i>	<i>26</i>
6.3.2	<i>Change in the Pattern of Trade.....</i>	<i>27</i>
6.3.3	<i>Insufficient Due Cause or Economic Justification.....</i>	<i>29</i>
6.3.4	<i>Undermining of the Remedial Effects of the Duty.....</i>	<i>31</i>
6.3.5	<i>Evidence of Dumping.....</i>	<i>34</i>
6.4	THE EFFECTS OF A CIRCUMVENTION DETERMINATION .....	34
<b>7</b>	<b>ANTI-CIRCUMVENTION AND THE GATT/WTO.....</b>	<b>36</b>
<b>8</b>	<b>CONCLUSION .....</b>	<b>40</b>
	<b>BIBLIOGRAPHY .....</b>	<b>42</b>
	<b>TABLE OF LEGAL DOCUMENTS.....</b>	<b>45</b>

# 1 Introduction

## 1.1 Background

I would like to begin by explaining why I decided to choose circumvention of EC anti-dumping measures as the topic for this thesis. Anti-dumping is an area of international trade law of great importance that has been attracting a lot of attention over the last few years, and still is. The interest is due both to the fact that it is a developing area of law in many countries, and to the fact that many commentators are questioning the mere existence of anti-dumping rules.<sup>1</sup> Some regard anti-dumping duties as an old-fashioned trade remedy, that should better be substituted by competition laws, and some argue that anti-dumping law and action has degenerated into a more-or-less straight forward protectionism. Nevertheless, as international trade is increasing, so is the number of users of anti-dumping measures. And, as many countries are now being both initiators and targets of anti-dumping actions, it is also increasingly important to have a good understanding of national and international rules of anti-dumping, which is why I chose the field of anti-dumping as the subject of my thesis.

My first idea when choosing a topic for this work was to make a comparative analysis between the European Community's anti-dumping provisions and the GATT/WTO rules on the area from 1994, in order to determine the compliance by the former of the latter. In my research, however, I did not find that much discrepancy of interest between the two bodies of law. It seems like the European Community has quite decently implemented the GATT/WTO rules. What I did come across, was a set of rules in the EC provisions that was not part of the GATT/WTO rules at all. Those were the provisions on anti-circumvention.<sup>2</sup> This caught my interest, and I began to closer examine these anti-circumvention rules that proved to be rather controversial. Consequently, circumvention of the European Community's anti-circumvention measures will be the topic of this thesis.

---

<sup>1</sup> For further discussion see, for example, Cartland, *Antidumping and Competition Policy*; Marceau, *Anti-Dumping and Anti-Trust Issues in Free Trade Areas*, Preface by Brian Hindley; Miranda, *Should Antidumping Laws be Dumped?*; Morgan, *Competition Policy and Anti-Dumping - Is It Time for a Reality Check?*; Niels and ten Kate, *Trusting Anti-Trust to Dump Anti-Dumping - Abolishing Anti-Dumping in Free Trade Agreements Without Replacing it with Competition Law*.

<sup>2</sup> Article 13, Regulation 384/96.

## 1.2 Purpose and Questions at Issue

What I intend to do in this thesis is to describe and analyse different ways in which anti-dumping measures may be circumvented, and what remedies against such behaviour there are within the EC legislation. Foremost, this thesis will describe and analyse the EC anti-circumvention provisions with regard to the jurisprudence that slowly has been developed on the matter. Another object is to illuminate the relationship between the EC anti-circumvention rules and the GATT/WTO anti-dumping legislation.

Anti-circumvention within the EC has been the main subject of legal doctrine only at a few occasions. I did find some sources that were helpful in my research, but most of the literature on the matter was written shortly after the new provisions were implemented in 1994. Therefore, the literature contained mostly speculations on how the provisions would be applied by the Commission and the Council. Now, after the anti-circumvention rules have been in use for some time, we can determine how they have been applied in reality. Therefore, the main emphasis of this work lies on the study of cases.

Consequently, the main questions at issue that I will make an attempt to answer in this thesis are:

- How and why are anti-dumping measures being circumvented?
- What rules are applicable on the circumvention of EC anti-dumping measures?
- What possible problems may arise in the application of those rules?
- How have the rules been applied in practice?
- What is the relationship between the EC anti-circumvention rules and the GATT/WTO regulations on anti-dumping?

## 1.3 Outline

The EC anti-circumvention rules form part of a larger set of rules regulating the matter of anti-dumping. This thesis begins with an explanation of the background and development of anti-dumping from a general perspective, followed by a brief introduction to the system of anti-dumping regulation in the European Community. The purpose of those first two parts is to give the reader some basic knowledge of the system in which the rules of anti-circumvention are working. After that follows a general introduction to the phenomenon of circumvention of anti-dumping measures. That piece is succeeded by a part consisting of a presentation of the main EC anti-circumvention legislation and an overview of thereto related cases. The case law overview is meant to be a reference for the following analysis of the anti-circumvention provisions where the cases are of great importance. Consequently, the case law overview is followed by an analysis of the conditions

necessary to establish circumvention. This is where the main emphasis of the thesis lies. That chapter is succeeded by an examination of the relationship between EC anti-circumvention legislation and GATT/WTO anti-dumping regulation. Finally there will be a conclusion, summarizing the findings of this thesis in combination with some personal comments.

## 2 The Development of Anti-Dumping

The word “dumping” is supposed to originate from Old Icelandic and has been used in the English language since medieval times, usually with a pejorative connotation describing “the act of getting rid of something unwanted quickly, usually rubbish.” Adam Smith is said to have been the first to use the word dumping in relation to international trade, and at the beginning of this century, the term was used to describe situations where goods were exported at cheap prices. It was inferred that the reason for this kind of behaviour was simply that the exporting country wanted to get rid of the product because of its inferior quality.<sup>3</sup>

Today, dumping is traditionally defined as price discrimination between national markets<sup>4</sup> where the reasons for selling a product cheaper in one market than another are not related to differences in cost. This definition requires that there are two or more separate markets. That segregation is often due to government regulation such as tariffs, quotas and technical barriers, but may also be caused by other circumstances, including consumer preferences. The idea is that one market, usually the home market, is isolated from the others, and that the elasticity of demand and supply differ between the two markets.<sup>5</sup> The sellers are therefore to some extent protected from international competition on their domestic market. They are able to dump products on one of the markets, while they can be sure to keep a higher price on their “closed” domestic market.

What is the rationale behind decisions to take recourse to dumping? Well, first of all, dumping is the result of private commercial behaviour, as opposed to selling subsidized goods, which is the result of some form of government intervention. There may be many reasons (other than getting rid of products of inferior quality) why a company would want to dump goods on a particular market, and just a few will be mentioned here. Short term dumping could be used for the purpose of ensuring market entry. Furthermore, in order to maintain employment and production levels, a business may dump the prices on excess production going on export, when there is an economic recession and the domestic demand is shrinking. Another reason, for what is often referred to as predatory dumping, is to drive competitors off the importing market in order to gain monopoly power. Dumping may also be used to absorb exchange rate movements.<sup>6</sup>

---

<sup>3</sup> Beseler and Williams, *Anti-Dumping and Anti-Subsidy Law: The European Communities*, p. 41; Marceau, *Anti-Dumping and Anti-Trust Issues in Free-trade Areas*, p. 7.

<sup>4</sup> Fifteenth Annual Report From the Commission To the European Parliament On the Community's Anti-Dumping and Anti-Subsidy Activities (1996), p. 2.

<sup>5</sup> Beseler and Williams, p. 41-42; Marceau, p. 11-12.

<sup>6</sup> Legal Framework and Rationale of European Community Anti-Dumping and Anti-Subsidy Policy, p. 5-6; Miranda, *Should Antidumping Laws Be Dumped*, p. 256-258.

Although not all economists agree on to what extent dumping is actually harmful, most of them certainly agree that not all kinds of dumping are injurious.<sup>7</sup> The reasons given for actually having anti-dumping provisions in many states' legislation may be that the normal reaction to such behaviour is precluded because of access barriers. Such normal reaction to the low prices of a competitor would be to sell on the latter's domestic market at equally low prices. If no measures are taken, it is said that the businesses of the importing state have to reduce their domestic prices to the level of the dumped import prices or lose market share. Even though users and consumers may benefit from lower prices in the short run, they may lose in the long run if the domestic business is defeated, and the exporter gains a monopoly situation.<sup>8</sup>

Due to industrial expansion and improved transportation, which made large-scale production possible, the use of dumping increased at the end of the nineteenth century. Hence, the first more systematic legal measures against dumping were taken. The first country to adapt national anti-dumping laws was Canada. In 1904 Canada included anti-dumping measures in its Customs Act, and was soon followed by other states, such as New Zealand in 1905, Australia in 1906 and the USA in 1916. After World War I many states further sharpened their anti-dumping provisions which lead the League of Nations to address itself to the problem. The result of all this came in 1948, with the first basic international regulation of anti-dumping measures in the General Agreement on Tariffs and Trade (GATT). After another increase of anti-dumping actions around the world during the 1960s, the first Anti-dumping Code of the GATT was negotiated (The 1967 Agreement on the Interpretation of Article VI). Since then there have been several changes to the Code leading up to the new GATT Anti-Dumping Code<sup>9</sup> which was adopted in Marrakesh following the successful completion of the Uruguay Round in 1994, which established the World Trade Organization (WTO).<sup>10</sup> The new GATT Anti-Dumping Code is binding on all members of the WTO, including the EC.<sup>11</sup>

---

<sup>7</sup> Miranda, p. 258-264.

<sup>8</sup> Legal Framework and Rationale of European Community Anti-Dumping and Anti-Subsidy Policy, p. 5.

<sup>9</sup> Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>10</sup> Beseler and Williams, p. 3-18; Marceau, p. 6-9; Steele, *Anti-Dumping under the WTO: A Comparative Review*, p. 1; Vander Schureren, *New Anti-Dumping Rules and Practice: Wide Discretion Held on a Tight Leash?*, p. 271.

<sup>11</sup> GATT, Analytical Index: Guide to GATT Law and Practice, p. 222.

# 3 The EC Regulation of Anti-Dumping

## 3.1 Introduction

The European Community introduced its first anti-dumping legislation in 1968,<sup>12</sup> and the EC was, until the late 1980s, one of the major users of anti-dumping actions together with Australia, Canada and the United States.<sup>13</sup> Quite a few other developed countries did have anti-dumping legislation as well, but they rarely made use of them.

Recently, many other states have begun to invoke anti-dumping laws. Mexico, New Zealand and South Africa have become significant users of their provisions, just as many of the traditional target countries in Asia have.<sup>14</sup> The EC is still one of the major users of anti-dumping measures,<sup>15</sup> but in recent years, the EC has become quite a common target for such actions as well, since there has been a sharp increase in the number of anti-dumping cases against Member States of the European Union.<sup>16</sup>

As a result of the successful completion of the Uruguay Round, the EC adopted a new anti-dumping regulation in 1994.<sup>17</sup> This was soon amended a couple of times and then in 1995 repealed by Council Regulation 384/96,<sup>18</sup> which now constitutes the EC anti-dumping law. The EC has traditionally stayed close to the language of the GATT codes, and so does Regulation 384/96. With the latest changes, the EC has in many instances just codified what was previously unwritten practice.<sup>19</sup>

## 3.2 Administration and Procedure

The Council and the Commission are the two principal institutions dealing with the

---

<sup>12</sup> Fifteenth Annual Report From the Commission To the European Parliament, p. 3.

<sup>13</sup> Steele, p. 2; Vermulst, *Adopting and Implementing Anti-Dumping Laws - Some Suggestions for Developing Countries*, p. 5.

<sup>14</sup> Steele, p. 3.

<sup>15</sup> In 1997, the EC initiated 45 new investigations and at the end of 1997, the EC had 141 anti-dumping measures in force. (Sixteenth Annual Report From the Commission To the European Parliament On the Community's Anti-Dumping and Anti-Subsidy Activities (1997), p. 5, 7.)

<sup>16</sup> Fifteenth Annual Report From the Commission to the European Parliament, p. 46, 61.

<sup>17</sup> Council Regulation (EC) No 3283/94.

<sup>18</sup> Council Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, as amended by Council Regulation (EC) No. 2332/96.

<sup>19</sup> Vermulst and Waer, *The Post-Uruguay Round EC Anti-Dumping Regulation - After a Pit Stop, Back in the Race*, p. 53.



administration of anti-dumping issues in the European Union. Being the defender of the Community interests in the Council, the Commission is doing the investigatory work in anti-dumping cases.

After a lodging of a complaint alleging dumping, the Commission decides whether an investigation to determine the existence, degree and effect of such behaviour should be opened. The complaint must include evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury. A notice of initiation is subsequently published in the Official Journal. All interested parties, including user and consumer organisations are invited to participate in the proceeding and they have the opportunity to be heard.<sup>20</sup>

The Commission sends questionnaires to exporters and importers of the products concerned, as part of the investigation,<sup>21</sup> but cooperation is entirely voluntary.<sup>22</sup> Still, non-cooperation does have certain consequences. “If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than if it had cooperated.”<sup>23</sup> The Commission will in such a case make its decisions, affirmative or negative, “on the basis of the facts available,”<sup>24</sup> which may be the information provided by the complainant.

If certain substantive requirements are met, the Commission may impose provisional duties and accept undertakings from exporters. A proposal for definitive duties may be put forward by the Commission, to be decided upon by the Council of the European Union by simple majority. An Advisory Committee, consisting of representatives from the Member States, is consulted by the Commission at every stage of a proceeding.<sup>25</sup> The total duration of an investigation is limited to fifteen months.<sup>26</sup>

Anti-dumping measures will normally remain in force for five years<sup>27</sup> and may consist of duties<sup>28</sup> or undertakings<sup>29</sup> concluded with the exporters. Measures are taken on a countrywide basis but individual treatment, i.e. the application of a company specific duty, can be granted to exporters that have cooperated throughout the investigation.

The competence to review anti-dumping cases lies with the Court of First

---

<sup>20</sup> Articles 5(2, 9, 10) and 6(5), Regulation 384/96.

<sup>21</sup> Article 6(2), Regulation 384/96.

<sup>22</sup> Steele, p. 100-101.

<sup>23</sup> Article 18(6), Regulation 384/96.

<sup>24</sup> Article 18(1), Regulation 384/96.

<sup>25</sup> Article 9(4), Regulation 384/96.

<sup>26</sup> Article 6(9), Regulation 384/96.

<sup>27</sup> Article 11(2), Regulation 384/96.

<sup>28</sup> Article 9(4), Regulation 384/96.

<sup>29</sup> Article 8, Regulation 384/96.

Instance and the European Court of Justice in Luxembourg, and for governments of WTO members there is also the possibility of recourse to the WTO dispute settlement mechanism. The European Court of Justice has been criticised for not taking much account of the GATT obligations in its judicial review of anti-dumping determinations. Supposedly the judicial review is undertaken solely from the point of view of domestic law. The European Court of Justice limits its review to determining whether the anti-dumping authorities committed manifest errors in the assessment of the facts, failed to observe the procedural guarantees of anti-dumping law or based their decision on considerations amounting to an abuse of power.<sup>30</sup>

Some steps have recently been taken to improve the “effectiveness, credibility and coherence” of the EC anti-dumping procedures.<sup>31</sup> But European Importers (FTA) want to go further in tightening the conditions necessary to initiate an anti-dumping proceeding and introduce measures in order to avoid “needlessly irritating trading partners and increasing the cost of trade”.<sup>32</sup>

### 3.3 Substantive Rules

#### 3.3.1 Determination of Dumping

The definition of dumping is to be found in Article 1(1) and 1(2) of Regulation 384/96:

1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.
2. A product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.

The *export price* is the price actually paid for the product when sold on export from the exporting country to the Community. In some cases where the export price is unreliable due to an association or an arrangement between the exporter and the importer or a third party, the export price may be constructed. The price at which the imported products are first resold to an independent buyer will then be used, or if there is no such price, any reasonable basis will be used. Adjustments for costs and profits shall be made.<sup>33</sup>

---

<sup>30</sup> Akakwam, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, p. 288-289.

<sup>31</sup> Commission Approves Improvements in Anti-Dumping Procedures Proposed by Sir Leon Brittan, p. 12.

<sup>32</sup> European Importers (FTA) Consider That the Conditions Necessary to Initiate an Anti-Dumping Proceeding and Introduce Measures Need Tightening, p. 15.

<sup>33</sup> Article 2(8-9), Regulation 384/96.

Article 2(1) provides that the *normal value* normally shall be based on the prices paid, in the ordinary course of trade, by independent customers in the exporting country. In certain cases, either a constructed normal value based on the cost of production plus a reasonable profit margin, or the export price to a third country, is used instead. This occurs when there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison. A domestic sales volume constituting less than 5% of the volume exported to the EC is normally regarded as insufficient sales, and prices below production costs may be treated as not being in the ordinary course of trade.

When the alleged dumper is situated in a non-market economy country, the normal value is based on a price or constructed value in a market economy third country, or the price from such a third country to other countries. The rationale behind this rule, is that heavy state control and the absence of meaningful market signals makes it impossible to calculate value according to standard domestic prices in non-market economies.<sup>34</sup> The Council recently removed the label of non-market economy for Russia and China, two of the traditional targets of this label. The new rules allow domestic price information to be used in cases where the existence of market economy conditions can be verified on a case by case basis. Similar changes had already been introduced for the countries of Central and Eastern Europe.<sup>35</sup>

A comparison is made between the export price and the normal value in order to obtain the dumping margin. This comparison is to be “fair” according to Regulation 384/96. Adjustments are to be made for differences in factors, which are demonstrated to affect prices and price comparability. The factors for which adjustment can be made are: physical characteristics; import charges and indirect taxes; discounts, rebates and quantities; level of trade; transport, insurance, handling, loading and ancillary costs; packing; credit; after-sales costs; commissions; and lastly, currency conversions.<sup>36</sup> This list used to be exhaustive, but the EC recently inserted a new paragraph 2(10)(k)<sup>37</sup> to incorporate the recommendations of the GATT Panel in the *Audio tapes in cassettes case*.<sup>38</sup> The new paragraph provides an adjustment for differences in other factors not provided for in the list, if it is demonstrated that they affect price comparability.

---

<sup>34</sup> Vermulst and Driessen, *International Trade Developments, Including Commercial Defence Actions in the European Communities XII: 1 July 1996 - 31 December 1996*, p. 367.

<sup>35</sup> Regulation 384/96 as amended by Council Regulation (EC) No 905/98 of 27 April 1998; Commission proposes removal of “non market economy” label for Russia and China, p. 1-2; The regulations regarding normal value are contained in Article 2(1-7).

<sup>36</sup> Article 2(10), Regulation 384/96.

<sup>37</sup> Council Regulation (EC) No 2331/96 of 2 December 1996.

<sup>38</sup> Vermulst and Driessen, *New Battle Lines in the Anti-Dumping War - Recent Movements on the European Front*, p. 135.

When a fair comparison has taken place, adjustments have been made and the export price and the normal value are established, the *dumping margin* is determined by the amount by which the normal value exceeds the export price. The dumping margin is normally to be established on the basis of a comparison of a weighted average export price with a weighted average normal value of all export transactions to the Community.<sup>39</sup> If it is determined that the dumping margin for an individual exporter is less than 2%, expressed as a percentage of the export price, the investigations shall be terminated immediately.<sup>40</sup>

### 3.3.2 Determination of Injury

Anti-dumping measures may only be applied if the dumped product causes injury. Injury caused by the dumping of goods is defined as material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry. A determination of injury shall be based on the volume of the dumped imports and the effect of the dumped imports on prices in the Community and the consequent impact of those imports on Community industry.<sup>41</sup>

Article 5(7) provides that proceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Community consumption. Furthermore, if the proceedings are already initiated, injury shall be regarded as negligible where the imports concerned represent less than those same volumes.<sup>42</sup> This market share test is different from the GATT test, which is based on the total imports of the like product in the EC and not on the market share of Community consumption. The EC test will in most cases be more lenient than the GATT test, but if not in a particular case, “the EC Commission presumably would be forced to apply the WTO test because to do otherwise would be an easily challengeable violation of the Agreement”.<sup>43</sup>

All relevant economic factors shall be evaluated in the examination of the impact of the dumped imports on the Community industry concerned. If other factors than the dumped imports are injuring the Community industry at the same time, these factors must not be attributed to the dumped imports.<sup>44</sup>

When imposing anti-dumping duties, the EC applies the “lesser duty rule”, which means that the duties should be set at a level which is adequate to remove the

---

<sup>39</sup> Article 2(11-12), Regulation 384/96.

<sup>40</sup> Article 9(3), Regulation 384/96.

<sup>41</sup> Article 3(1-2), Regulation 384/96.

<sup>42</sup> Article 9(3), Regulation 384/96.

<sup>43</sup> Vermulst and Waer, p. 63-64.

<sup>44</sup> Article 3, Regulation 384/96.

injury.<sup>45</sup> This means that the duties may be set at a lower level than the actual dumping margin found. This actually occurs in many of the Community's cases.<sup>46</sup> The duty is never allowed to exceed the dumping margin.<sup>47</sup>

### **3.3.3 Community Interest**

A final necessary consideration before imposing anti-dumping duties is to determine whether such actions are in the Community interest. The Community interest shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and of users and consumers.<sup>48</sup> It may seem as if there is a good possibility for exporters to avoid the anti-dumping duties when the Community interest is taken account of. However, although the practice of the Community authorities tends to recognize an interest on the part of users or consumers, it is usually not enough to override the interests of the Community industry.<sup>49</sup>

---

<sup>45</sup> Article 9(4), Regulation 384/96.

<sup>46</sup> Trade Policy Review Body - Review of the European Union TPRB's Evaluation, p. 5.

<sup>47</sup> Fifteenth Annual Report From the Commission to the European Parliament, p. 3.

<sup>48</sup> Article 21 and Article 9(4), Regulation 384/96.

<sup>49</sup> Vander Schueren, p. 296.

## 4 Circumvention of Anti-Dumping Measures

Businesses that become subjected to anti-dumping measures will of course try to reduce the negative effects of such measures on their trade. They may focus on other markets than the one where their products suddenly have lost their price advantage, or they may try to find ways of circumventing the anti-dumping measures imposed. Circumvention simply means avoiding or getting around, and hence, in the case of anti-dumping it means avoiding anti-dumping duties which would otherwise be payable. There are numerous ways in which circumvention can occur, and according to the European Community there are at least four different types of circumvention.<sup>50</sup> Those are minor modifications, assembly operations, transshipment and incorrect customs declarations.

A minor modification could consist of a change in the composition or the form of a product. The product, however, keeps its essential characteristics and is sold to similar groups of customers or for similar purposes. An example of circumvention by modification would be to import a chemical product in a form not covered by the anti-dumping order such as in the form of a paste instead of powder. The characteristics and use of the product remains the same, but it would avoid anti-dumping duties.

Circumvention by assembly operations could take place in third countries or in the importing country. Instead of for example importing a product from a country subject to anti-dumping duties, parts or kits of the same product could be shipped to a third country where they are assembled and subsequently forwarded to the importing country. The result would be that the same or a very similar product is sold in the importing country but no anti-dumping duties have been paid.

Transshipment of goods could circumvent anti-dumping duties in a similar manner. Instead of shipping goods for assembly in a third country, it is just shipped via the same country, which is not subjected to anti-dumping measures.

The last type of circumvention that is mentioned is making incorrect customs declarations concerning the origin, tariff classification or value of the imported goods. With this kind of fraudulent behaviour the goods ends up with a different classification, thus avoiding the anti-dumping duties.

In order to meet the strategy of Japanese companies to set up “screwdriver” plants to assemble their products within the EC, in an attempt to avoid anti-dumping duties, the EC launched its first anti-circumvention law in 1987. Many

---

<sup>50</sup> WTO document, G/ADP/IG/W/1, 3 October 1997.

investigations were initiated, but they did not result in much anti-dumping duty being paid.<sup>51</sup> These first anti-circumvention provisions were eventually struck down by a GATT Panel, and the EC stopped using them.<sup>52</sup> When the EC adopted a new anti-dumping regulation in 1994, however, anti-circumvention provisions formed an important part of the anti-dumping system again.

---

<sup>51</sup> Holmes, *Anti-Circumvention under the European Union's New Anti-Dumping Rules*, p. 163-164.

<sup>52</sup> Vermulst and Driessen, *Journal of World Trade*, p. 145.

# 5 The EC Regulation of Anti-Circumvention and thereto Related Cases

## 5.1 Article 13 of the Anti-Dumping Regulation

The EC anti-circumvention rules are now contained in Article 13 of Regulation 384/96. The rules are divided into two different parts depending on what kind of circumvention is being dealt with. One part deals with “classic circumvention”,<sup>53</sup> which refers to circumvention by assembly operations, whereas the other part deals with virtually any other form of circumvention.<sup>54</sup> Although I will further deal with these two forms of circumvention below, I choose to present the text of Article 13(1) and (2) in its entirety in this part as a reference for the following case law overview.

Article 13 provides:

1. Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries of like products, or parts thereof, when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products and there is evidence of dumping in relation to the normal values previously established for the like or similar products.
2. An assembly operation in the Community or a third country shall be considered to circumvent the measures in force where:
  - (a) the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures; and
  - (b) the parts constitute 60% or more of the total value of the parts of the assembled product, except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25% of the manufacturing cost, and
  - (c) the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

---

<sup>53</sup> Holmes, p. 165.

<sup>54</sup> Article 13(1-2), Regulation 384/96.



There have so far been seven proceedings under Article 13, of which three have led to anti-circumvention duties being imposed. Those three cases are *the Chinese bicycles case*,<sup>55</sup> *the Belarus PFT (polyester filament tow) case*<sup>56</sup> and *the Chinese pocket lighters case*.<sup>57</sup>

## 5.2 An Overview of the Cases

The following passages contain brief overviews of each one of the seven proceedings concerning circumvention of EC anti-dumping measures that have come before the Commission. This case law overview is meant to facilitate the reading of the analysis of the anti-circumvention provisions in the following chapter, by providing useful background information.

### 5.2.1 The Magnetic Discs Case<sup>58</sup> – Terminated

The investigation in *the magnetic disks case* was initiated following a request from the Committee of European Diskette Manufacturers (Diskma). They claimed that the anti-dumping measures imposed on 3,5” microdisks originating in Japan, Taiwan and China were being circumvented by imports of the same product from several other countries. Those countries were Canada, Hong Kong, India, Indonesia, Macao, Malaysia, the Philippines, Singapore and Thailand. Allegedly, the microdisks were either transhipped through or assembled in those countries.

For Hong Kong, Indonesia, Malaysia and Thailand, no evidence of transshipments was found. Furthermore, it was established that for each company investigated in those four countries, the parts imported from the countries subject to the anti-dumping duties constituted less than 60% of the total value of the parts of the

---

<sup>55</sup>Council Regulation (EC) No 71/97 of 10 January 1997 extending the definitive anti-dumping duty imposed on bicycles from China to certain bicycle parts from China.

<sup>56</sup>Council Regulation (EC) No 2513/97 of 15 December 1997 extending the definitive anti-dumping duty imposed on polyester staple fibre from Belarus to polyester filament tow from Belarus.

<sup>57</sup> Council Regulation (EC) No 192/1999 of 25 January 1999 extending the definitive antidumping duty, imposed on gas-fuelled, non-refillable pocket flint lighters originating in the People’s Republic of China to imports of certain disposable refillable pocket flint lighters originating in the People’s Republic of China or consigned from or originating in Taiwan and to imports of non-refillable lighters consigned from or originating in Taiwan and terminating the proceeding in respect of imports of non-refillable lighters consigned from Hong Kong and Macao.

<sup>58</sup> Commission Regulation (EC) No 1445/96 of 24 July 1996 terminating the investigation concerning the circumvention of anti-dumping measures imposed on certain magnetic disks (3,5” microdisks) originating in Japan, Taiwan and the People’s Republic of China by imports of the same product from Canada, Hong Kong, India, Indonesia, Macao, Malaysia, the Philippines, Singapore and Thailand.

assembled product. Hence, they all passed the test in Article 13(2)(b) of Regulation 384/96.

The accusations against Canada, India, the Philippines and Singapore were dismissed because of their small market shares of Community consumption.

Finally, the investigation against Macao was terminated since following an investigation by the anti-fraud services of the Commission, it was already decided that anti-dumping duties would be applied retroactively on imports of Chinese microdisks exported from Macao.

### **5.2.2 The Chinese Bicycles Case<sup>59</sup> – Circumvention Found**

*The Chinese bicycles case* covered bicycle parts imported into the European Community from China which were assembled into finished bicycles for sale in the EC. At the time, there was an anti-dumping duty on bicycles from China. Some of the assemblers ordered almost complete bicycles in a disassembled form from the producers in China. To avoid classification of the imported parts as finished bicycles, which would have been subject to the anti-dumping duty, the suppliers spread the parts across different containers, sent them on different dates and even shipped them to different ports. This kind of behaviour was found to constitute circumvention. All of the conditions of Article 13 were fulfilled and the anti-dumping duties were extended to the bicycle parts.

### **5.2.3 The Japanese and Singaporean Weighing Scales Case<sup>60</sup> – Terminated**

In *the Japanese and Singaporean weighing scales case* the Community industry alleged that the anti-dumping duties imposed on imports of electronic weighing scales originating in Japan and Singapore were being circumvented through an assembly operation in the Community. Therefore, the scope of the investigation was to examine whether the conditions of Article 13(2) were fulfilled.

The investigation showed that parts were being assembled in the Community and that the value of those parts was higher than 60% of the total value of the assembled scales.<sup>61</sup> Nevertheless, the investigation was terminated because the value added to the parts brought in, during the assembly, was greater than 25% of the manufacturing cost.<sup>62</sup>

---

<sup>59</sup> Council Regulation (EC) No 71/97.

<sup>60</sup> Commission Regulation (EC) No 984/97 of 30 May 1997 terminating the investigation concerning the circumvention of anti-dumping measures imposed on certain electronic weighing scales originating in Japan and Singapore, by imports of parts thereof assembled in the European Community.

<sup>61</sup> Article 13(2)(b) p 1.

<sup>62</sup> Article 13(2)(b) p 2.

#### **5.2.4 The Japanese Weighing Scales Case<sup>63</sup> – Terminated**

In the second case concerning electronic weighing scales, the Community industry alleged that the anti-dumping duties imposed on scales originating in Japan were being circumvented by imports of the same product assembled in and/or transhipped through Indonesia. The investigation did not produce any evidence of transshipments, but it did prove that Japanese parts were being assembled in Indonesia.

It was found that the average value of the Japanese parts in the assembly operation exceeded the 60% threshold,<sup>64</sup> and that the value added to the parts during the operation was far below the 25% threshold.<sup>65</sup> That result would normally lead to a circumvention finding, but in this case it did not. The Commission took into consideration that the value of Japanese parts brought in dropped far below the 60% threshold at the end of the investigation period. Since the Commission found this level likely to be maintained, they decided to terminate the investigation without extending the anti-dumping duties.

#### **5.2.5 The Belarus PFT Case<sup>66</sup> – Circumvention Found**

*The Belarus PFT case* involved imports of PFT (polyester filament tow) from Belarus, which were subsequently converted into PSF (polyester staple fibre) in the Community, a product subjected to anti-dumping duties. The only difference between PFT and PSF results from a simple cutting process, and they were determined to be essentially the same product. The imports of PSF were almost entirely substituted by imports of PFT following the imposition of a provisional anti-dumping duty on PSF. The Commission did not find any justification for the substitution and the anti-dumping duties were extended to imports of PFT.

#### **5.2.6 The Chinese Pocket Flint Lighters Case<sup>67</sup> – Circumvention Found**

*The Chinese pocket flint lighters case* concerned an alleged circumvention of anti-dumping duties on imports of disposable pocket lighters originating in China. The investigation showed that the Chinese producers of pocket flint lighters had

---

<sup>63</sup> Commission Regulation (EC) No 985/97 of 30 May 1997 terminating the investigation concerning the circumvention of definitive anti-dumping measures imposed on certain retail electronic weighing scales originating in Japan by imports of the same product assembled in and/or transhipped through Indonesia.

<sup>64</sup> Article 13(2)(b) p 1.

<sup>65</sup> Article 13(2)(b) p 2.

<sup>66</sup> Council Regulation (EC) No 2513/97.

<sup>67</sup> Council Regulation (EC) No 192/1999.

added a refill valve to the basic disposable lighter. With this modification the producers hoped to avoid paying anti-dumping duties by having their product classified as a refillable lighter rather than a disposable one. The Commission found the modification to be ineffectual since the lighters were still being treated as disposable lighters by all involved parties. Consequently, the anti-dumping duties were extended to the modified lighters.

Furthermore, the original anti-dumping duty on Chinese disposable pocket lighters was significantly increased in 1995. Immediately after this change there was a major increase in imports of disposable pocket lighters from Taiwan, at the same time as there was a decrease in imports from China. The circumstances around this event were also scrutinized by the Commission in *the Chinese pocket flint lighters case*. It was found that there was no genuine production of such lighters in Taiwan, at least not for export purposes. Because of that, and since there was evidence of falsified certificates of origin, the Commission concluded that the imports from Taiwan had been transhipped through that country but were originating in China. The existing measures were extended also to imports from Taiwan.

In the same case there were allegations that imports of disposable pocket lighters from Hong Kong were circumventing the anti-dumping measures. The import quantities from Hong Kong were however so small that this particular part of the circumvention investigation was terminated and no actions were taken.

Moreover, accusations against Macao were withdrawn. The only existing producer in Macao passed the 60% test of Article 13(2)(b). Since this one producer could account for the total imports into the Community from Macao, the allegations that Chinese lighters were falsely declared as having Macao origin could be dropped as well.

### **5.2.7 The Japanese Television Camera Systems Case<sup>68</sup> – Terminated**

In March of 1998 Philips Broadcast Television Systems Bv filed a complaint concerning an alleged circumvention of definitive anti-dumping duties imposed on television camera systems from Japan, by assembly operations in the Community. The Commission initiated an investigation, but in December 1998 Philips formally withdrew its complaint. The investigation was then terminated since it was concluded that such termination would not interfere with Community interest.<sup>69</sup>

---

<sup>68</sup> 99/123/EC: Commission Decision of 9 February 1999 ceasing registration of television camera systems' modules, kits, sub-assemblies and parts thereof and terminating the investigation concerning the alleged circumvention of anti-dumping measures imposed on imports of certain television camera systems originating in Japan.

<sup>69</sup> See Article 9(1), Regulation 384/96.

# 6 Prerequisites for the Establishment of Circumvention

## 6.1 Introduction

As mentioned above, Article 13 of the anti-dumping regulation entails two different definitions of circumvention. One defines classic circumvention, or circumvention by assembly operations, whereas the other one is a general definition. Each one of these definitions contains several conditions that must be fulfilled in order to establish circumvention. In most of the cases the Commission examines each condition thoroughly, however, the examination generally ends if the Commission concludes that one of the necessary conditions is not fulfilled. Therefore, the cases resulting in the establishment of circumvention are often substantially longer than those prematurely terminated.

## 6.2 Classic Circumvention (Article 13(2))

Under the old EC anti-circumvention rules only assembly operations carried out within the EC could be caught. The new rules are broader in this perspective since they let the EC authorities tackle also third-country assembly. The EC felt that without these provisions, “there would be an incentive for manufacturers to establish plants in third countries rather than in the EU (with a loss of investment, jobs, etc. for the EU).”<sup>70</sup>

Another change in the new EC anti-circumvention provisions, is that there is no longer a need for a relationship between the assembler and the manufacturer whose products have been found to have been dumped. In practice, however, most cases will probably still involve affiliates of the companies that were subjected to the original procedures.<sup>71</sup>

When the following five conditions are fulfilled, an assembly operation in the Community or a third country shall be considered to circumvent the measures in force:

- i. The operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures.

---

<sup>70</sup>Holmes, p. 165-166.

<sup>71</sup>Holmes, p. 171.

- ii. The parts constitute 60% or more of the total value of the parts of the assembled product.
- iii. The value added to the parts brought in, during the assembly or completion operation, is 25% of the manufacturing cost or less.
- iv. The remedial effects of the duty are being undermined by the assembled products.
- v. There is evidence of dumping in relation to the normal values previously established for the like or similar products.

We will now closely examine the first three of the listed conditions and look at how they have been implemented in practice. Conditions (iv) and (v) are virtually the same as the last two conditions necessary to establish other forms of circumvention, and will be dealt with in conjunction with those in chapters 6.3.4 and 6.3.5.

### 6.2.1 Start or Substantial Increase of Operations

The first necessary condition for assembly circumvention is contained in Article 13(2)(a) of the anti-dumping regulation which states:

“the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures;”

First we need to establish what is meant by the reference to “the initiation of the anti-dumping investigation.” According to the Commission’s practice the term “initiation” in this condition refers to the publication date of the notice of investigation of the original anti-dumping investigation.<sup>72</sup> One particular part of *the Chinese pocket flint lighters case* concerned assembly operations in Macao. In that case the original proceeding had been initiated in April 1990. The assembly company was registered in April 1991 and started production in January 1992. These facts satisfied the first condition of Article 13. The Commission was however not able to continue the investigation on those grounds since the main market for the producer at that time was the USA and sales to the Community were insignificant. Instead the Commission went on by investigating what happened after the initiation in December 1993 of a review investigation, eventually resulting in further increased anti-dumping duties. Following this event the exports to the Community were found to have gradually increased to over 60 million units in 1997. Hence, the Commission could go on to examine the next criteria.<sup>73</sup> The conclusion to be drawn from this case is that the phrase “initiation of the anti-dumping investigation” can refer both to the original investigation and to a review investigation.

---

<sup>72</sup> See inter alia: the Japanese weighing scales case, recital 11.

<sup>73</sup> The Chinese pocket flint lighters case, recitals 59-60.

Now that the meaning of the term “initiation” has been established we can move on to examine the test for start or substantial increase of operations. This test was easily carried through in *the Chinese bicycles case*. All involved companies started or substantially increased their assembly operations or their imports after the original anti-dumping investigation took place and the output of assembled bicycles increased by 80%.<sup>74</sup>

In the cases not already mentioned above, the assembly operations have started after the initiation of the investigations. Therefore, the Commission has not had any reason to give any detailed guidance on what constitutes a “substantial increase”. Nevertheless, guidance can be found in practice under the previous anti-dumping regulations, which contained similar expressions.<sup>75</sup> In one case, different Japanese producers of paper photocopiers were examined. For one producer the total number of photocopiers assembled in the Community increased by only 4% following the opening of the anti-dumping investigation. That was not enough to be considered a substantial increase.<sup>76</sup> Another producer argued that a 30% increase in the year following the initiation was not substantial since that was in line with those of previous years. The Commission disposed of that argument by saying that “[...] a 30 % increase from a large base is greater, in absolute terms, than from a smaller base.”<sup>77</sup> Considering an investigation from 1989, however, it seems as if the Commission does take production increases preceding the initiation of the anti-dumping investigation into account, at least when it confirms the opinion that a substantial increase has occurred. In the first year after the initiation of that investigation, volumes of assembled goods at the two examined plants increased by more than 24%, and in the first two years together by more than 40%. Over the previous four year period there had only been increases between 0% and 2,3% for the two companies concerned. Accordingly, the increases for both companies were considered substantial.<sup>78</sup>

Thus, all we are able to say with some certainty is that the line between a non-substantial and a substantial increase goes somewhere between 4% and 30% and that the overall trend for the product can be taken into consideration.

### **6.2.2 The 60%-test**

The second condition for classical circumvention is to be found in the first part of Article 13(2)(b), which reads as follows:

---

<sup>74</sup> The Chinese bicycles case, recitals 11 and 13.

<sup>75</sup> Müller, Khan & Neumann, *EC Anti-Dumping Law 3/4 A Commentary on Regulation 384/96*, p. 392.

<sup>76</sup> Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty to certain plain paper photocopiers assembled in the Community, recital 8.

<sup>77</sup> Council Regulation (EEC) No 3205/88, recital 11.

<sup>78</sup> Commission Decision of 20 January 1989 terminating the proceedings under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain ball bearings assembled in the Community, recital 7.

“the parts constitute 60% or more of the total value of the parts of the assembled product [...]”

This condition means that at least 60% of the total value of the parts used in the assembly must be imported from the dumping country. Thus, it does not refer to 60% of the value of the finished product. Furthermore, it is irrelevant where the remaining 40% come from.<sup>79</sup>

Different opinions have been expressed on whether the parts must originate in the dumping country, to meet the 60%-test, or if it is sufficient that they simply are consigned from that country.<sup>80</sup> In *the Chinese bicycles case* some of the assemblers declared some parts consigned from China as being of non-Chinese origin and therefore claimed that more than 40% of the parts used originated in other countries than China. To that the Commission responded:

“Essential bicycle parts which are consigned from the People’s Republic of China shall be deemed to originate in that country unless it can be proven by production of an origin certificate issued in accordance with the origin provisions in force in the Community that the parts in question originate in another specific country.”<sup>81</sup>

The European assemblers were unable to produce such evidence and all parts, which were consigned from China, were therefore considered to be of Chinese origin.<sup>82</sup> This seems to indicate two things: 1) that parts which simply are consigned from the dumping country shall not be included in the 60%-test, and 2) that the burden of proof of origin under this provision lies entirely on the importers.<sup>83</sup>

Another question that arises is at what level the origin of a part is to be determined. An advanced product could be a single composite part or a collection of individual parts. In the latter case, each part must be given a particular origin.<sup>84</sup> In *the Japanese weighing scales case* the Commission used the so called “destruction test”<sup>85</sup> to determine what could be considered an individual part. Recital 13 of that case describes the method used by the Commission:

“All elements, material or immaterial (such as software) purchased by [the assembler] to be incorporated into the [scales] have been considered as parts. Any element manufactured, assembled or developed by [the assembler] to be incorporated into the [scales] has been considered as an individual part where its manufacture, assembly or development could not

---

<sup>79</sup> Holmes, p. 167.

<sup>80</sup> Holmes, p. 167 and Müller, Khan & Neumann, p. 392.

<sup>81</sup> The Chinese bicycles case, Article 2(2).

<sup>82</sup> The Chinese bicycles case, recital 15.

<sup>83</sup> Vermulst & Driessen, *Journal of World Trade*, p. 148.

<sup>84</sup> Holmes, p. 168.

<sup>85</sup> Holmes, p. 168.



be reversed to any extent without significantly diminishing the value of that element.”

One of the results of this test was that printed circuit boards were considered as being collections of parts. Hence, the origin and value of each electronic component was determined at the state immediately prior to its mounting into the bare board. The only sub-assembly that was impossible to disassemble without causing significant material damage to the components was the load cell. It appears as if the origin of the load cells was therefore determined to be the assembly country, Indonesia, with a value based on the cost of parts as brought in plus direct labour cost and manufacturing overheads.<sup>86</sup>

Questions have been raised concerning over what period the 60%-test is to be calculated.<sup>87</sup> The answer to this question is that “[...] as a rule, the situation during the whole period of investigation is used as a basis for the decision on whether measures are to be taken, [...]”<sup>88</sup> The Commission has, however, in two cases taken changes in sourcing patterns during the investigation, into consideration. In *the Chinese bicycles case*, one assembler that was above the 60% threshold at the beginning of the investigation could show that it had decreased its Chinese content below the 60% level at the end of the investigation. The Commission considered the company not to be circumventing the anti-dumping duty from that time on.<sup>89</sup> The scenario was similar in *the Japanese weighing scales case*, where the Commission added that it was of importance that the decrease was likely to be maintained, since the production of a crucial part for the scales had been moved from the dumping country (Japan) to the assembly country (Indonesia).<sup>90</sup> In other words, regarding this particular question, the Commission seems to feel free to make exceptions from the general rule whenever it is suitable, and does not hesitate to do so in favour of the “accused”.

### 6.2.3 The 25%-test

The second part of Article 13(2) b constitutes the third criterion that has to be met in order to establish classical circumvention. This condition is formed as an exception to the 60%-test:

“[...] except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25% of the manufacturing cost”

In other words, in order to establish circumvention the value added to the parts brought in, during the assembly or completion operation, can be at the most 25%

---

<sup>86</sup> The Japanese weighing scales case, recital 14.

<sup>87</sup> Holmes, p. 167.

<sup>88</sup> The Japanese weighing scales case, recital 17.

<sup>89</sup> The Chinese bicycles case, recital 17.

<sup>90</sup> The Japanese weighing scales case, recitals 16-17.

of the manufacturing cost of the complete finished product. The value added is normally calculated as the sum of labour costs and factory overheads (including R&D, etc.)<sup>91</sup> incurred within the assembly plant.<sup>92</sup> Neither the value of EC parts nor of other parts brought in is relevant when calculating the value added. Since the Commission has not in detail declared its calculations in these tests it is unclear if the value of parts manufactured internally within the assembly plant will count toward the 25%. Commentators, however, seem to agree that those parts should be taken into account.<sup>93</sup> The rather peculiar result of that would be that parts manufactured internally would benefit the assembler twice: both when applying the 60%-test and the 25%-test.

Furthermore, the manufacturing cost has to be established in order to apply the 25%-test. The manufacturing cost should be interpreted as to include “the value of all parts, based on the into-factory, at arms length purchase prices of these parts, plus the value added to the parts during the assembly or completion operation.” Neither the value added nor the manufacturing cost includes selling, general and administrative expenses, or profit.<sup>94</sup> All companies concerned in both *the Chinese bicycles case* and *the Japanese weighing scales case* were clearly below the 25% threshold. So far, *the Japanese and Singaporean weighing scales case* is the only investigation that has been terminated due to the 25%-test.

### 6.3 Other Circumvention (Article 13(1))

The provision now contained in Article 13(1) did not have any equivalence under the old EC anti-circumvention rules, which were aimed only at assembly operations. The new general definition of circumvention gives extensive powers to fight virtually any form of circumvention. In its proposal for the new anti-dumping regulation from 1994 the Commission explained that the new definition could cover for example wrong origin declarations and imports of knockdown kits and slightly altered products.<sup>95</sup> The general definition technically covers circumvention by assembly operations as well, but since those cases have been given a specific provision in Article 13(2), it does not seem likely that Article 13(1) will be used for that purpose.

The Commission points out that even though the definition in Article 13(1) may appear wide-ranging, anti-dumping measures can only be imposed under narrowly defined circumstances.<sup>96</sup> Those circumstances are represented in the second sentence of Article 13(1) and can be divided into four separate conditions. Each of which must be fulfilled in order to establish circumvention. The

---

<sup>91</sup> Holmes p. 170.

<sup>92</sup> The Japanese and Singaporean weighing scales case, recital 15.

<sup>93</sup> Holmes, p. 170 and Müller, Khan & Neumann, p. 394.

<sup>94</sup> The Japanese and Singaporean weighing scales case, recital 15.

<sup>95</sup> COM(94) 414, Uruguay round implementing legislation, Explanatory memorandum, p. 164.

<sup>96</sup> COM(94) 414, Uruguay round implementing legislation, Explanatory memorandum, p. 165.

four conditions are:

- i. There has been a change in the pattern of trade between third countries and the Community which stems from a practice, process or work.
- ii. There is insufficient due cause or economic justification for the behaviour other than the imposition of the duty.
- iii. The remedial effects of the duty are being undermined.
- iv. There is evidence of dumping in relation to the normal values previously established for the like or similar products.

We will take a close look at each of the four conditions and examine how the Commission and the Council have applied them. It should be noted that the last two conditions can be found in Article 13(2) as well, but the analysis of them has been saved for this part of the work. However, before going deeper into the four conditions it would be appropriate to explain the term “like product” in the first sentence of Article 13(1).

### **6.3.1 Explanation of the Term “Like Product”**

The first sentence of Article 13(1) states that anti-dumping duties may be extended to imports of like products, or parts thereof, when circumvention of the measures in force is taking place. Therefore it is important to examine what “like products” really means. Article 1(4) of the Anti-dumping regulation defines the term like this:

“[...] the term “like product” shall be interpreted to mean a product which is identical, that is to say, 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.”

This definition may appear quite cryptic. Thus, we will now look at some practice for guidance. As mentioned earlier, imports of PSF from Belarus were substituted by imports of PFT from the same country. The PFT was subsequently converted into PSF in the Community. The Commission noted that the only difference between PFT and PSF results from a simple cutting process. Such differences that can be created or eliminated by minor alterations were not considered sufficient to determine that two products are not alike. The Commission did not just look at the physical characteristics of the products, but did also take the uses of PSF and PFT into consideration. The investigation showed that there are two recognized applications of PFT. Except for cutting PFT into PSF, it is possible to produce tops through a more complex process. No PFT was, however, used to produce tops in this case. The Commission compared the situation with that of an assembly operation where parts are imported: “[...] the imports of PFT ultimately

end up as a product which is not only alike but identical to the imports subject to the original investigation [...].<sup>97</sup>

The question of the meaning of “like product” also arose in *the Chinese pocket flint lighters case*. In that case lighters that were identical except for the addition of a refill valve substituted the non-refillable lighters in the original investigation. Nevertheless, the consumers perceived and treated the lighters as disposable, and the valve was determined to be an ineffectual addition. The two different lighters were considered alike.<sup>98</sup>

To sum up, at least three factors can affect the determination of whether two products are to be considered alike: 1) physical characteristics 2) use, and 3) public perception. Price difference is another factor that could probably be of significance in this determination.

### 6.3.2 Change in the Pattern of Trade

According to Article 13(1) there has to be a change in the pattern of trade between a third country and the Community to establish circumvention. In *the case of the Belarus PFT*, the first objection from the importers regarded the term “third country”. The importers argued that the investigation could not be initiated at all since the term “third country” would exclude the exporting country in respect of which the anti-dumping measures were imposed. This was of course rejected by the Commission. The term “third country” refers to any country outside the Community.<sup>99</sup>

Now we move on to the question of what constitutes a change in the pattern of trade. A change in the pattern of trade usually consists of a decrease in imports from the country subject to anti-dumping measures and a corresponding increase in imports of “like products” either from the “dumping country” or a third country.

A question that arises is to what extent the pattern of trade must be changed in order to be sufficient to fulfil the first condition of the general definition in Article 13(1). The anti-dumping regulation itself does not give any guidance in this case, so we have to once again study the Commission’s practice. In *the Belarus PFT case* imports of PSF from Belarus were almost entirely substituted by imports of PFT from that country. The Commission studied the amount of imported PFT in relation to the total amount of imported PFT and PSF. The percentage of PFT rose from around 1% just after the start of the original proceeding in 1994 to as much as 99,27% at the end of the investigation period in 1997. Regardless of

---

<sup>97</sup> The Belarus PFT case, recital 9.

<sup>98</sup> The Chinese pocket flint lighters case, recitals 9-10.

<sup>99</sup> The Belarus PFT case, recital 8.

those facts, the companies involved argued that no change in the pattern of trade had occurred since the PFT imports never reached the same import levels in absolute numbers as those for PSF in 1994. It was however stated that “it is not required that the substitution is found to have attained the highest import levels which the substituted product ever reached in a particular segment in the benchmark period [...] provided that there is a clear and consistent trend of substitution over an extended period.”<sup>100</sup>

The investigation in *the magnetic discs case* was initiated after it was concluded that there was sufficient evidence to do so. This evidence was inter alia that the market share in the Community represented by imports from the assembly or transshipment countries grew from 21% in the year preceding the imposition of the original measures to 36% in the succeeding year. During the same period, the market share represented by imports from the countries subjected to the original measures fell from 20% to 4%. These figures were considered to show that a clear change had taken place in the pattern of trade between the countries concerned and the European Community.<sup>101</sup> One has to keep in mind that this decision regarded the initiation of an investigation, but it would probably be safe to guess that the same evidence would have been enough to satisfy the Commission in a real investigation as well.

In *the Chinese bicycles case* a substitution, in absolute numbers, of less than one third of the pre-duty imports was considered sufficient. The imports of bicycles had decreased by 98% (1,5 million units) and the imports of frames had increased by 139% (450 000 units).<sup>102</sup>

Furthermore, in *the Chinese pocket flint lighters case* a decrease in imports of disposable lighters by 127 million units was almost perfectly substituted by an increase in imports of refillable lighters from the same country by 121 million units. There were however lighters on the market that were clearly not disposable. To make sure that the increase in imports was not made up of such generally more expensive non-disposable lighters, the Commission compared the average unit prices for refillable lighters over different periods. The average unit price in 1993 when a review of the original measures begun was ECU 0,37, in 1994 it was ECU 0,19 and in 1997 it had dropped to ECU 0,10. Those figures were taken as evidence for that disposable, refillable lighters represented the vast majority of the imports of refillable lighters from 1994 onwards.<sup>103</sup>

---

<sup>100</sup> The Belarus PFT case, recital 12.

<sup>101</sup> Commission Regulation (EC) No. 2451/95 of 19 October 1995 initiating an investigation concerning the circumvention of anti-dumping measures imposed by Regulation (EEC) No 2861/93 on imports of certain magnetic disks originating in Japan, Taiwan and the People's Republic of China, recitals 4-6.

<sup>102</sup> The Chinese bicycles case, recital 11.

<sup>103</sup> The Chinese pocket flint lighters case, recitals 11-14.

In the same case there were allegations that disposable non-refillable lighters were being transhipped through Taiwan to the Community. Imports of such lighters from Taiwan increased from 7,5 million units in 1994 to 37 million units in 1995. The numbers then dropped in 1996 and again in 1997 to 16 million units, but the Commission did nevertheless conclude that lighters from China had been partially replaced by imports from Taiwan. Therefore, a change in the pattern of trade between China, Taiwan and the Community had occurred.<sup>104</sup>

These findings do not add up to a clear conclusion of to what extent the pattern of trade must be changed in order to continue the investigation, but at least we have been able to somewhat narrow down the range.

### **6.3.3 Insufficient Due Cause or Economic Justification**

The second condition of the definition of circumvention gives the concerned parties a chance to show that the change in the pattern of trade stems from legitimate reasons or is otherwise economically justifiable. The provision does not expressly lay the burden of proof on the concerned parties, and the Commission has discussed several possible factors other than the imposition of the anti-dumping duties even in those cases where the parties have not cooperated. But, at the end of the day, it is up to the exporters and importers to make sure that the arguments they want to put forward are being considered properly. The nature of this condition makes it impossible to set up any list of what factors are to be considered and how they should be weighed against evidence for the opposing opinion. Consequently, the Commission will have to make decisions on a case by case basis and therefore these parts of the proceedings may contain rather creative argumentation.

In *the Chinese bicycles case* the test of insufficient due cause or economic justifications was rather easily carried through. A couple of the assemblers claimed some economical advantages other than avoiding anti-dumping duties for starting assembling in the EC. Those arguments were disposed of due to the high costs for shipments to Europe that occurred since the suppliers ensured that parts destined for the same assembler were spread across different containers, sent on different dates and sometimes unloaded at different ports.<sup>105</sup>

To dismiss due cause and economic justification in *the Belarus PFT case*, the Commission referred to the high level of substitution of PSF by PFT and to the fact that only negligible amounts of PFT had been imported to the Community before the imposition of a provisional anti-dumping duty. Those were the same facts that had been referred to in order to fulfil the condition of change in the pattern of trade. It may seem a bit unfair to use the same argument to satisfy two

---

<sup>104</sup> The Chinese pocket flint lighters case, recitals 39-40.

<sup>105</sup> The Chinese bicycles case, recital 12.

different conditions in the same provision, but the Commission went on by stating:

“This inference would be displaced if a new significant factor — other than the anti-dumping measures — arising around the time when the substitution took place, could be identified. Such is not the case and no interested party has put forward any such claim.”<sup>106</sup>

So after all, at least the Commission indicated that there is some way for the company involved to get out of the trap.

The European importers and converters of Belarus PFT did argue that certain cost savings in terms of stock keeping and greater flexibility to meet customer demand for various sizes and small orders followed the changed behaviour. The Commission rejected this argument due to the fact that no benefits were quantified by the importers. The Commission went further in finding factors to justify its conclusion: cutting in the importing country generated extra costs in terms of labour and packaging; the labour cost in the Community was higher than in Taiwan (which was the market economy country of reference in the original investigation); and finally, since all other export markets continued to be supplied with PSF from Belarus, cutting in the importing country was not likely to be economically justifiable.<sup>107</sup>

In *the Chinese pocket flint lighters case*, just as in *the Belarus PFT case*, the Commission considered what had happened regarding other exporting and importing markets for the like product. The result was that the change in proportion that took place between the imports to the Community of Chinese non-refillable and refillable lighters did not have any equivalence in imports from any other third country. The conclusion was that if there existed any external factors, except the imposition of duties, those would have resulted in changes in the pattern of trade from other markets as well.

Moreover, the Commission argued that the massive rise in sales of refillable lighters should have resulted in a drop in the total sales of lighters in the Community. Since no such decrease in sales was noted, the Commission concluded that the Chinese refillable lighters were actually used as disposable ones and not being refilled. The Commission also pointed out that the lighters were treated just as disposable non-refillable lighters in marketing and distribution. In addition to that, the average consumer would only save about ECU 2 per year by going through the rather complicated process of refilling and flint replacement. That is if the lighters could be refilled at all, which tests showed that they could not always be.

Another factor to consider was that the Chinese producers had not done any changes to the basic design of non-refillable lighters since the start of the

---

<sup>106</sup> The Belarus PFT case, recital 13.

<sup>107</sup> The Belarus PFT case, recitals 13-17.

production ten years earlier, until the addition of the refill valve for the Community market. All of the mentioned arguments led the Commission to conclude that there was no due cause or economic justification for the addition of the refill valve, other than the imposition of the existing duties.<sup>108</sup>

These examples show that the Commission does not hesitate to consider many different factors of different characters in order to analyse the existence of valid reasons for the change in the pattern of trade that has occurred in each case. Factors of importance may be purely economical or practical and the method of investigation may change from using statistics and expert opinions to performing tests and studying consumer behaviour. So far there has not been any case where the “accused” has been freed due to this second condition of the definition of circumvention. Therefore, it is still difficult to say what would be needed in order to convince the Commission that valid reasons lay behind the changed behaviour. The arguments in the examples above may however reasonably give an important indication of what sort of factors could help in doing the job. It is, however, up to the Commission to decide if the factor in question, alone or together with others, is significant enough to justify the change in the pattern of trade.

#### **6.3.4 Undermining of the Remedial Effects of the Duty**

The third condition under the general definition of circumvention in Article 13(1), which is similar to the first condition contained in Article 13(2)(c) states that the remedial effects of the original duty has to be undermined in terms of the prices and/or quantities of the like products. In its explanatory memorandum to the new anti-dumping regulation, the Commission described this condition as an injury test ensuring that the provisions are only used in truly deserving cases.<sup>109</sup>

The method for determining price undermining has been virtually the same in all of the examined cases. A comparison is made between the sales prices in the Community of the products in the circumvention investigation and the “non-dumped” export prices of the products in the initial investigation. The “non-dumped” export prices are based on the actual export prices at the Community border as established in the initial investigation, and to those prices customs duties and anti-dumping duties are added. It is then established to what extent the prices of the circumventing products have undercut the “non-dumped” prices.

In *the Chinese bicycles case* more than 90% of the investigated sales of assembled bicycles had undercut the non-dumped export prices, and overall the prices had been undercut by on average 14,5%.<sup>110</sup> The average sales price of PSF converted from PFT originating in Belarus had undercut the non-dumped

---

<sup>108</sup> The Chinese pocket flint lighters case, recital 15-24.

<sup>109</sup> COM(94) 414, Uruguay round implementing legislation, Explanatory memorandum, p. 164-165.

<sup>110</sup> The Chinese bicycles case, recitals 19-23.



price of PSF imported from Belarus by 19,5%.<sup>111</sup> Both of these findings were considered to satisfy the condition of price undermining. In *the Chinese pocket flint lighters case* the average price of the Chinese disposable refillable lighters was compared not only with the non-dumped export price, but also with the equivalent price for all refillable flint lighters in the Community. Price undermining was determined to have occurred here as well.<sup>112</sup>

To prove undermining in terms of quantities, the Commission referred, in all three cases mentioned above, to the previously established substitution of the original product by the circumventing product. In all of the cases a clear substitution pattern had been showed, which was enough to establish that the remedial effects of the anti-dumping measures in question had been undermined in terms of quantities as well.

In the particular part of *the Chinese pocket flint lighters case* that concerned transshipment of Chinese lighters through Taiwan into the Community, price and quantity undermining was found. Here however, the imported quantities were much lower than in the other cases. Imports from Taiwan represented only 2,5% of the total market for disposable lighters (including Chinese refillable lighters) in the Community and 4,8% of total imports during the investigation period. At some point though, the imports accounted for about 10% of total imports and 6% of Community consumption. These figures were compared to the import quantities in the year preceding the initial investigation, which were 0,3% and 1,1% respectively. Undermining in terms of quantities was established since imports of disposable lighters from Taiwan had partly replaced the imports of such lighters from China.

The Commission has in two cases not been able to establish quantity undermining and the investigations have therefore been terminated without any measures being imposed. The first case was the magnetic discs case and the part of it where magnetic discs were allegedly transhipped through Canada, India, the Philippines and Singapore. The combined market share of those four countries was only 2,8% of Community consumption during the investigation period. It was noted that injury should normally be regarded as negligible where the countries concerned collectively account for less than 3% of Community consumption.<sup>113</sup> Consequently, the import volume was considered unlikely to undermine in terms of quantities the remedial effects of the anti-dumping duties imposed.<sup>114</sup>

The second case where no undermining in terms of quantities was found, was the part of *the Chinese pocket lighters case* where lighters were allegedly transhipped through Hong Kong. In this case imports from Hong Kong

---

<sup>111</sup> The Belarus PFT case, recital 18.

<sup>112</sup> The Chinese pocket flint lighters case, recitals 25-28.

<sup>113</sup> Articles 9(3) and 5(7), Regulation 384/96.

<sup>114</sup> The magnetic discs case, recitals 7-8.

represented 2% of the total imports into the Community during the investigation period of disposable lighters, including Chinese refillable lighters. The Commission also examined to what level the imports from Hong Kong substituted imports from China. The Hong Kong lighters imported during the circumvention investigation accounted for 4,1% of the volume of lighters imported from China before circumvention started to take place. The Commission then decided to terminate the circumvention investigation with regard to this part of the case, since they did not consider the undermining (if any) to be significant.<sup>115</sup>

Although the circumventing product's share of total imports into the Community during the investigation period is not the only factor of importance in determining if quantitative undermining has occurred, it seems to be one of the most important ones. It is also in respect of this factor that we are able to narrow down where the boundary line between harmful and acceptable undermining is drawn. The examined cases indicate that this line should go somewhere between 2% and 4,8% of the total imports. It is probably not just a coincidence that this happens to correspond to Article 5.8 of the Agreement on Implementation of Article VI of GATT 1994: "The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member". It therefore feels safe to conclude that the acceptable limit will be kept at 3%.

It is more difficult to draw any reliable conclusions on whether any price undercutting is acceptable or not. In all the cases where price undermining have been examined, there have clearly been undercutting of the undumped export prices (the lowest amount was 14,5%). Since quantitative undermining was determined to be negligible in some cases it would seem logical that the same would apply to price undercutting with small amounts. But, the wording in *the Belarus PFT case* seems to indicate the opposite: "Subsequently, it was established to what extent the average price of PSF [...] has undercut the 'undumped' export price thus undermining the remedial effects of the duties."<sup>116</sup> In my own opinion this suggests that any price undercutting automatically results in the undermining of remedial effects of the duty. The question whether any price undercutting is acceptable therefore remains.

The condition in question states that price *and/or* quantity undermining must be established in order to impose measures. In the two cases discussed above however, where no quantity undermining was established, the Commission terminated the investigations when they had concluded *only* that no quantity undermining of the remedial effects of the duties had occurred. They were satisfied with that and did not go on to look at whether price undermining had occurred. Correspondingly, in the rest of the examined cases the Commission did

---

<sup>115</sup> The Chinese pocket flint lighters case, recitals 50-54.

<sup>116</sup> The Belarus PFT case, recital 18.

not settle after finding that one type of undermining had occurred. In all those cases they continued to examine if *both* price and quantity undermining had taken place. One may therefore wonder what purpose the “or” in the “and/or” of the condition serves. Judging from all the cases that have been dealt with by the Commission until today, it seems clear that *both* price and quantity undermining have to be established in order to go on with the investigation and eventually impose measures. It will be interesting to see if the Commission finds any reason to change this, for the “accused” very favourable attitude, in the future. However, I find it hard to see how only quantity undermining without price undercutting could be harmful.

### **6.3.5 Evidence of Dumping**

The last condition included for both classic and other circumvention was controversial when it was introduced in the new anti-dumping regulation. In addition to all the other conditions there now has to be evidence of dumping in relation to the normal values previously established for the like or similar products. The sceptics feared that the whole purpose of the quicker anti-circumvention process would be undermined by this condition. The purpose of the anti-circumvention measures is to fight circumvention of existing anti-dumping measures without having to go through a new lengthy anti-dumping procedure. Therefore, the Commission has avoided carrying out new investigations of dumping and injury.<sup>117</sup> Instead a price adjusted to be comparable with the normal value established in the original anti-dumping investigation is calculated. The two prices are compared, and if the price of the product in the circumvention investigation is lower than the normal value, there is evidence of dumping. The dumping margins established in the examined cases were all above 16%. The most important task in this part of the investigation is to establish dumping and not so much to calculate an exact dumping margin. The reason for this is that the dumping margin in the circumvention investigation will not be used as the basis for imposing measures. Instead the duty based on the dumping margin from the original investigation will be extended to the circumventing products.<sup>118</sup>

## **6.4 The Effects of a Circumvention Determination**

The remedy against circumvention is extension of the original anti-dumping duty to the imported goods. GATT/WTO rules require that the duties are imposed at the EU frontier. In all of the three anti-circumvention cases where measures have been imposed, the original measures were in the form of ad valorem duties, that is as a percentage of the value of the goods. In those cases it has therefore been

---

<sup>117</sup> COM(94) 414, Uruguay round implementing legislation, Explanatory memorandum, p. 164.

<sup>118</sup> Müller, Khan & Neumann, p. 390.

easy just to extend the duties on the finished products to the circumventing products. The circumventing products have consequently been subjected to duties at the same rate as the finished products. There is no answer yet to the question of what would happen if the original measure was imposed in the form of a fixed or variable duty.<sup>119</sup>

In some cases the circumventing products are used for other legitimate purposes in the Community as well as for the illegitimate ones. An example of that would be if some importers of PFT from Belarus were actually going to produce tops instead of converting the PFT into PSF. In such cases, the importers may apply for exemption certificates. After thorough appraisal of the facts, a certificate declaring non-circumvention and exemption from the measures may be authorized.<sup>120</sup>

---

<sup>119</sup> Müller, Khan & Neumann, p. 397.

<sup>120</sup> Article 13(4); The Chinese bicycles case, recitals 30-44.

## 7 Anti-Circumvention and the GATT/WTO

As mentioned earlier, the first EC anti-circumvention law was introduced in 1987 to combat the establishment of Japanese “screwdriver” plants in the Community.<sup>121</sup> In 1990 a GATT Panel deemed these first anti-circumvention provisions inconsistent with the GATT, and the EC stopped using them.<sup>122</sup> The EC conditioned its acceptance of the GATT decision upon a satisfactory solution in the Uruguay Round to the problem of circumvention.<sup>123</sup>

Both the EC and the United States had the inclusion of anti-circumvention measures in the anti-dumping code as one of their highest priorities during the Uruguay Round negotiations of the GATT. Nevertheless, the topic was too controversial at the time. Several countries opposed the introduction of anti-circumvention provisions in the GATT, and consequently, no agreement on this issue was reached. This has been said to be one of the biggest failures of the Uruguay Round negotiations on the GATT anti-dumping code.<sup>124</sup> However, one decision regarding anti-circumvention was taken:

*Ministers,*

*Noting* that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,

*Mindful* of the desirability of the applicability of uniform rules in this area as soon as possible,

*Decide* to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution.<sup>125</sup>

Both the EC and the United States have claimed that this statement permits them to apply anti-circumvention measures, in spite of the fact that neither the Ministerial Decision nor the GATT anti-dumping code says this.<sup>126</sup> On the contrary, the GATT anti-dumping code states that no specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. Moreover, an anti-dumping measure shall be applied only under the circumstances provided

---

<sup>121</sup> Holmes, p. 163-164.

<sup>122</sup> Vermulst & Driessen, *Journal of World Trade*, p. 145.

<sup>123</sup> Holmes, p. 164.

<sup>124</sup> Vermulst & Waer, p. 20.

<sup>125</sup> Decision on Anti-Circumvention, Marrakesh Agreement Establishing the World Trade Organization.

<sup>126</sup> Horlick and Shea, *The WTO Antidumping Agreement*, p. 28.

for in Article VI of GATT 1994.<sup>127</sup> The response by the EC to this is that the Ministerial Decision should be interpreted as permitting “individual Members to deal with the [circumvention] problem unilaterally, pending a multilateral solution via the GATT Anti-Dumping Committee”<sup>128</sup> since there was no stipulation that no anti-circumvention measures could be taken in the meantime. This is also the opinion of the USA, and the reasoning should be seen in light of the fact that the Ministerial Decision was taken knowing that many WTO members already had provisions dealing with anti-circumvention. Since valid arguments exist in favour of both sides it would be difficult to foresee the outcome of a WTO dispute settlement process.

There has not been much progress since the Ministerial Decision was taken, but in April 1997 the Anti-Dumping Practices Committee established the Informal Group on Anti-Circumvention. The first (and so far only) question to be dealt with by the WTO members within the framework of this group, was “What constitutes circumvention?” Only six parties have got themselves involved in the discussions so far. Those are the European Community, the United States, Canada, Hong Kong, Japan and Turkey.<sup>129</sup> The EC did, of course, answer in accordance with its provisions on the matter. The United States followed by adopting a very similar approach. The United States also submitted some examples of behaviour that it thought most would agree to consider being “clear-cut cases of circumvention.” Nevertheless, it probably did not come as a surprise that Japan and Hong Kong did not find that the provided examples indicated any need for additional rules for circumvention. Both countries found that the existing GATT/WTO rules on anti-dumping were sufficient to deal with the situations included in the examples.

In the case of minor modifications of a product subjected to anti-dumping duties, Japan and Hong Kong first pointed out that this behaviour could occur for several valid business reasons. Secondly, they argued that if a modified product was not included in the product coverage definition of the original investigation, the solution would be to open a new anti-dumping investigation for the modified product. The only way to avoid this, they said, would be to define the scope of the original anti-dumping order more accurately to include the specific modification.

One of the United States’ examples regarded circumvention by assembly operations. Japan and Hong Kong responded that the existing rules could be used for dealing with imports of parts and therefore there was no reason to develop additional provisions. Furthermore, also in this case they mentioned that in

---

<sup>127</sup> Article 1 and 18.1, Agreement on implementation of Article VI of the GATT 1994.

<sup>128</sup> Holmes, p. 165; The preamble (at 20) of Regulation 384/96.

<sup>129</sup> For the opinion of the EC see: WTO document, G/ADP/IG/W/1, 3 October 1997; for the United States see: WTO document, G/ADP/IG/W/2, 8 October 1997; for Canada see: WTO document G/ADP/IG/W/3, 23 October 1997; for Hong Kong, China see: WTO document G/ADP/IG/W/8, 28 April, 1998; for Japan see: WTO document G/ADP/IG/W/9, 30 April 1998; for Turkey see: WTO document G/ADP/IG/W/10, 22 September 1998.

increasingly globalized economies there might be various factors independent of an anti-dumping proceeding justifying such changes in the production processes.

As a comment to the arguments of Japan and Hong Kong that there may be many valid commercial reasons for the modifications and assembly operations I would like to recapitulate what the EC anti-circumvention provisions have to say regarding this matter. In the case of slight modifications, Article 13(1) of the EC anti-dumping regulation requires the Commission to examine whether there is any due cause or economic justification other than the imposition of the original duty. Regarding assembly operations there is no such requirement expressed in Article 13(2), but the Commission did nevertheless perform the same examination of possible independent factors in the Chinese bicycles case,<sup>130</sup> which is the only case where circumvention by assembly operation has been found in the EC. The conclusion that I therefore would like to draw from this is that the introduction of anti-circumvention rules does not necessarily have to increase the risk of imposing anti-dumping measures on legitimate commercial activities.

Hong Kong further claimed that international customs classification rules state that parts that have the essential character of the complete or finished article are included in the customs reference to the same product. Consequently an anti-dumping order concerning a finished product would include that article incomplete or unfinished. This may be true if the parts of the product are shipped together to the Community, but can be avoided if the parts are spread across different containers, sent on different dates and to different ports,<sup>131</sup> as was the case in the Chinese bicycles case.

After these first submissions, with quite wide differences among the views of some of the more important actors on the world market, the discussion in the Informal Group on Anti-Circumvention seems to have stagnated. In my opinion we will probably have to wait until the next round of multi-lateral trade negotiations before there will be a chance of making any progress on the issue and hopefully reaching a satisfactory solution. The next round of WTO negotiations, which is due to start early in 2000, will be launched at the next WTO Ministerial Conference, scheduled for November/December 1999.<sup>132</sup> The negotiations will most likely be scheduled to last for a period of three years.<sup>133</sup> In the meantime, the question whether the European Community and the United States were entitled to adopt anti-circumvention legislation without authorization in the GATT Antidumping Agreement will in my view probably remain unanswered. It does not seem likely that any of the WTO members will risk jeopardizing the negotiation

---

<sup>130</sup> The Chinese bicycles case, recital 12.

<sup>131</sup> Müller, Khan & Neumann, p. 391.

<sup>132</sup> WTO Release on the Ministerial, June 1999, document retrieved from <http://www.wto.org/wto/minist/seatmin.htm>

<sup>133</sup> Speech made by David Hartridge, Director in charge, to ECOSOC, Geneva, 5 July 1999, document retrieved from: <http://www.wto.org/wto/speeches/ecosoc2.htm>

climate by referring the matter of anti-circumvention to a WTO dispute resolution panel.



## 8 Conclusion

The regulation of dumping is internationally authorized and more or less standardized through the World Trade Organization. In all areas of society, if some phenomenon becomes regulated, people are going to look for loopholes. It is therefore only natural that there are attempts to circumvent the existing anti-dumping regulations in different ways. The European Community sees this as a problem and has unilaterally decided to deal with it through more regulation.

In the introduction to this thesis I declared the intention to answer a few specific questions. One of them was why anti-dumping measures are being circumvented. This question was just answered by a simple: because it is natural. Another question was how anti-dumping measures are being circumvented. We have been given a variety of examples from the reality in the cases that have been dealt with by the Commission and there is probably an infinite number of other possible ways. Not all of them will however be considered unlawful. The other questions that were formed in the introduction regarded the application of the EC anti-circumvention rules and the relation of those rules to the GATT/WTO body of law. Those questions are not answered quite as easily, and I will not make an attempt to repeat all possible conclusions right here. I will, however, give some personal comments on the issue.

A large part of this thesis was concentrated on the examination and analysis of the EC anti-circumvention provisions, whose purpose is to enforce anti-dumping measures. In my opinion the anti-circumvention provisions have served their purpose well since the introduction in 1994. As with all new legislation, the EC anti-circumvention provisions lack the legal certainty that years of practice can bring about. There are still questions regarding the application of the anti-circumvention rules, but the first few years of usage have brought clarity to quite a few issues and I feel confident that, if the rules remain in use, the remaining questions will eventually be answered one by one. The interesting issue regarding this development is however not *if* but *how* these questions are being dealt with. In my own opinion the EC authorities have in most cases interpreted the uncertain provisions in a reasonable way, with a reasonable portion of objectivity. After all, in most cases the investigations have been terminated without the imposition of any anti-circumvention measures. To me it seems like all the three cases where the Commission has found reasons for extending the anti-dumping duties were clear-cut examples of circumvention. On the other hand, there are probably people arguing the exact opposite, a fact which could lead to repercussions on the EC in the long run. Trade specialists Edvin Vermulst and Paul Waer have for example expressed their concern for the matter like this: "One may wonder whether the EC authorities sufficiently realize that the protectionist facets of EC legislation will form examples for developing countries' anti-dumping laws which are often patterned after the EC law because of the perceived closeness between

EC and WTO law. [...] It will thus be interesting to see what the EC will argue in the WTO in cases where its industries become the victim of impossible burdens of proof.<sup>134</sup>

Now, I do not believe that it is the features themselves of the EC anti-circumvention provisions or the way that they have been applied that are most provocative to the states whose businesses become subjected to them. I think that it is rather the fact that the European Community has adopted these provisions without authorization in the GATT/WTO Antidumping Agreement that is controversial. In this aspect I imagine that the next few years will be crucial. There are many possible different scenarios for the future, but to me there are three that are a bit more probable. The first one is that the next round of WTO trade negotiations will resolve the issue in the way that anti-circumvention provisions similar to the ones presently in use in the European Community and the United States will be adopted. This solution would bring about only a small need for changes in the existing EC legislation.

The second scenario is similar to the first one, but with the difference that the scope of the negotiated GATT/WTO anti-circumvention provisions will be much more limited than the existing EC rules. This scenario would force the EC to make major changes in its existing provisions.

The third and last of the more probable scenarios is that no uniform international rules will be agreed upon in the next few years and the problem will therefore remain unsolved. The probable effects of this scenario would be either that the use of anti-circumvention would be referred to a WTO dispute resolution panel with a rather uncertain outcome, or that veritable lawlessness in the area would await.

It is difficult to say which one of these three scenarios is the most probable one. I think, however, that considering the importance on the world market that the European Community and the United States have, it will be difficult for the opponents of anti-circumvention rules to resist the negotiation power of those two if they decide to act together in this matter.

---

<sup>134</sup> Vermulst & Waer, p. 75-76.

# Bibliography

Akakwam, *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, Minnesota Journal of Global Trade, Volume 5, Issue 2, 1996.

Beseler and Williams, *Anti-Dumping and Anti-Subsidy Law: The European Communities*, London, 1986.

Bronckers, *The WTO Implementation in the EC - Antidumping, Safeguards and Intellectual Property*, Journal of World Trade, Vol 29(5) Oct 1995.

Cartland, *Antidumping and Competition Policy*, Law and Policy in International Business, Vol 28(1) Fall 1996.

*Commission Approves Improvements in Anti-Dumping Procedures Proposed by Sir Leon Brittan*, Europe - No 7050, September 1997.

*Commission proposes removal of "non market economy" label for Russia and China*, Brussels, 17 December 1997, document retrieved from <http://www.europa.eu.int/>

*European Importers (FTA) Consider That the Conditions Necessary to Initiate an Anti-Dumping Proceeding and Introduce Measures Need Tightening*, Europe - No 7051, September 1997.

*GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995)*, Geneva 1995.

Hartridge, *Speech to ECOSOC, Geneva, 5 July 1999*, document retrieved from <http://www.wto.org/wto/speeches/ecosoc2.htm>

Holmes, *Anti-Circumvention under the European Union's New Anti-Dumping Rules*, Journal of World Trade, Vol 29(3) June 1995.

Horlick and Shea, *The WTO Antidumping Agreement*, World Trade Journal, Vol 29(1) Feb 1995.

*Legal Framework and Rationale of European Community Anti-Dumping and Anti-Subsidy Policy*, Europe - No 1858, 1993.

Marceau, *Anti-Dumping and Anti-Trust Issues in Free Trade Areas*, Oxford, 1994.

Miranda, *Should Antidumping Laws be Dumped?*, Law and Policy in International Business, Vol 28(1) Fall 1996.

Morgan, *Competition Policy and Anti-Dumping - Is It Time for a Reality Check?*, Journal of World Trade, Vol 30(5) Oct 1996.

Müller, Khan & Neumann, *EC Anti-Dumping Law ¾ A Commentary on Regulation 384/96*, Chichester, England, 1998.

Niels & ten Kate, *Trusting Anti-Trust to Dump Anti-Dumping - Abolishing Anti-Dumping in Free Trade Agreements Without Replacing it with Competition Law*, Journal of World Trade, Vol 31(6) Dec 1997.

Steele, *Anti-Dumping under the WTO: A Comparative Review*, London, 1996.

Trade Policy Review Body - *Review of the European Union TPRB's Evaluation*, 27 November 1997, document retrieved from <http://www.wto.org/reviews/tprb66.htm/>

Vander Schureren, *New Anti-Dumping Rules and Practice: Wide Discretion Held on a Tight Leash?*, Common Market Law Review, Vol 33(2) April 1996.

Vermulst and Driessen, *International Trade Developments, Including Commercial Defence Actions in the European Communities XII: 1 July 1996 - 31 December 1996*, European Journal of International Law, Vol. 8, No. 2, 1997.

Vermulst and Driessen, *New Battle Lines in the Anti-Dumping War - Recent Movements on the European Front*, Journal of World Trade, Vol 31(3) June 1997.

Vermulst and Waer, *The Post-Uruguay Round EC Anti-Dumping Regulation - After a Pit Stop, Back in the Race*, Journal of World Trade, Vol 29(2) April 1995.

Vermulst, *Adopting and Implementing Anti-Dumping Laws - Some Suggestions for Developing Countries*, Journal of World Trade, Vol 31(2) April 1997.

WTO document, G/ADP/IG/W/1, 3 October 1997, *Paper by the European Community*.

WTO document, G/ADP/IG/W/2, 8 October 1997, *Paper by the United*

*States.*

WTO document G/ADP/IG/W/3, 23 October 1997, *Paper by Canada.*

WTO document G/ADP/IG/W/8, 28 April 1998, *Paper by Hong Kong, China.*

WTO document G/ADP/IG/W/9, 30 April 1998, *Paper by Japan.*

WTO document G/ADP/IG/W/10, 22 September 1998, *Paper by Turkey.*

WTO Release on the Ministerial, June 1999, document retrieved from <http://www.wto.org/wto/minist/seatmin.htm>

# Table of Legal Documents

Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

COM(94) 414, Uruguay round implementing legislation, Explanatory memorandum to the Proposal for a Council Regulation (EC) on protection against dumped imports from countries not members of the European Community.

COM(97) 428, Fifteenth Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities (1996).

COM(1998) 482, Sixteenth Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities (1997).

Commission Decision of 20 January 1989 terminating the proceedings under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain ball bearings assembled in the Community.

99/123/EC: Commission Decision of 9 February 1999 ceasing registration of television camera systems' modules, kits, sub-assemblies and parts thereof and terminating the investigation concerning the alleged circumvention of anti-dumping measures imposed on imports of certain television camera systems originating in Japan.

Commission Regulation (EC) No 2451/95 of 19 October 1995 initiating an investigation concerning the circumvention of anti-dumping measures imposed by Regulation (EEC) No 2861/93 on imports of certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China by imports of certain magnetic disks (3,5" microdisks) originating in Canada, Hong Kong, India, Indonesia, Macao, Malaysia, the Philippines, Singapore and Thailand, and making these imports subject to registration.

Commission Regulation (EC) No 1445/96 of 24 July 1996 terminating the investigation concerning the circumvention of anti-dumping measures imposed on certain magnetic disks (3,5" microdisks) originating in Japan, Taiwan and the People's Republic of China by imports of the same product from Canada, Hong Kong, India, Indonesia, Macao, Malaysia, the Philippines, Singapore and Thailand. (*Cit. The magnetic discs case*)

Commission Regulation (EC) No 984/97 of 30 May 1997 terminating the investigation concerning the circumvention of anti-dumping measures imposed on certain electronic weighing scales originating in Japan and Singapore, by imports of parts thereof assembled in the European Community. (*Cit. The Japanese and Singaporean weighing scales case*)

Commission Regulation (EC) No 985/97 of 30 May 1997 terminating the investigation concerning the circumvention of definitive anti-dumping measures imposed on certain retail electronic weighing scales originating in Japan by imports of the same product assembled in and/or transhipped through Indonesia. (*Cit. The Japanese weighing scales case*)

Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty to certain plain paper photocopiers assembled in the Community.

Council Regulation (EC) No 3283/94.

Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community.

Council Regulation (EC) No 2331/96 of 2 December 1996 amending Regulation (EC) No 384/96.

Council Regulation (EC) No 71/97 of 10 January 1997 extending the definitive anti-dumping duty imposed on bicycles from China to certain bicycle parts from China. (*Cit. The Chinese bicycles case*)

Council Regulation (EC) No 2513/97 of 15 December 1997 extending the definitive anti-dumping duty imposed on polyester staple fibre from Belarus to polyester filament tow from Belarus. (*Cit. The Belarus PFT case*)

Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation No 384/96 on protection against dumped imports from countries not members of the European Community.

Council Regulation (EC) No 192/1999 of 25 January 1999 extending the definitive anti-dumping duty, imposed on imports of gas-fuelled, non-refillable pocket flint lighters originating in the People's Republic of China to imports of certain disposable refillable pocket flint lighters originating in the People's Republic of China or consigned from or originating in Taiwan and to imports of non-refillable lighters consigned from or originating in Taiwan, and terminating the proceeding in respect of imports of non-refillable lighters consigned from Hong Kong and Macao. (*Cit. The Chinese pocket flint lighters case*)

Decision on Anti-Circumvention, Marrakesh Agreement Establishing the World

Trade Organization.