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## The Community Interest Test in Antidumping Proceedings of the European Union

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# THE COMMUNITY INTEREST TEST IN ANTIDUMPING PROCEEDINGS OF THE EUROPEAN UNION

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## INTRODUCTION

Both the rules of the World Trade Organization (“WTO”)<sup>1</sup> and the law of the European Union (“EU”)<sup>2</sup> safeguard domestic industries against dumped<sup>3</sup> imports, provided that these imports cause (or threaten to cause) material injury to the complaining industry. The imposition of antidumping measures, however, has an effect that is far from isolated. For example, applying antidumping duties on imported commodities increases the costs of production for domestic

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1. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 13 (1994) [hereinafter GATT 1994] (permitting the use of antidumping and countervailing duties against countries exporting products at less than normal value); see also GATT 1994, Annex 1A, Legal Instruments—Results of the Uruguay Round [hereinafter WTO Antidumping Agreement] (enumerating that antidumping measures shall only be applied under the circumstances provided for in Article VI of GATT 1994 and in accordance with the provisions of the WTO Antidumping Agreement).

2. See Council Regulation 384/96 of 22 December 1995 on Protection Against Dumped Imports from Countries not Members of the European Union, 1996 O.J. (L 56) 1 [hereinafter Council Regulation 384/96 or *Basic Regulation*] (adopting common rules for protection against dumped or subsidized products from non-EU members).

3. See WTO Antidumping Agreement, *supra* note 1, art. 2.1 (defining dumping as the introduction of a product into the commerce of a country at an export price that is less than the comparable price, in the ordinary course of trade, of the like product sold for consumption in the market of the exporting country (*i.e.*, the normal value)).

manufacturers who use these imported commodities to manufacture finished added-value products. The manufacturers' concerns are to continue obtaining supplies at the lowest possible cost. Other groups, such as consumers, importers, and retailers, have similar interests to protect. Therefore, these broad and competing interests must somehow be balanced.

The WTO Antidumping Agreement encourages members to make the imposition of duties voluntary, rather than mandatory, once dumping and consequent injury are shown to exist.<sup>4</sup> Although the WTO Antidumping Agreement does not explicitly prescribe a public interest test, the *Community's 1994 Basic Antidumping Regulation* has historically maintained the principle that a domestic industry, showing injury caused by dumping, is not automatically entitled to relief (*i.e.*, the "Community interest" principle).<sup>5</sup> Relief will be denied if it is not considered to be in the Community interest.<sup>6</sup> This test has traditionally distinguished European Community antidumping law from U.S. antidumping law,<sup>7</sup> for the U.S. antidumping administering authorities do not have similar discretion under U.S. law to deny or modify relief to a domestic industry.<sup>8</sup>

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4. See *id.* art. 9.1 ("it is desirable that the imposition (of duties) is permissive in all Member states or custom territories.").

5. The WTO rules, however, are not indisputable. During meetings in May 2000 with the EU Commission in Brussels, the Japanese government insisted that antidumping provisions be on the agenda of any future WTO negotiations, and wanted a mandate calling for a public interest test in antidumping cases. See *U.S., EU try to narrow gaps on WTO talks*, Inside US Trade, June 16, 2000, at 15.

6. See Council Regulation 384/96, *supra* note 2, art. 21(1) (determining intervention in cases of dumping on the basis of whether it serves the Community interest as a whole, taking into consideration the interests of domestic industry, and users and consumers of the product in question). Measures against dumping will not be applied where authorities, having weighed all relevant factors, do not conclude that it is not in the Community interest to apply such measures. See *id.*

7. See EDWIN A. VERMULST, ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITY 330-31 (1987) (contrasting the EU's Community interest analysis with the United States' procedure for imposing antidumping duties, which only takes into consideration the position of interested parties to the dispute).

8. But see Consuming Industries Trade Action Coalition (CITAC), *CITAC Seminar: America's Consuming Industries and the new Global Economy* (comments of Lewis F. Leibowitz, Counsel to CITAC) (demanding for the addition of a public interest component to antidumping cases such that antidumping duty cases

In theory, the Community interest principle operates as a safety valve in antidumping cases. It allows the possibility of avoiding the automatic imposition of duties where duties would create adverse, even disastrous economic effects on other sectors of industry.<sup>9</sup> In practice, though, EU Member states have rarely used the Community interest mechanism as a reason for refraining from antidumping measures.<sup>10</sup> Instead, the interests of the injured industry of the Community interest state have generally prevailed over the interests of other parties—such as importers, upstream and downstream suppliers, retailers, and consumers—and, thus, protection is granted.<sup>11</sup> A number of Member states, however, have exerted political pressure to overhaul the manner in which the Community interest test is applied, and to attribute greater value to commercial and economic interests other than those of the complaining Community industry.<sup>12</sup>

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would be terminated where relief would be clearly detrimental to the public interest) available at <http://www.citac-trade.org>.

9. See Report from the Commission, Eighteenth Annual Report from the Commission to the European Parliament on the Community's Antidumping and Antisubsidy Activities (1999), COM (00)210 final, at 20 (stating that it must be established that the application of relief measures will not be contrary to the overall interest of the Community, and that the interests of all relevant economic operators must be taken into account during the investigation of the Community interest test).

10. There are only a few notable exceptions where Community interest states have avoided the automatic imposition of duties in an antidumping proceeding. See Commission Decision of 10 January 1994 Terminating the Antidumping Proceeding Concerning Imports of Gum Rosin Originating in the People's Republic of China (PRC), 1994 O.J. (L 41) 50 [hereinafter *Gum Rosin from China*]; Commission Decision of 21 December 1998 Terminating the Antidumping Proceeding Concerning Imports of Certain Laser Optical Reading Systems for Use in Motor Vehicles Originating in Japan, Korea, Malaysia, the People's Republic of China and Taiwan, 1999 O.J. (L 18) 62 [hereinafter *Disc Changers from Japan, Korea, Malaysia, PRC and Taiwan*].

11. See J. Bourgeois, *EC Antidumping Enforcement—selected second generation issues*, FORDHAM CORP. L. INST. 563, 589 (1985), reprinted in IVO VAN BAELE & J.F. BELLIS, *ANTIDUMPING AND OTHER TRADE PROTECTION LAWS OF THE EEC* 150 (1990) (“it can be said that in many cases, once dumping and injury are found and measures are likely to give relief to the complainant industry, there is a presumption that such measures would be in the Community interest.”).

12. See Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L L. BUS. 49, 83 (1997) (noting that the consideration of consumer and public interest in the community can serve as an opportunity for EU states opposed to an antidumping measure to seek reduc-

Along with new procedural rules introduced in 1994,<sup>13</sup> the European Commission has adopted a more thorough approach to assessing precisely where the Community interest lies in antidumping cases. Reform of the substantive approach, however, has not taken shape through new provisions in the EU Regulations. Rather, the reform is evident from the methodological approach applied by the Commission in investigations carried out since the beginning of 1996.<sup>14</sup> When viewed in conjunction with the procedural modifications in the EU Antidumping Regulation, it is apparent that there has been a shift in the Community interest test, away from the traditional view of the complaining Community industry's interests being paramount.<sup>15</sup> Together, these procedural and substantive changes suggest greater scope for taking into account the interests of other relevant economic operators.

Based on the foregoing, the question is whether these changes are sufficient to diffuse the political and economic tensions of the previous interpretation of the Community interest test. This Article attempts to answer this question. First, it evaluates the shortcomings of the previous approach towards assessing where the balance of the Community interest lay in antidumping cases. Second, it considers the criticisms of this approach. The change in approach brought about by these reforms can be analyzed against this background. Finally, this Article assesses whether the appropriate balance of interests has been struck through the new methodology applied by the Community institutions and, if not, what reforms should be implemented to achieve a more reasonable balance of interests.

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tion (or elimination) of the antidumping duty margins to the level minimally required to offset the injury).

13. See Council Regulation 522/94 of 7 March 1994 on the Streamlining of Decision-Making of Commercial Defense, 1994 O.J. (L 66) 10 (facilitating actions by European Community members against dumping by streamlining the procedural requirements to bring a grievance).

14. See *infra* Part IV (discussing the Commission's methodological approach regarding the Community interest test since 1996).

15. See *infra* Part III (discussing the amendments to the regulations governing the Community interest test).

## I. APPLICATION OF THE 'COMMUNITY INTEREST' CLAUSE BEFORE 1996

The concept of 'Community interest' was created as an umbrella under which the various competing interests of Community industries could be evaluated in light of the application of anti-dumping measures.<sup>16</sup> Unfortunately, the original basic antidumping regulation<sup>17</sup> and succeeding regulations,<sup>18</sup> with the possible exception of the two

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16. See Fifteenth Report from the Commission to the European Parliament on the Community's Antidumping and Antisubsidy Activities (1996), COM(97)210 final, at 3 (noting that even though the WTO rules set minimum conditions for applying antidumping measures, the Community legislation contains two further provisions, which are not applied by all WTO members, that are aimed at ensuring a balanced application of the Community's antidumping rules: the "Community interest test," which is based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; and the "lesser duty rule").

17. See Council Regulation 459/68 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1968 O.J. (L 93) 1.

18. See generally Council Regulation 2011/73 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1973 O.J. (L 206) 3 of 24 July 1973 amending Regulation (EEC) No. 459/68 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community; Council Regulation 1411/77 of 27 June 1977 Amending Regulation No. 459/68 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1977 O.J. (L 160) 4 (creating a framework for decision making and enforcement regarding measures to be taken against dumping by non-EU members); Council Regulation 1681/79 of 1 August 1979 Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1979 O.J. (L 196) 1 (amending Art. 3 of Council Regulation 459/68 for purposes of determining the qualifications for a dumped product); Council Regulation 3017/79 of 20 December 1979 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1979 O.J. (L 339) 1 (establishing provisions for protection against dumped and subsidized imports from non-members of the Community); Council Regulation 1580/82 of 14 June 1982 on Amending Regulation (EEC) No. 3017/79 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1982 O.J. (L 178) 9 (amending Council Regulation 3017/79 to establish regulatory review concerning decisions on antidumping and countervailing duties resulting in defensive undertakings); Council Regulation 2176/84 of 23 July 1984 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic

most recent,<sup>19</sup> fail to define the scope of the principle in any meaningful or systematic way.<sup>20</sup> The prior regulations neither distinguished succinctly pertinent interests from wholly or partially irrelevant interests of the various interest groups, nor provided guidance as to a hierarchy of interests or special considerations to be taken into account in making an antidumping protection assessment.

Instead, the European Court of Justice gives considerable discretion to the Commission to define the extent and scope of the concept of "Community interest."<sup>21</sup> The Commission may consider a wide range of factors for its decisions. In the past, it indicated that the most important factors were the interests of the consumers and users of the imported product, as well as the competitive status of the

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Community, 1984 O.J. (L 201) 1 (adopting common rules for protection against dumped or subsidized imports from countries not members of the Community); Council Regulation 1761/87 of 22 June 1987 Amending Regulation (EEC) No. 2176/84 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1987 O.J. (L 167) 9 (amending Regulation No. 2176/84 on protection against dumped or subsidized imports from countries not members of the Community); Council Regulation 2423/88 of 11 July 1988 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1988 O.J. (L 209) 1 (establishing provisions for protection against dumped or subsidized imports from countries not members of the Community).

19. See Council Regulation 384/96, *supra* note 2, art. 21(1) (declining to intervene in cases of dumping where authorities do not conclude that it is not in the Community interest to apply such measures); Council Regulation 3283/94 of 22 December 1994 on Protection Against Dumping or Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, 1994 O.J. (L 349) 2, art. 22(1) (reiterating Council Regulation 384/96, art. 21(1)).

20. See, e.g., Council Regulation 2176/84, *supra* note 18, art. 12 (addressing definitive actions to be taken where antidumping measures have materially harmed "Community interests," though not specifying what the term means); Council Regulation 2423/88, *supra* note 18, art. 12 ("Where the facts finally established show that there is dumping or subsidization during the period under investigation, and injury caused thereby, and the interests of the Community call for Community intervention, the Commission, after consultation, shall impose a definitive antidumping or countervailing duty.").

21. See generally Case 188/85, *Fediol v. Commission*, 7 E.C.R. 4193 (1988) (upholding the Commission's refusal to grant relief to a European industry against another unfair trade practice, subsidization, reasoning that that the Commission had "very wide discretion" under the Community interest clause of the antidumping and countervailing legislation in force).



Common Market.<sup>22</sup> The Commission, however, never specified the relative importance or weight of these other factors in relation to the interests of the domestic industry seeking antidumping relief. In a significant number of cases, the Commission, when addressing Community interest, has simply stated that the imposition of antidumping measures is in the Community interest in light of serious difficulties of the Community industry.<sup>23</sup> Almost invariably, the concept of Community interest has been equated with the overriding need to grant protection to Community industries from dumped products.

Advocates for the imposition of antidumping duties argue that the impact of a price increase from antidumping measures on the relevant product would be small,<sup>24</sup> or easily absorbable,<sup>25</sup> by consumers and industrial users. The Commission has argued that it is in the consumers' long-term interest to have a viable Community industry to

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22. Council Regulation 384/96, *supra* note 2, at 3.

23. See Council Decision of 9 February 1987 Accepting an Undertaking in Connection with the Antidumping Proceeding Concerning Imports of Certain Paints and Brushes Originating in the People's Republic of China, 1987 O.J. (L 46) 45, 48 (concluding that it was appropriate to take action against antidumping due to the negative effects on the Community interest); see also Council Regulation 1244/86 of 28 April 1986 Imposing a Definitive Antidumping Duty on Imports of Copper Sulphate Originating in Yugoslavia, 1986 O.J. (L 113) 4, 6 (concluding that the imposition of antidumping duties were in the best interests of the Community to eliminate the harm inflicted upon the industry).

24. See Council Regulation 2557/94 of 19 October 1994 Imposing a Definitive Antidumping Duty on Imports of Calcium Metal Originating in the People's Republic of China and Russia, 1994 O.J. (L 270) 27, 30-31 (deciding to enact a provisional antidumping duty in light of the harm imposed on the Community industry); see also Council Regulation 821/94 of 12 April 1994 Imposing a Definitive Antidumping Duty on Imports of Silicon Carbide Originating in the People's Republic of China, Poland, the Russian Federation and Ukraine, 1994 O.J. (L 94) 21, 27-28 (imposing definitive antidumping duties to eliminate the injurious effects of dumped imports).

25. See Commission Decision 84/259 of 10 May 1984 Accepting an Undertaking in Connection with the Antidumping Proceeding Concerning Imports of Certain Sensitized Paper Originating in Japan, 1984 O.J. (L 124) 45, 48 (stating that consumers would suffer only minor impact due to protective measures that would not affect purchasing habits); see also Commission Regulation 699/88 of 15 March 1988 Imposing a Provisional Antidumping Duty on Imports of Oxalic Acid Originating in Taiwan and South Korea, 1988 O.J. (L 72) 12, 14 (taking defensive action against dumping in order to protect Community industries given the Commission's belief that the exporting industry members would not be harmed).

compete with and offer alternatives to imports.<sup>26</sup> Furthermore, the Commission has argued that there is no guarantee that consumers and users will continue to benefit from price advantages resulting from unfair competition.<sup>27</sup> Factors that may outweigh the disadvantage of higher prices caused by the imposition of antidumping duties may be experienced through the benefits of safeguarding employment, avoiding dependency on imports, and maintaining a competitive technological sector within the Community.<sup>28</sup> Regulations, which have introduced antidumping measures, have relied on the basis of assigning 'special weight' to the elimination of the trade-distorting effects of injurious dumping—indicating that it is in the Community interest to impose antidumping measures.<sup>29</sup> Thus, the importance of eliminating the effects of injurious dumping has nearly created an irrefutable presumption in favor of protecting Community industries from injurious dumping.

Next to the Community's agenda to eliminate harmful dumping was the need to restore effective competition.<sup>30</sup> The Commission's approach to dumping has been based on the assumption that dumping is an unfair trade practice, which *ipso facto* distorts the competitive

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26. See Council Regulation 1698/85 of 19 June 1985 Imposing a Definitive Antidumping Duty on Imports of Electronic Typewriters Originating in Japan, 1985 O.J. (L 163) 1, 9 (arguing that, while defensive measures may raise prices in the short term, any harm incurred is outweighed by the long-term benefit to consumers of having a viable Community industry that can offer an alternative to imports).

27. See Commission Regulation 2684/88 of 26 August 1988 Imposing a Provisional Antidumping Duty on Imports of VCRs Originating in Japan and the Republic of Korea, 1988 O.J. (L 240) 5, 15 (noting that it is unclear whether consumers would continue to benefit from price advantages in the future if defensive measures were not imposed).

28. See *id.* (noting that several thousands of jobs could be lost if Community industries ceased to produce VCRs).

29. See Commission Regulation 1645/95 of 5 July 1995 Imposing a Provisional Antidumping Duty on Imports of Certain Microwave Ovens Originating in the People's Republic of China, the Republic of Korea, Thailand and Malaysia, 1995 O.J. (L 156) 5, 19 ("The purpose of antidumping measures is to eliminate the trade distorting effects of injurious dumping and to restore effective competition which is, as such, in the interest of the Community."); see also Council Regulation 2557/94, *supra* note 24, at 30 ("Removing distortions of competition arising from unfair commercial practices is fundamentally in the general Community interest").

30. Council Regulation 384/96, *supra* note 2, at 3.

conditions within the Community. The imposition of antidumping duties, therefore, restores the competitive environment.<sup>31</sup> The idea of needing to negate the distortion, however, would almost always justify the adoption of antidumping measures.<sup>32</sup>

The failure by the Community to assess properly the competitive conditions inside a specific market before imposing antidumping duties has been one of the most critical deficiencies in the methodology applied for determination of the Community interest balance.<sup>33</sup> Ignoring an unfair competitive environment and restricting or blocking foreign competition through the imposition of antidumping duties signaled the creation of an even worse competitive situation.<sup>34</sup>

The EU Antidumping procedural rules underlying the Commission's substantive evaluation of Community interest did not require that the authorities consider other interests apart from Community

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31. See generally CLIVE STANBROOK & PHILIP BENTLEY, *DUMPING AND SUBSIDIES* 144 (1996).

32. In fact, the Commission has even refused to refrain from adopting measures on the grounds of Community interest in instances where a Community industry has been found to have previously engaged in cartel behavior. See Commission Regulation 823/95 of 10 April 1995 Imposing a Provisional Antidumping Duty on Imports of Disodium Carbonate Originating in the United States, 1995 O.J. (L 83) 8. In 1990, the Commission imposed fines on three Community soda ash producers, thus penalizing infringements of Articles 85 and 86 of the EEC Treaty. See Commission Decision of 19 December 1990 Relating to a Proceeding under Articles 85, 86 of the EEC Treaty, 1990 O.J. (L 152) 1. The Commission discovered market share agreements designed to restrict competition, exchange agreements and anticompetitive discount practices. See *id.* at 16, 21. In 1995, however, the Commission decided to impose provisional antidumping duties on imports of soda ash from the United States. See STANBROOK & BENTLEY, *supra* note 31, at 52. With respect to the anticompetitive behavior of the Community producers, the Commission explained that the producers concerned were required to cease such anticompetitive practices, and that the situation was under surveillance. The Commission went on to state that "it can therefore be assumed that normal competitive conditions have been reestablished in the Community and that the Community soda ash industry is now more competitive and market-driven than it was before in 1991. Consequently, this situation should not be distorted by unfair trading practices." See *id.* at 16.

33. *Id.* at 144.

34. See Patrick A. Messerlin, *Antidumping Regulations or Pro-Cartel Law? The EC Chemical Cases*, 13 *WORLD ECON.* 465 (1990) (noting that an analysis of extra-EC and intra-EC trade flows reveals that most EC antidumping measures have been very costly for EC consumers).

industries. Thus, EU authorities were not obliged to make an analysis on their own notion of the different Community interests.<sup>35</sup> Rather, various interest groups were given certain rights to submit their views to the investigating authorities. When interest groups failed to submit their views to the Commission, the authorities regularly refrained from taking the interests of that particular sector into consideration.<sup>36</sup> The rights of various parties to intervene in antidumping proceedings differed sharply, for consumer and user organizations were given a limited role in antidumping proceedings, including the right to submit their views in writing at the start of an investigation.<sup>37</sup> They did not, however, have the right to inspect the non-confidential file of the Commission in a particular case, nor were they entitled to an oral hearing, nor did they have the right to be informed of the findings and conclusions of the authorities prior to the adoption of antidumping measures.<sup>38</sup> Certainly, for the Community interest test to be effective, it had to allow for potentially negatively affected parties to defend their interests by giving them not only the opportunity to present their arguments to the investigators, but also the legal standing to do so.<sup>39</sup>

In 1989, the European Office of Consumer Unions ("BEUC") attempted to challenge its lack of access to the record of an antidumping investigation.<sup>40</sup> The BEUC relied on, *inter alia*, the general principle that a person is entitled to a fair hearing in proceedings, where

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35. Marco Bronckers, *Rehabilitating Antidumping and other Trade Remedies through Cost-Benefit Analyses*, 30 J. WORLD TRADE 5, 11 (1996) [hereinafter Bronckers, *Cost-Benefit Analyses*].

36. J.H.J. Bourgeois, *Trade Measures, Competition Policy, and the Consumer*, in TRADE LAWS OF THE EUROPEAN COMMUNITY AND THE UNITED STATES IN A COMPARATIVE PERSPECTIVE 227, 256 (1992).

37. Council Regulation 2423/88, *supra* note 18, art. 7(1)(a) (outlining the protocol for a commission proceeding).

38. *Id.* arts. 7(4)(a), 7(5).

39. See Bernhard Hoekman & Petros Mavrodīs, *Dumping, Antidumping and Antitrust*, 30 J. WORLD TRADE 27, 46 (1996) (arguing that negatively affected parties should have access to the information presented by the import-competing industry seeking protection in making their case).

40. Case 170/89, *Bureau Europeen des Unions de Consommateurs v. Commission*, 1991 E.C.R. I-5709.

the outcome of such proceeds may adversely affect his interests.<sup>41</sup> The European Court of Justice rejected this plea, however, reasoning that because antidumping procedures were directed at industries producing the products rather than the consumers of such products, these measures could not result in a measure adversely affecting them.<sup>42</sup> In effect, this decision ignored the economic reality that antidumping measures adversely affect consumer interests through higher prices and a reduced choice of goods.<sup>43</sup> The decision is understandable, however, in light of the fact that the antidumping legislation itself is more focused on safeguarding industries being injured by dumped imports than on consumer interests. Inasmuch as the concern was to remedy unfair trade practices of exporters that were injuring a European industry, at this time, the Commission never denied antidumping relief merely out of the concern for the adverse effects on the consumers or users, which seemingly had any role to play.<sup>44</sup> Consequently, the EC opposed the application of a cost-benefit analysis to unfair trade remedies in general.

In 1994, only a few years after the BEUC's challenge, the EU, for the first time, denied antidumping relief in *Gum Rosin from China*<sup>45</sup> on the grounds that European users of the imported product would suffer overwhelmingly disproportionate adverse effects. Gum rosin is a primary product used by a number of Community industries, including tire manufacturers, the paint industry, adhesive producers, and varnish producers.<sup>46</sup> Prior to the decision, the Commission received a great deal of pressure from a large majority of Member states to refrain from imposing antidumping measures.<sup>47</sup> The Commission took into consideration the special economic circumstances

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41. *Id.* at 5714.

42. *Id.* at 5735.

43. See Bronckers, *Cost-Benefit Analyses*, *supra* note 35, at 11 (adding that another, long term, effect would be lower income due to slower economic growth).

44. Marco Bronckers, *Antidumping Law and Consumer Interest*, in TRADE LAWS OF THE EUROPEAN COMMUNITY AND THE UNITED STATES IN A COMPARATIVE PERSPECTIVE 261, 265 (1992) [hereinafter Bronckers, *Consumer Interest*].

45. See *Gum Rosin from China*, *supra* note 10, at 50.

46. *Id.*

47. *Id.*

of the case in its decision. Specifically, while the complaining Community industry, which was situated in one Member State, only consisted of medium-sized firms, the numerous industrial users of gum rosin, which were situated throughout most Member States, provided a large number of jobs.<sup>48</sup> Therefore, had antidumping measures been imposed, the Community market would remain largely dependent on imports as the Community industry's capacity covered only a minority share.<sup>49</sup> The Commission recognized that a price increase for gum rosin due to antidumping measures could jeopardize the situation of more important industrial users that required a steady and abundant supply of gum rosin.<sup>50</sup> Consequently, the Commission found that the negative effects of imposing antidumping duties on user groups would be "overwhelmingly disproportionate" to the benefits accruing to the Community gum rosin industry.<sup>51</sup> The *Gum Rosin* case stands out against the general practice of the Community authorities. To provide guidance on the applicable Community interest principles, however, the Commission should have developed further criteria to assess those circumstances in which it is "overwhelmingly disproportionate" to impose duties because of the effects on consumer or user groups. Unfortunately, insufficient details on this exceptional decision are available to assess the merits of arguments such as the cost increase to the user industry or the relative size of the user industry workforce. Thus, *the Gum Rosin* case did not represent a new willingness to give more attention to the users and consumers, although some valid arguments were used.<sup>52</sup> Instead, it seemed to be merely a casualty of broader overriding political considerations.

The general practice of equating Community interest to the interest of the complaining Community industry in antidumping cases, however, inevitably provoked criticism. The result of this practice was the exclusion or marginalization of important economic interests

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48. *Id.*

49. *See Gum Rosin from China, supra* note 10, at 54.

50. *Id.*

51. *Id.*

52. *See Hoekman & Mavroidis, supra* note 39, at 47 (stating that the new developments in the *Gum Rosin* case reveal a tendency to better balance the interests of beneficiaries and injured parties as a result of an eventual introduction of anti-dumping duties).

in the Community's antidumping decision-making process.<sup>53</sup> The Community interest test, as applied, contributed immensely to increasing tensions in the decision-making process, despite the fact that the purpose of the test was to diffuse pressure within the system.

## II. CRISIS IN THE ANTIDUMPING DECISION-MAKING PROCESS

In contrast with the position in EU competition law, the European Commission does not have exclusive control over the Community's antidumping policy.<sup>54</sup> Responsibility for the enforcement of antidumping policy is shared between the Commission and the Council of Ministers ("the Council"), which is composed of representatives from the Member States. While the Commission carries out the investigations and has authority to impose provisional duties, it is the Member States acting in the Council that have sole responsibility to impose definitive measures and collect provisional duties.<sup>55</sup>

Coordination between the Commission and the Member States is carried out through the specific inter-institutional Advisory Committee. The Committee itself is composed of representatives from the Member States and the European Commission.<sup>56</sup> At various stages in the investigation, the Commission is required to consult with the Committee.<sup>57</sup> In theory, if the Member States have been consulted properly at all important stages of the investigation, the imposition of definitive measures and the collection of provisional duties is a mere

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53. See Bronckers, *Cost-Benefit Analyses*, *supra* note 35, at 19 (observing that EC antidumping authorities still have ample discretion to favor domestic industries).

54. See Council Regulation 17/62 of February 6, 1962 Implementing Articles 85 and 86 of the EEC Treaty, 1962 O.J. (Special Edition) 87, arts. 3, 9, 15; see also LUIS ORTIZ BLANCO, *EC COMPETITION PROCEDURE* 34 (1998) (remarking that the Commission is regarded as the guiding hand in matters of community competition law).

55. See Council Regulation 384/96, *supra* note 2, art. 9(4) (differentiating between council and commission powers).

56. *Id.* art. 15.

57. See *id.* (outlining the consultation process between the Committee and the Commission).

formality.<sup>58</sup>

Prior to 1994, this process seemed to be working quite effectively. At the Council Meeting in December 1993, it was agreed upon by the Member States that future decisions on definitive antidumping measures would be taken by simple majority vote in the Council, by a qualified majority as previously required.<sup>59</sup> The change in voting requirements meant that, in order to impose definitive duties, the Commission now needs a simple majority of eight out of fifteen Member States in the Council. Therefore, eight Member States may also block a Commission proposal to impose definitive duties. This significantly strengthens the Commission compared with the previous system of weighted voting under which it needed a qualified majority in the Council to adopt definitive measures. A minimum of twenty-five out of eighty-seven votes, which was divided among the fifteen Member States,<sup>60</sup> constituted a blocking minority. Thus, under the previous voting system, at least three countries could block definitive antidumping duties. The change in voting requirements should have meant, *prima facie*, that the Commission's proposals required less support than before, *i.e.*, a simple majority vote in favor instead of a qualified majority. Since individual Member States in the Council have only one vote each, they have become far more willing than before to withhold their support from the Commission's proposals for definitive measures on the grounds that it is not in their national interests to support such measures.<sup>61</sup> After 1994, a number of Member States began voting for or against the adoption of measures based upon the type of interested industries located within their territories.<sup>62</sup> Since, in their view, the commercial interests of these eco-

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58. See STANBROOK & BENTLEY, *supra* note 31, at 157 (detailing antidumping and countervailing procedures administered by the Commission).

59. Council Regulation 522/94, *supra* note 13, at 10.

60. See Corr, *supra* note 12, at 81 (stating that the votes of the Member States are weighted as follows: Germany, France, the UK, and Italy each have ten votes; Spain has eight votes; Belgium, Greece, the Netherlands, and Portugal each have five votes; Austria and Sweden each have four votes; Denmark, Finland, and Ireland each have three votes; and Luxembourg has two votes).

61. See *id.* at 83 (noting that as EU membership expands, the interests of its constituent Members diverge).

62. See STANBROOK & BENTLEY, *supra* note 31, at 143 (stating that there is an obvious polarization in the Advisory Committee when some countries have all the



conomic operators were not being given proper weight in the Community interest assessment during each investigation, it was considered legitimate to express support for these interests by refraining from supporting proposals which failed to take them adequately into account.<sup>63</sup> With the enlargement of the Community, now including fifteen countries, the situation appears to have become even more critical.<sup>64</sup>

The political argument then was that, if it is not in the majority of the Member States' national interests to impose duties, how could it be in the Community interest to do so?<sup>65</sup> While the Commission continues to define the parameters of the concept through administrative practice and legal terms, a parallel political notion of Community interest developed in the Council. This was the notion that the concept of Community interest was in fact an expression of the collective national interests of the majority of Member States, particularly manifested in the Advisory Committee and the Council of Ministers.<sup>66</sup> This opened the door allowing for other interests of Member States to be expressed.

Realizing that the administrative procedure did not recognize their commercial interests adequately, interested parties, particularly industrial user groups and distributors, turned their attention toward lobbying Member States to oppose the adoption of measures.<sup>67</sup> Obviously, if eight or more Member States opposed the adoption of measures, the Council could block any such proposal. By trying to

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producers and others only representatives of user industries).

63. *See id.* (commenting that the sum of the views of the respective Member States is not necessarily consistent with the Community interest).

64. *See Corr, supra* note 12, at 81 (noting that a simple majority imposing definitive antidumping duties can be achieved by representatives of under fourteen percent of the total Community population).

65. *See STANBROOK & BENTLEY, supra* note 31, at 143 (arguing that Community interest is reflected in the final analysis because it is the sum of the views of the respective Member States).

66. *See id.* (disclosing that because the proceedings of the Council are not published, Member States can vote without accountability of their own interests).

67. *See, e.g., infra* notes 68-72 and accompanying text (discussing the European glass industry's efforts to lobby Member States in Council to vote against the imposition of definitive antidumping duties on U.S. soda ash after the Commission ignored its pleas in making its Community interest assessment).

persuade government representatives that antidumping duties would cause damage to industrial user groups located in their countries, these groups tried to use extra-procedural means to achieve their ends.

In *Soda Ash from the USA*,<sup>68</sup> the Community glass industry, which uses significant quantities of soda ash in its production process, strenuously lobbied the individual Member States to prevent the adoption of definitive antidumping duties.<sup>69</sup> Imposing these duties, argued the glass industry, would increase their production costs and render them less internationally competitive.<sup>70</sup> Moreover, the glass industry argues that the benefits that would accrue to the community soda ash industry from imposing additional duties could not outweigh the damage that would be done to the Community glass manufacturing industry.<sup>71</sup> While the Commission effectively ignored these arguments in its Community interest assessment of the matter, seven Member States sympathized with the case of the Community glass producers and refused to support definitive antidumping measures.<sup>72</sup>

A number of user groups implemented similar strategies in a series of subsequent cases involving various products. In each case, the user groups pitted their commercial interests against those of the complaining Community industry. The various Member States fought these battles in the Council, not as part of the ordinary administrative procedures.<sup>73</sup> The political notion of Community interest

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68. Council Regulation 2381/95 of 10 October 1995 Imposing a Definitive Antidumping Duty on Imports of Disodium Carbonate Originating in the United States, 1995 O.J. (L 244) 32.

69. Ian Young, *Europe Votes for Duties on U.S.*, CHEMICAL WK., Oct. 18, 1995, at 12.

70. See Robert Westervelt & Andrew Wood, *FMC Sells Soda Ash to Japan as EU Readies Antidumping Duties*, CHEMICAL WK., Feb. 15, 1995, at 13 (reporting that the European glass industry was arguing that there was no link between U.S. imports and the problems of the Community soda ash industry).

71. See *id.* (stating that European soda ash producers, whose prices were already double that of their U.S. competitors, would raise their prices even further without competition from cheaper U.S. imports).

72. See Young, *supra* note 69, at 13 (noting that the European Council of ministers voted eight to seven in favor of imposing definitive antidumping duties on imports of U.S. soda ash).

73. See Lionel Barber & Jenny Luesby, *France Reopens Wounds on Cotton*

was threatening to usurp the legal one.

The whole issue came to a head in the *Unbleached Cotton Fabrics Case*.<sup>74</sup> In January 1996, the Cotton and Allied Textile Industries of the EC ("Eurocoton"), representing Europe's mainly Mediterranean cotton growers, complained that China, Egypt, India, Indonesia, Pakistan, and Turkey were dumping cotton in the Community market.<sup>75</sup> The Commission determined that these imports accounted for more than forty percent of the Community cotton market and that the aggregate volume of dumped imports had increased by 12.5 percent in recent years to more than 125,000 tons per year.<sup>76</sup> The Commission concluded that these imports threatened the future of European cotton producers.<sup>77</sup> This Commission report in favor of Eurocoton directly conflicted with the interests of the high value-added textile-finishing industry based predominantly in Northern Europe, which claimed it needed the cheap imports to safeguard tens of thousands of jobs.<sup>78</sup> After conducting an extensive antidumping investigation into allegations that China, Egypt, India, Indonesia, Pakistan, and Turkey were dumping unbleached cottons in the Community market, the Commission imposed provisional antidumping duties.<sup>79</sup> The Commission then proceeded to propose the imposition of definitive

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*Tariff*, FIN. TIMES, May 28, 1997, at 4 (discussing the political battle fought by France and other protectionist EC countries against EC Member States supporting free trade over whether to impose antidumping duties on cotton imports from Asia).

74. See Council Regulation 2208/96 of 18 November 1996 Imposing a Provisional Antidumping Duty on Imports of Unbleached Cotton Fabrics Originating in the PRC, Egypt, India, Indonesia, Pakistan, and Turkey, 1996 O.J. (L 295) 3 [hereinafter *Unbleached Cotton Fabrics*] (reporting the EC's decision to levy provisional antidumping duties on imports of unbleached cotton fabrics).

75. See *id.* at 4 (detailing the procedural history of the hereinafter *Unbleached Cotton Fabrics* case).

76. See *id.* at 13 (assessing injury to European cotton producers in terms of volume and market share caused by increased imports).

77. See *id.* at 14-15 (concluding that the increase in cotton imports from 1992 to 1995 had materially injured the European cotton industry).

78. See Jonathan Annells, *Britain to Referee Dustup on Cotton*, EVENING STANDARD, Sept. 25, 1997, at 35 (quoting a Commission official who summarized the dilemma as "two lobbies pitted against each other, both touting massive job losses and the commission as piggy-in-the-middle.").

79. See *Unbleached Cotton Fabrics*, *supra* note 74, at 17-20 (providing details of the provisional duties imposed by the Commission on cotton imports).

duties to the Council.<sup>80</sup> Nine Member States refused to support the proposal.<sup>81</sup> Their main argument was that the impact of the additional duties on the cost of production of manufacturers using this material in the production of value-added goods was disproportionate to the benefits to the Community industry seeking protection.<sup>82</sup> The implication was that such measures were not in the interest of the Community despite the formal affirmative findings of the Commission.<sup>83</sup> France, which was in the minority, expended a great deal of its political clout within the EC in an attempt to convince Germany to change its vote and support the imposition of duties on cotton imports.<sup>84</sup> In response, Britain, with the support of the Netherlands, Sweden, Finland, and Ireland, began to call for a further broadening of the antidumping rules to take greater account of the impact of duties on importing industries.<sup>85</sup>

The principal source of this crisis can be attributed to a single factor, namely the inflexible policy adopted by the Commission when assessing whether antidumping measures are in the overall interest of the Community. Since the administrative process did not take these powerful interest groups into account, they resorted to political channels to accomplish their goals.<sup>86</sup> The introduction of this political dimension was the almost inevitable consequence of the

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80. See Commission Proposal for a Council Regulation Imposing a Definitive Antidumping Duty on Imports of Unbleached (gray) Cotton Fabrics Originating in the PRC, Egypt, India, Indonesia, Pakistan, and Turkey, COM(97)160 final (providing a detailed proposal for definitive antidumping duties on cotton imports).

81. See Barber & Luesby, *supra* note 73, at 4 (detailing the political battle fought between EC Member States).

82. See Edwin Vermulst & Bart Driessen, *New Battle Lines in the Antidumping War—Recent Movements on the European Front*, 31 J. WORLD TRADE, 135, 154 (June 1997) (explaining that several EC Member states opposed the imposition of definitive antidumping duties on cotton imports from Asia because higher-priced cotton would harm their textile finishing industries).

83. *Id.*

84. See Barber & Luesby, *supra* note 73, at 4.

85. *Id.*

86. See *supra* notes 68-72 and accompanying text (discussing the European glass industry's efforts to lobby Member States to vote against the imposition of definitive antidumping duties on U.S. soda ash in Council after the Commission ignored its pleas in making its Community interest assessment).

strict interpretation applied by the Commission.<sup>87</sup> Thereafter, the Commission recognized that its original approach to determine where the interests of the Community lay in such proceedings was too rigorous. Hence, the European Commission changed its policy to a more exhaustive approach to balancing competing interests in anti-dumping cases.<sup>88</sup>

### III. AMENDMENTS TO THE APPLICATION OF THE 'COMMUNITY INTEREST' TEST

The Commission first indicated that it would change the way it applied the Community interest test in the *Basic Regulation*.<sup>89</sup> The current *Basic Regulation* contains the same provision.<sup>90</sup> In parallel terminology, both regulations provide that, before imposing anti-dumping duties, the Commission will determine whether the Community interest calls for intervention "based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers."<sup>91</sup> The Commission must now draw a distinction between the interests of the Community industry bringing the antidumping complaint, on the one hand, and

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87. See Barber & Luesby, *supra* note 73, at 4 ("Several EU countries are unhappy about what they see as French-driven politicization of the antidumping rules.").

88. See Vermulst & Driessen, *supra* note 82, at 154-55 (analyzing a Note issued by the Commission following *Unbleached Cotton Fabrics* suggesting that it will expand its use of the Community interest test in future antidumping cases).

89. See Council Regulation 3282/94 on Protection Against Dumped Imports from Countries not Members of the European Community, art. 21(1), 1994 O.J. (L 349) 1, 20 (indicating that the Community interest test required consideration of community interests as a whole, including the interests of the various domestic industries, users, and consumers affected).

90. See Council Regulation 384/96, *supra* note 2, art. 21(1) (providing identical guidelines to the 1994 regulation regarding the Community interest test).

91. See *supra* notes 89-90 and accompanying text (indicating that the Community used the same provision regarding the Community interest test in 1996 that it adopted in 1994); see also Explanatory Memorandum: Proposal for a Council Regulation on Protection Against Dumped Imports from Countries not Members of the European Community, COM (94)414 final at 166 (explaining that the new Community interest test provided for in Article 21 of Council Regulation 384/96 provides users and consumers with a comprehensive set of rights under Community antidumping law).

industrial users and consumers on the other. In applying the Community interest test, the Commission must evaluate these competing interests and adopt measures only if, on balance, intervention would be in the Community's interest.

Despite this reformulation, the new regulation gave little indication of the methodological approach the Commission should use in application of the revised principle of Community interest. For the Community authorities to decide not to impose antidumping measures, they must, in the words of Article 21 of the *Basic Regulations*, "clearly conclude that it is not in the Community interest to apply such measures."<sup>92</sup> Furthermore, Article 21(1) requires the Community authorities to give "special consideration" to the need to eliminate the trade distorting effects of injurious dumping and the need to restore effective competition.<sup>93</sup> Apart from this, Article 21 provides no other indication as to how the Community authorities should approach their task. Both these factors, however, favor the Community industry. In balancing the competing interests, the Community industry is still given special weight, and so there is still a presumption in the language of Article 21(1) in favor of the introduction of anti-dumping duty measures.<sup>94</sup> Therefore, the language in Article 21(1) corresponds closely with the policy adopted by the Commission in the past, which means that the Community interest will only interfere with the imposition of duties in the most exceptional of cases.<sup>95</sup> Because the *Basic Regulation* lacks detailed substantive guidelines explaining how the Commission should balance the different competing interests, the Commission continues to retain considerable discretion in applying the new Community interest principles on a case-by-case basis.

While substantive detail is lacking in the revised provisions on Community interest in the *Basic Regulation*, the same is not true of

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92. See Council Regulation 384/96, *supra* note 2 (providing the basic statement of Community interest test).

93. *Id.*

94. *Id.*

95. See Klaus Stegemann, *Anti-Dumping Policy and the Consumer*, 19 J. WORLD TRADE 466, 474 (1990) (stating that, under the old Community interest rule, everyone usually expected the Commission to apply the clause very sparingly and, generally, only in response to political pressure).

the provisions concerning procedural rights and safeguards for interested parties concerning the application of the Community interest test. In contrast to the earlier regulations, the new *Basic Regulation* permits significantly greater access for parties other than the complainants to make representations to Community institutions related to Community interest.<sup>96</sup> Not only complainants, but also importers, users, consumer groups, and their respective trade associations are entitled to make their interests in the proceedings known within the time period specified by the Commission in its notices of initiation.<sup>97</sup> The same parties may also request a hearing with the Commission to make their views known on the issue of Community interest,<sup>98</sup> and they have access to non-confidential information made available by other parties.<sup>99</sup> The Commission has in fact modified its practice to conform to this requirement in new investigations. Under current practice, notices of initiation appearing in *the Official Journal of the European Commission* expressly state that user groups and consumer organizations should make themselves known for the purpose of establishing Community interest.<sup>100</sup> The Commission also imposes procedural time-limits on such parties in the same manner as they impose them on traditional interested parties in antidumping proceedings, *i.e.*, Community industries, exporters, and importers.<sup>101</sup>

In discharging its obligation to assess Community interest, the

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96. See Council Regulation 384/96, *supra* note 2, art. 21(2) (permitting importers, user groups, and representative consumer organizations to provide information to the Commission during antidumping proceedings relevant to Community interest).

97. *Id.*

98. See *id.* art. 6(5) (allowing all interested parties "likely to be affected by the result of the proceeding" to request a hearing).

99. See *id.* art. 6(7) (providing that all interested parties that have made themselves known with the access to all non-confidential information).

100. See, *e.g.*, Commission Notice of Initiation of Antidumping Proceedings Concerning Imports of Personal Fax Machines Originating in the People's Republic of China, Japan, Republic of Korea, Malaysia, Singapore, Taiwan, and Thailand, 1997 O.J. (C 32) 3, 4, para. 6 (notifying all interested parties such as importers, representative users, and consumer groups that they may make submissions to the Commission regarding Community interest).

101. See *id.* at 4, para. 7 (requiring all interested parties who want to make submissions in regard to Community interest to submit all information in writing within thirty-seven days).

Commission dispatches specific Community interest questionnaires in which the complaining industry, users, and importers are entitled to explain their specific interest in the proceedings.<sup>102</sup> The Community interest questionnaire asks interested parties to explain how the measures will affect their business activities measured in terms such as additional cost of production, loss of employment, profitability, reduction of volume in sales, and decreasing market share. Commission officials subsequently verify this information through on-the-spot investigations conducted at the premises of the interested parties making the representations.<sup>103</sup> The Commission, however, is only obliged to take into account information gathered on this basis where it is supported by actual evidence substantiating its validity.<sup>104</sup> On the other hand, where no user groups or other interested party responds to a questionnaire, the Commission is still relatively free to take into account the factors it wishes when assessing Community interest. The absence of such responses will invariably mean that the Commission will not deny antidumping duties on the grounds of Community interest.<sup>105</sup> Where parties make representations concerning only a small part of the relevant group, the Commission is quick to find such submissions not persuasive.<sup>106</sup>

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102. *See, e.g.*, Council Regulation 449/98 of 23 February 1998 Amending Regulation 3068/92 in Respect of Definitive Antidumping Duties on Imports of Potassium Chloride Originating in Belarus, Russia, and Ukraine, 1998 O.J. (L 58) 15, 20 (naming all those to whom the Commission sent questionnaires and who actually returned them).

103. *See id.* at 20 (noting that the Commission carried out on-site verifications of information provided in several of the returned questionnaires).

104. *See* Council Regulation 384/96, *supra* note 2, art. 21(7) ("Information shall only be taken into account where it is supported by actual evidence which substantiates its validity.").

105. *See, e.g.*, Commission Regulation 593/97 of 25 March 1997 Imposing a Provisional Antidumping Duty on Imports of Unwrought, Unalloyed Zinc Originating in Poland and Russia, 1997 O.J. (L 89) 6, 14-15 (concluding that since no user group or other interested party made a submission regarding community interest, absent evidence to the contrary, it was in the Community interest to apply antidumping measures).

106. *See, e.g.*, Commission Regulation 1778/97 of 12 September 1997 Imposing a Provisional Antidumping Duty on Imports of Ferro-Silico-Manganese Originating in the People's Republic of China, 1997 O.J. (L 252) 6, 15-16 (determining that the imposition of antidumping duties would best serve the Community interest where the Commission lacked representative information about the user group due



Users and consumer organizations are now entitled to receive information provided by other parties involved in the investigation and to submit their comments on such information to the Commission.<sup>107</sup> The Community interest clause also permits these parties to comment on any provisional duties applied by the Commission.<sup>108</sup> Through these procedures, Community institutions can conduct a more structured analysis of Community interest in antidumping proceedings. Even though the new *Basic Regulation* has opened the channels of communication, another matter remains as to how Community institutions should analyze and take into account this information when assessing Community interest.

#### IV. CHANGES IN THE APPROACH TOWARDS THE ASSESSMENT OF 'COMMUNITY INTEREST'

After affirmative findings of dumping, injury, and causation, the Commission now conducts a separate in-depth study of Community interest in each investigation.<sup>109</sup> Its purpose is to decide whether the negative effects that imposing antidumping duties would have on the Community as a whole outweigh the positive effects such duties would have on a particular ailing Community industry. The Commission conducts this evaluation in two stages: (1) an evaluation of the positive and negative effects of imposing antidumping duties in relation to the complaining industry itself; and (2) an evaluation of the positive effects on the Community industry of granting protection against the negative effects on other industries and interested parties adversely affected.<sup>110</sup>

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to few users returning questionnaires).

107. See Council Regulation 384/96, *supra* note 2, art. 21(7) (permitting all parties that have made submissions under the Community interest clause to have access to the "key facts and considerations" the Commission is likely to consider in making its determination).

108. See *id.* art. 21(4) (permitting all interested parties qualified under the Community interest clause to comment on provisional duties).

109. See *supra* notes 89-108 and accompanying text (discussing how the Commission applies the amended Community interest test).

110. See Vermulst & Driessen, *supra* note 82, at 154-56 (listing the several factors considered by the Commission in making a Community interest assessment: competitiveness of the Community industry, effects of antidumping duties on importers, upstream suppliers, and downstream users, and the impact on consumers).

In applying the Community interest test, the Commission ordinarily presumes that, when it finds dumping, injury, and causality, antidumping measures are in the Community interest.<sup>111</sup> If the imposition of antidumping measures would injure the complaining Community industry, another Community industry, or another party in the Community substantially more than such measures would benefit the complaining industry, then the imposition of measures is deemed not to be in the best interest of the Community.<sup>112</sup> This is because the harmful effect of such measures would be clearly disproportionate to the main principle being pursued, namely protecting the Community industry.<sup>113</sup>

#### A. IDENTIFICATION OF THE MARKET FOR THE RELEVANT PRODUCT AND ANALYSES OF ITS COMPETITIVE STRUCTURE

The first step in applying the revised Community interest test is to ascertain the relevant market, including both the type of product concerned and the principal characteristics of the market for the product.<sup>114</sup> The characteristics of the relevant market are identified by reference to the nature of the product, supply and demand in the market, and the geographical concentration of producers and manufacturers.<sup>115</sup> The economic viability of the relevant industry is also assessed at this point, both in terms of domestic sales and volume of exports.<sup>116</sup> Once the significant factors of the relevant market are identi-

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111. *See id.* at 154 (noting the Commission's emphasis on the presumption that antidumping duties are in the Community interest).

112. *See id.* at 154-55 (emphasizing that the Community interest test will rarely be important in antidumping cases since the parties claiming to be harmed by the imposition of duties must show that harm is "disproportionate" to the benefit that the complaining industry would incur).

113. *Id.*

114. *See id.* at 139-41 (examining the amended Article 2(10)(k) of EC antidumping legislation, under which complainants may point to any factors, which affect price differentials between domestic EU producers and importers).

115. *See Vermulst & Driessen, supra* note 82, at 155 (citing factors to be taken into account during a Community interest assessment, which include an assessment of the market for the product concerned, the record of competitiveness in the particular industry, the effects of antidumping duties on importers, and the effect of such measures on Community suppliers and on consumers).

116. *See, e.g.,* Commission Regulation 967/00 of 8 May 2000 Imposing a Provisional Antidumping Duty on Imports of Hairbrushes Originating in the People's

fied, the Commission performs an evaluation of its competitive environment in terms of competition among domestic producers as well as that between domestic producers and foreign exporters.<sup>117</sup>

### *1. Competition Among Domestic Producers*

The existence of anti-competitive practices or structures within the Community market is a relevant factor in determining whether it would be in the interests of the Community to impose protective antidumping measures. Article 21(1) of the *Basic Regulation* explicitly states that the need to restore effective competition shall be given special consideration in an antidumping investigation.<sup>118</sup> The difficulty is that in some cases the objectives of antidumping policy and of competition policy conflict.<sup>119</sup> To balance the requirements of antidumping and internal competition policy, the Community authorities are now required to take the entire economic market into consideration and to refrain from applying antidumping measures that would distort competition within the Community. Thus, where the Community producers might use the antidumping proceedings to drive independent importers from the market,<sup>120</sup> or where the effect of duties would create or reinforce a dominant position within the common market, it may not be in the Community interest to impose

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Republic of China, the Republic of Korea, Taiwan, and Thailand, 2000 O.J. (L 111) 4 (analyzing and attempting to alleviate the adverse market effects of dumping in Asian markets on the Community).

117. *See id.* (comparing the profit margins of Asian importers with those of thirteen major EU producers of hairbrushes and finding measurable economic injury).

118. *See* Council Regulation 384/96, *supra* note 2, art. 21(1); *see also* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 3(g), O.J. (C 340) 3 (1997) [hereinafter EC TREATY] (requiring Community authorities to support a system ensuring that competition in the internal market is not distorted).

119. *See* Case 16/90, Detlef Nolle v. Council, 1988 E.C.R. I-5177 (1988) (Opinion of Advocate General van Gerven) (construing the antidumping provisions of the EC Treaty as intended to protect domestic European industries from price undercutting by foreign exporters).

120. *See* Vermulst & Driessen, *supra* note 82, at 155 (stating that the Commission's determination on the degree of competition has become more relevant and seems to acknowledge that it is quite possible that EC companies attempt to abuse the antidumping instrument in order to decrease the level of competition on the EC market).

measures.<sup>121</sup>

First, the Commission makes a record on the state of competitiveness in the industry<sup>122</sup> by examining the structure and characteristics of the Community industry. Generally, the characteristic of an industry with a large number of independent producers indicates that the degree of competition will be relatively high.<sup>123</sup> On the other hand, a Community industry characterized by a monopoly, a duopoly, or some other less competitive structure, is an indication of weak competition.<sup>124</sup> Where the market is composed of a large number of independent Community producers and competition is intense, imposing duties will more likely be in the Community interest.<sup>125</sup> For example, where industrial user groups enjoy the presence of a wide range of suppliers in the Community industry, the imposition of antidumping measures is more likely to be in the Community interest as the impact will be far less noticeable due to the alternative sources of supply.<sup>126</sup> Similarly, if the complaining Community industry cannot

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121. See Commission Decision of 15 December 1990 Relating to a Competition Proceeding Under Article 85 of the EEC Treaty, 1991 O.J. (L 152) 1 (outlining the Commission's recognition of the influence of antidumping duties as a factor in market dominance).

122. See, e.g., Commission Regulation 209/97 of 3 February 1997 Imposing a Provisional Antidumping Duty on Imports of Certain Handbags Originating in the People's Republic of China, 1997 O.J. (L 33) 11 (assessing the economic impact of Chinese leather imports on the competitiveness of the market for European leather handbags).

123. *Id.*

124. See, e.g., Commission Regulation 137/96 of 22 January 1996 Imposing a Definitive Antidumping Duty on Imports of Refractory Chamottes Originating in the People's Republic of China, 1996 O.J. (L 21) 1 (rejecting the contention that antidumping measures could create a European monopoly in the chamotte market).

125. See, e.g., Commission Regulation 2140/97 of 30 October 1997 Imposing a Provisional Antidumping Duty on Imports of Personal Fax Machines Originating in the People's Republic of China, Japan, Republic of Korea, Malaysia, Singapore, Taiwan, and Thailand, 1997 O.J. (L 297) 61 (asserting that antidumping measures would not have a significant effect on the market for fax machines because of the number of competitors in the market).

126. See, e.g., Council Regulation 2496/97 of 11 December 1997 Imposing a Definitive Antidumping Duty on Imports of Silicon Metal Originating in the People's Republic of China, 1997 O.J. (L 345) 1 (stating that as far as the competitive environment in the Community market is concerned, user industries and other economic operators have always enjoyed the presence of a wide range of competitors in the product market). The alternative sources of silicon from Norway, Brazil,

supply all the requirements of its industrial consumers, it is also likely that it will be in the Community interest to impose antidumping measures as imports will be needed to supply Community users. The imposition of antidumping duties will cause the price of both domestic and imported products to rise in response to an increase in demand.<sup>127</sup>

Where the Community industry is composed of a small number of producers, the Commission is more cautious in evaluating this characteristic. For example, in *Ringbinder Mechanism*,<sup>128</sup> despite the fact that a virtual duopoly existed, the Commission imposed antidumping measures believing that it would be corrective and that it would not prevent the entrance of exporters from other countries into the Community market.<sup>129</sup>

Where there are a relatively large number of producers, it will be highly relevant whether such producers have engaged in practices that could be described as anti-competitive under Article 85(1) of the EC Treaty.<sup>130</sup> An established history of abusive anti-competitive col-

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South Africa, and Australia may have mitigated the adverse economic effects of Chinese price undercutting. *See id.*

127. *See, e.g.*, Commission Regulation 45/97 of 15 January 1997 Imposing a Provisional Antidumping Duty on Imports of Polyethylene Bags originating in India, Indonesia and Thailand, 1997 O.J. (L 12) 16 (stating that, since the Community producers could only satisfy roughly forty percent of the demand on the Community market, imports from third countries will therefore always be necessary; and, after the imposition of antidumping measures, producers located in the countries concerned would therefore be able to promote their exports to the Community at fair prices, and could even increase their exports attracted by remunerative price levels).

128. *See* Commission Regulation 1465/96 of 25 July 1996 Imposing a Provisional Antidumping Duty on Imports of Certain Ring Binder Mechanism Originating in Malaysia and the People's Republic of China, 1996 O.J. (L 187) 47 (finding that the two complaining Community producers of metal ring binders accounted for more than ninety percent of the total EU market share in that industry).

129. *See id.* (stating that some EU members argued that the imposition of measures would lead to a duopoly of supply to the Community market, with possible adverse effects on price). The Commission, however, did not accept this line of reasoning as it ignored the corrective nature of antidumping measures. *See id.* The measures would neither prevent third country exporters from entering the Community market, reduce effective competition, nor decrease the quality and diversity of supply. *See id.*

130. *See* Commission Regulation 45/97 of 10 January 1997 Imposing a Provisional Antidumping Duty on Imports of Sacks and Bags made of Polyethylene or

clusion should be a serious factor weighing against the adoption of antidumping measures.<sup>131</sup> The Commission dismisses unsubstantiated allegations that the Community industry may form a cartel in the future as a result of antidumping measures.<sup>132</sup> Since its change of policy, the Commission still has not hesitated before granting protection to a producer that has abused its dominant position. This issue has arisen several times already and in none of these cases did the rejection of measures seem seriously contemplated.<sup>133</sup> In the most significant case, *Advertising Matches from Japan*,<sup>134</sup> a formal complaint was lodged with the Commission's Directorate-General for Competition Policy against the main producer in the complaining Community industry.<sup>135</sup> The company was alleged to be abusing its dominant position in the Community market through anti-competitive practices such as predatory pricing and the acquisition of competitors.<sup>136</sup> The Directorate-General for Competition rejected the complaint, a fact the antidumping case-handlers for the Directorate-General for Trade Policy seized upon as being a sufficient pretext for rejecting these

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Polypropylene Originating in India, Indonesia, and Thailand, 1997 O.J. (L 12) 8 (finding that Indian, Indonesian, and Thai imports, which were in direct competition with EU manufacturers, rose to a volume of more than fifty-eight percent from 1992 to 1996).

131. *Id.*

132. *See id.* (stating that exporters claimed that there was a risk of the complainant industry forming a cartel and that antidumping measures would therefore reduce effective competition). The Commission, however, discounted this argument because there was no indication of any violations of national or Community competition rules. *See id.*

133. *See id.* (stating that, as far as the allegations about the abuse of a dominant position were concerned, the Commission only concluded that, in light of the competitive forces in the Community market, such allegations were without foundation); *see also* Commission Regulation 1731/97 of 4 September 1997 Imposing a Provisional Antidumping Duty on Imports of Glyphosate Originating in the People's Republic of China, 1997 O.J. (L 243) 7.

134. *See* Council Regulation 2025/97 of 15 October 1997 Imposing a Definitive Antidumping Duty on Imports into the Community of Advertising Matches Originating in Japan, 1997 O.J. (L 284) 57 (finding material injury to complainants who represent seventy-eight percent of the Community output of the product).

135. *Id.*

136. *See id.* (comparing EU production volumes with Japanese import volumes sold at lower prices in assessing the advisability of imposing import measures).

allegations.<sup>137</sup> This was not, however, a convincing or exhaustive evaluation of the competitive situation within the Community market.<sup>138</sup> Despite the fact that the evidential support for the complaint was not sufficient for the competition, the Directorate-General should not necessarily have allowed the antidumping division to ignore the economic implications of the behavior when it authorized protection in the form of antidumping measures.<sup>139</sup> Furthermore, as far as can be ascertained from the text of the regulation, no real investigation into these allegations was made by the Commission.

By not correctly analyzing these allegations of anticompetitive practices, the Commission is repeating its earlier error of ignoring the legitimate concerns of user industries when assessing Community interest.<sup>140</sup> It is still unacceptable that Community industries engaging in anticompetitive behavior should be able to consolidate their position by further restricting competition from foreign sources. However, the argument that the imposition of antidumping duties will reduce competition is frequently reversed by the Commission who maintains essentially that, provided there is a higher price, there will be more competition.<sup>141</sup>

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137. *See id.* (stating that as to the competition law investigations, the Commission was aware that a complaint had been lodged with the Community authorities alleging that the complainant Swedish Match abused its dominant position by practicing a policy of acquisitions and predatory pricing). The complaint was dismissed, however, as there was no supporting evidence. *See id.*

138. *See id.* (rejecting Japan's contention that the injury to EU domestic producers was not material). The Commission found that the adversely affected firms represented a substantial percentage of EU producers and revenue for the industry, and that Japanese imports significantly depressed Community industry prices. *See id.*

139. Council Regulation 2025/97, *supra* note 134.

140. *See, e.g.*, Commission Regulation 138/96 of 22 January 1996 Amending Regulation 520/94 Establishing a Community Procedure for Administering Quantitative Quotas, 1996 O.J. (L 21) 6.

141. *See id.* (arguing that the belief that the imposition of antidumping measures might lead to a monopolistic position of the Community industry is unfounded, and that these measures will have the effect of maintaining the number of competing suppliers of chamottes on the Community market because the measures will ensure the continued presence of the Community producers together with exporters from other countries).

## 2. *Competition Between Domestic Producers and Foreign Exporters*

Competition between Community producers and importers is considered significant if the entire productive capacity of Community producers cannot satisfy the Community market's needs.<sup>142</sup> This is because imports from third countries will always be necessary, especially if the market share held by the Community industry is low.<sup>144</sup> In these circumstances, the likelihood that antidumping measures will be in the Community interest is normally high.<sup>144</sup> If, on the other hand, the imposition of duties will allow Community producers to monopolize the Community market by shutting out foreign exporters, this must be considered a factor mitigating against the adoption of antidumping measures.<sup>145</sup> This would be particularly so if, for example, exports originated from only one country other than the European Community and there is a single non-EC producer.

There is little evidence showing that the Commission would consider future market foreclosure to foreign exporters due to antidumping duties a valid reason for refraining from imposing duties. The Commission has rejected claims that high market shares held by Community producers, and the likelihood of increasing these shares, are against the Community interest.<sup>146</sup> Furthermore, the Commission

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142. *See, e.g.*, Council Regulation 423/97 of 3 March 1997 Amending Regulation 3433/91 in Respect of Imports Originating in Thailand and Imposing Definitive Antidumping Duties on Imports of Gas-Fuelled, Non-Refillable Pocket Flint Lighters Originating in Thailand, the Philippines and Mexico, 1997 O.J. (L 65) 1.

143. *See, e.g.*, Commission Regulation 1023/97 of 6 June 1997 Imposing a Provisional Antidumping Duty on Certain Imports of Flat Pallets of Wood Originating in Poland, 1997 (L 150) 4 (determining that, as a result of an eighty-eight percent increase in Polish imports, the Community industry suffered a loss of twelve percent market share).

144. *See id.* (conceding that, although the Community industry had a healthy record in global markets during the investigation period, its market position deteriorated to the detriment of medium and small producers such that antidumping measures were appropriate).

145. *See id.* (rejecting the argument that the imposition of antidumping measures could have an anti-competitive effect on EU domestic markets because of the diversity of the product market, which includes a number of medium and small firms).

146. *See* Commission Regulation 1587/97 of 16 June 1997 Imposing a Provisional Antidumping Duty on Imports of Advertising Matches originating from Ja-



has cited the need to increase low market shares held by Community producers as being strongly in the Community interest.<sup>147</sup>

## B. ASSESSMENT OF THE EFFECT OF MEASURES ON THE COMMUNITY INDUSTRY

Once the relevant market has been isolated, and its competitive environment evaluated, the Commission moves on to assess the effect on the complaining Community industry of imposing anti-dumping duties against the impact of not imposing duties.<sup>148</sup> It is critical to note that this analysis is confined to the economic and commercial impact on the relevant complaining Community industry. No attempt is made at this point to offset competing interests among other affected industries or interested parties. Furthermore, it is always considered in the general interests of the Community to maintain a viable Community industry.<sup>149</sup>

The viewpoint of this analysis ignores the past condition of the industry and focuses on present and future market conditions. This is inevitable because assessing whether measures are in the interests of

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pan, 1997 O.J. (L 158) 8 (recognizing that the Community industry, which represented seventy-eight percent of the whole Community production and whose market share is over fifty percent of the Community's market overall, held an important position on the Community market but concluding that antidumping duties would not result in an abuse of such a position, despite arguments from importers that the imposition of antidumping duties would strengthen the position of the complaining industry and put them in a position to set prices in the Community market at such low levels that the importers would simply be eliminated from it).

147. See, e.g., Commission Regulation 1731/97, *supra* note 133 (stating that following the imposition of measures, the price of the relevant product and, to some extent, the volume of sales in the Community market, were expected to rise, thus enabling the Community industry to recover lost market share and even increase their market share from the expected increase in consumption).

148. See, e.g., Commission Regulation 1043/00 of 18 May 2000 Imposing a Provisional Antidumping Duty on Imports of Glycine Originating in the People's Republic of China, 2000 O.J. (L 118) 6 (assessing the impact on various Community industries, including the complainant producers, pet food, agrochemical, and pharmaceutical industries of Chinese product dumping, and imposing antidumping measures upon the determination of material injury).

149. See, e.g., Council Regulation 384196 of 22 December 1995 on Protection Against Dumped Imports from Countries Not Members of the European Community, 2000 O.J. (L 56) 1, art. 3 (stipulating that the totality of the circumstances surrounding a product importation should be considered in applying the enumerated factors and in ascertaining the effect of imports on a particular market).

the Community inherently involves taking a prospective view, *i.e.*, evaluating the effect on the industry in the future after duties have or have not been imposed. To make an accurate assessment, the Community can only extrapolate from the indicators that have been identified as part of the investigation into the injury aspects of each case.<sup>150</sup>

### 1. *Effect of Measures on Market Share of the Community Industry*

Evidence of declining market shares held by Community industries is a factor strongly supporting the introduction of measures.<sup>151</sup> In the event that the Commission finds that the prospect of duties will stimulate demand for Community-produced products over non-Community goods, the possibility of measures increases.<sup>152</sup> In practice, the Commission tends to identify declining market share with other factors related to decreasing market share, such as declining investment and employment.<sup>153</sup> By aggregating the loss of market share with other economic indicators evidencing injury, the need for duties appears even more acute and the imposition of duties therefore more justifiable.

### 2. *Effect of Measures on Prices and Profit Margins*

Price depression, together with evidence of negative profitability in the Community industry, strongly support intervention being in the interests of the Community.<sup>154</sup> To a certain extent, however, a

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150. *See id.* (listing as relevant to the advisability of imposing antidumping measures such factors as the rate of increase of dumped imports into the Community market, the availability of other export markets, the effect of import prices on the market price of the Community goods, and the inventories of the product investigated).

151. *See* Commission Regulation 1731/97, *supra* note 133 (finding that the market shares of European producers decreased by seven percent as a result of price cutting practices).

152. *See id.* (stating that the Commission assumes an increase in demand following the imposition of antidumping measures).

153. *See, e.g.*, Commission Regulation 967/00, *supra* note 116, at 4 (stating that it can be expected that the Community industry will increase its market share as a consequence of the imposition of antidumping measures).

154. *See, e.g.*, Commission Regulation 1465/96, *supra* note 128, at 56 (stating that, without the imposition of antidumping measures, the financial situation of the

finding of dumping will always automatically lead to financial losses for a Community industry since injury caused by dumping is often attributed to price undercutting or underselling.<sup>155</sup> Price depression is simply the natural corollary of this phenomenon.<sup>156</sup>

### 3. *Effect of Measures on Future Production and Capacities*

Clearly, where the future existence or viability of the Community industry is genuinely threatened, there is a strong presumption in favor of intervention.<sup>157</sup> This presumption is based not only on the need to ensure the continued existence of the Community industry, but also, on a macro-economic level, to ensure that competitive conditions inside the Community do not deteriorate because of declining businesses.<sup>158</sup>

Although this is a valid consideration to take into account, the Commission has, however, seemed too willing to accept these worst-case scenarios at face value and demanded little evidence of these allegations.<sup>159</sup> It seems that the fear of job losses and factory closures

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Community industry would worsen).

155. *See id.* (conceding that the imposition of antidumping measures is likely to improve a Community producer's market share initially, but may eventually lead to further depressed market prices).

156. *Id.*

157. *See, e.g.,* Commission Regulation 165/97 of 28 January 1997 Imposing a Provisional Antidumping Duty on Imports of Certain Footwear with Textile Up-pers Originating in the People's Republic of China and Indonesia, 1997 O.J. (L 29) 3 (arguing that, without measures to correct the effect of the dumped imports, the Commission considers that the position of the Community producers will further deteriorate and the existence of the Community industry as a whole will ultimately be at risk).

158. *See id.* (stating that, in the Commission's view, if fewer producers are present in the Community market, competition may be reduced commensurately).

159. *See, e.g.,* Commission Regulation 837/00 of 19 April 2000 Imposing a Provisional Antidumping Duty on Imports of Certain Cathode-ray Color Television Picture Tubes Originating in India, Malaysia, the People's Republic of China, and the Republic of Korea, 2000 O.J. (L 102) 15 (arguing that, on the one hand, in the absence of the imposition of antidumping measures, a further deterioration of the situation of the Community industry is quite probable; and that, on the other hand, because no sufficient evidence was provided by the users of the dumped product with regard to disadvantages to their businesses, the Commission performed no subsequent analysis).

in the manufacturing industry is superseding every other concern.<sup>160</sup> Moreover, there is virtually an automatic assumption that this effect will occur if antidumping duties are not imposed.<sup>161</sup> Frequently, the evidence for reaching this conclusion is far from conclusive.<sup>162</sup> In contrast, little attention has been paid to arguments that, even at full capacity, the Community industry cannot satisfy the demand in the Community market and, therefore, measures would not necessarily be in the overall interest of the Community, especially in times of short supply. For example, in *PVC Bags from India, Indonesia and Thailand*,<sup>163</sup> the Commission rejected an argument that imposing measures would not be in the Community interest because the total productive capacity of the Community industry could only satisfy forty percent of the Community demand.<sup>164</sup>

#### 4. *Impact of Measures on Employment*

The issue of employment is raised in almost every case. The prospect of declining employment rates, particularly against a background of faltering industries, is a strong factor in favor of intervention. This is particularly true where the Community industry is labor-intensive, or where there has been a great deal of investment in job creation.<sup>165</sup> Additionally, intervention becomes even more compelling when the majority of the industry's establishments are located in

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160. *See id.* (determining that the declining productivity of the Community market is likely to lead to an appreciable loss of manufacturing and employment in this sector).

161. *See id.* (stating that "the imposition of antidumping measures is necessary to prevent further [economic] injury . . . and to preserve employment").

162. *See, e.g.*, Commission Regulation 1043/00, *supra* note 148, at 14 (arguing that, if antidumping measures are not imposed, the sole Community producer will most likely have to close its production facility because of its low profit margins and financial losses).

163. *See* Commission Regulation 45/97, *supra* note 130, at 18 (finding the effects of a general recession on the market for plastics to be a negligible factor in determining whether to impose an antidumping duty).

164. *See id.* at 18 (ascertaining the effect on the potential uses of bags in the Community market within the agricultural and chemical sectors as significant factors mitigating in favor of the imposition of antidumping measures).

165. *See, e.g.*, Commission Regulation 209/97, *supra* note 122, at 19 (stating that the Community handbag industry is a significant contributor to employment in the EC).

economically disadvantaged areas.<sup>166</sup>

5. *Evaluation of the Impact of Measures on the Complaining Community Industry*

In most cases, the Commission makes a provisional determination concerning the likely effects of imposing or not imposing measures on the complaining industry. There are, however, very few situations where the adverse effects of imposing measures outweigh the benefits to the complaining Community industry. This trend is reflected in the Community interest analysis of all antidumping investigations conducted since the change in methodology. The only exception is found in *Leather and Non-Leather Handbags from the PRC*,<sup>167</sup> where the Commission decided that imposing duties on synthetic handbags would not benefit the Community industry.<sup>168</sup> The reasons for the exception were due to the fact that the product could be easily attained from third countries, and that employment in the particular Community sector was already relatively limited.<sup>169</sup> Several months later, however, in *Textile Footwear from the PRC*,<sup>170</sup> importers and retailers of the dumped product contested the issue again. They argued that, like in *Leather and Non-Leather Handbags from the PRC*, antidumping measures would have no positive effect on the Community industry as the supply of the product would simply be substituted by third countries.<sup>171</sup> Nevertheless, the Council rejected this argument

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166. See, e.g., Commission Regulation 593/97, *supra* note 105, at 14, 15 (explaining that the fact that the production facilities of two Community producers most threatened by dumped imports are already located in vulnerable areas threatens to disproportionately impact the local-area economies).

167. See Commission Regulation 1567/97 of 1 August 1997 Imposing a Definitive Antidumping Duty on Imports of Leather Handbags Originating in the People's Republic of China, 1997 O.J. (L 208) 31, 41 (describing how the imposition of definitive antidumping margins would impact importers and traders).

168. *Id.*

169. See *id.* (stressing that definitive antidumping measures on handbag imports are not in the Community's best interest given the likelihood that such handbags would be imported from third countries).

170. Council Regulation 2155/97 of 29 October 1997, Imposing a Definitive Antidumping Duty on Imports of Textile Footwear Originating in the People's Republic of China, 1997 O.J. (L 298) 1.

171. See *id.* at 14 (comparing the situation of the textile footwear industry to the synthetic handbag manufacturers).

since the complainant Community industry's market share was relatively high and a great amount of investment had already been put into producing footwear.<sup>172</sup>

Once injury has been established, determinations rarely result in the termination of an investigation due to the fact that measures would not be in the Community interest. Community institutions are obliged to consider the need to eliminate the trade-distorting effects of injurious dumping and to restore effective competition.<sup>173</sup> Both of these factors weigh heavily in favor of intervention. The case for imposing measures becomes even stronger where the adverse economic situation of an industry is compounded by affirmative injury. In the vast majority of cases where injury has been established, the effects of imposing measures are positive for the Community industry, *i.e.*, increased market share, prices, and profits for the Community industry.<sup>174</sup> Thus, the imposition of duties often becomes equated with returning the industry to the economic state prior to dumping.

### C. BALANCING THE EFFECTS OF MEASURES AGAINST THE INTERESTS OF OTHER ECONOMIC OPERATORS

While there are very few scenarios where the Community institutions would opt against imposing antidumping measures, oftentimes the effect of these measures may cause greater damage on other economic actors. The damage may even outweigh the benefits to the complaining Community industry. The Community interest test, if properly applied, is designed to prevent this type of situation. The failure to balance these competing interests has led to the crisis in the

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172. *See id.* (rejecting the alleged parallel between the *Textile Footwear* case and the *Synthetic Handbags* case, based on the significant market share still held by the complainant Community industry, the nature of the capital holders, and the significant industrial investment made to produce footwear).

173. *See* Council Regulation 384/96, *supra* note 2, art. 21(1) (requiring that the Commission, in its evaluation of all of the effected interests, give special consideration to the need to eliminate the trade distorting effects of injurious dumping and restore effective competition).

174. *See* Hoekman & Mavrodīs, *supra* note 39, at 46 (explaining that the impact of public interest clauses is diminished by the fact that they are invoked at the final stage of antidumping investigations, by which time users have a heavier burden in countering firmly established evidence).

institutional decision-making process discussed above.<sup>175</sup>

The Commission, therefore, conducts a second-phase analysis to consider whether imposing antidumping duties would cause more damage to other Community industries and interest groups than provide more benefits to the complaining Community industry. In order to appraise effectively the economic and commercial interests involved, the purported benefits of imposing duties for the Community industry must be assessed carefully against the effects that such duties will have on all other interested parties. As a general principle, the Commission considers four sets of interested parties: (1) Community traders and importers; (2) upstream suppliers; (3) industrial users; and (4) general consumers. In some cases, special consideration is also given to external economic policy issues.

The impact of the measures on all of these groups of economic operators is examined cumulatively and weighed against the benefits accruing to the complaining Community industry. This is not a precise scientific process because it would be practically impossible to carry out a strict cost-benefit analysis in each case.<sup>176</sup> Nevertheless, there are instances where the weight of some interests discourages imposing duties because that would not be in the general Community interest.

#### *1. Assessment of the Effect of Measures on Community Traders and Importers*

Imposing antidumping measures will have an adverse effect on traders and importers of the dumped product. In earlier cases, the Commission simply considered that the adverse effects were counterbalanced by the positive benefits of low dumped import prices previously enjoyed by the traders and importers. Balancing one against the other, there was no harm caused to the Community as a whole.<sup>177</sup>

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175. See *supra* Part II (discussing the conflicts surrounding the Community interest test that led to the amendments to the *Basic Regulation*).

176. See Bronckers, *Cost-Benefit Analyses*, *supra* note 35, at 23-24 (arguing that, although some costs could be politically admissible for a government, merely finding that a particular antidumping measure imposes costs or that the producer's benefit is less than the consumer's cost, is not necessarily dispositive).

177. See, e.g., Commission Regulation 1645/95, *supra* note 29, at 5, 20. The

The Commission, now, conducts a more thorough analysis. The current assessment considers three main criteria: (a) the importance of traders and importers in the sales and distribution process of the relevant product; (b) their ability to absorb duties in profit; and (c) the effect of measures on their future viability.

*(a) The importance of traders/importers in the sales and distribution process*

First, the Commission places in context the economic significance of the group. The factors that increase such significance include the group's importance as facilitators of imports, its role as employers, and its contribution to the overall functioning of the market.<sup>178</sup> Conversely, the nominal number of importers and their limited economic strength marginalizes their importance in relation to the complaining Community industry.<sup>179</sup>

Next, the Commission measures the economic viability of the

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Commission stated in this ruling that:

provisional measures might affect the market shares and businesses of those importers who have, to a large extent, benefited from the unfairly low dumped import prices, but such an effect would not harm the Community interest as a whole, because antidumping measures should normally have a positive effect on those distributors which have suffered from the unfair competition.

*Id.*

178. *See, e.g.*, Commission Regulation 1732/97 of 4 September 1997 Imposing a Provisional Antidumping Duty on Imports of Stainless Steel Fasteners Originating in the People's Republic of China, India and Malaysia, 1997 O.J. (L 243) 17, 33 (stating that the distribution of the dumped product was characterized by a significant number of importers and traders that operated between the producers and the users of the product in such a way that the behavior of the importers and traders on the market significantly influenced the price of the dumped product). Furthermore, it was found that the Community industry had minimal direct contact with the user industries and therefore relied on the distribution network for most of its sales. *See id.* The Commission finally concluded that, although the trader and importer's positive situation was likely to continue if measures were not imposed, their situation would not significantly worsen if measures were imposed. *See id.* at 34.

179. *See, e.g.*, Commission Regulation 1092/97 of 16 June 1997 Imposing a Provisional Antidumping Duty on Imports of Advertising Matches Originating in Japan, 1997 O.J. (L 158) 8, 18 (observing that the Commission considered that refraining from imposing antidumping measures would entail an advantage for a very limited number of importers while disadvantaging the Community industry overall). Additionally, if the Commission did not impose measures, there would likely be negative economic effects (*e.g.*, plant closures). *See id.*



group in terms of its market power, its ability to set prices, and its dependency on the Community industry. Adverse effects are considered minimal if traders and importers have a large selection of suppliers from which to source products.<sup>180</sup> This is particularly true where traders and importers buy products from both Community and foreign suppliers.<sup>181</sup>

*(b) The ability of traders/importers to absorb duties in their profits*

The higher the gross profit on the allegedly dumped products, the more likely that importers and traders will be able to absorb anti-dumping duties. Consequently, the adverse effects of imposing measures on these groups are less likely to outweigh injury to the Community industry. Substantial mark-ups between importation and resale are a strong indicator that traders, importers, and retailers can absorb the additional duties in their profit margins.<sup>182</sup> Additionally, in assessing this factor, the Commission also considers a retailer's ability to pass on the costs of additional duties.<sup>183</sup> Notably, the Commission has ruled that importers should be able to absorb the costs of duties in their profits.<sup>184</sup> Often average gross margins are exaggerated and the market's ability to absorb increased prices from the imposi-

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180. See, e.g., Commission Regulation 18/98 of 7 January 1998 Imposing a Provisional Antidumping Duty on Imports of Synthetic Fiber Rope Originating in India, 1998 O.J. (L 4) 28, 36 (stating that "since importers and distributors have the power to set the prices on the market and are generally free to determine the source of their supply (Community or imported), the Commission does not see that they would be adversely affected by the imposition of measures.").

181. See *id.* at 34 (delineating the Community and foreign traders involved in the case).

182. See, e.g., Commission Regulation 165/97, *supra* note 157, at 13, 15 (explaining that antidumping duties would be absorbed eventually somewhere between the importer and the final consumer—and that after a common 100 percent margin was added before retail sale, it would most likely be borne entirely by the consumer). The Commission noted that although numerous large retailers contended that they had reduced their margins to respond to consumer expectations, the retailers had provided no evidence to support this claim. See *id.*

183. See, e.g., Commission Regulation 967/00, *supra* note 116, at 4, 10 (stating that "any price increase due to antidumping measures is likely to be moderate and thus carried over to the customers of the importers and traders").

184. See Commission Regulation 1732/97, *supra* note 178, at 17, 35 (stating that importers and retailers should not obtain advantages through dumping since this creates an imbalance vis a vis the other competitors, namely the Community industry).

tion of duties is underestimated. The Community institutions often make broad generalizations, which have little support in commercial reality.<sup>185</sup>

(c) *The effect on the economic viability of traders/importers*

General injury indicators are then applied to the group.<sup>186</sup> Any injury is assessed in terms of loss of revenues, employment, and other criteria.<sup>187</sup> This analysis is less thorough than the injury analysis carried out on damages done to the complaining Community industry and is based on far less extensive economic data.<sup>188</sup> Nevertheless, the current analysis is more exhaustive than that carried out prior to the change in methodology. Despite this, there is little proof that the impact of imposing duties on importers and traders would, in the absence of exceptional circumstances, be deemed sufficient by the Community institutions to outweigh the impact on the Community industry itself. Even where substantiated claims have been made that the Community's internal distribution system had more economic significance than the complaining Community industry itself, these interests have been rejected in favor of protecting the Community industry. In *Textile Footwear from the PRC*,<sup>189</sup> for example, both employment and turnover for companies involved after distribution

185. See Council Regulation 2155/97, *supra* note 170, at 12.

186. See, e.g., Commission Regulation 2140/97, *supra* note 125, at 61, 71-73 (considering the factors and injurious impact of the dumped imports with regard to the Community industry).

187. See, e.g., Commission Regulation 467/98 of 23 February 1998 Imposing a Provisional Antidumping Duty on Imports of Potassium Permanganate Originating in India and the Ukraine, 1998 O.J. (L 60) 1 (analyzing the specific economic impact of the proposed antidumping measures on various distribution channels).

188. See P. Tharakan et al., *Interface Between Antidumping Policy and Competition Policy*, 21 WORLD ECON. 1035, 1041 (1998).

189. See Council Regulation 2155/97, *supra* note 170, at 1, 14. The Council stated that:

despite the greater significance of the whole distribution chain of textile footwear in the Community in terms of both turnover and employment, the direct effects of possible antidumping measures on the financial situation of these companies would be negligible if the amount of antidumping duty were to be fully passed on the consumer, furthermore indirect financial effects could only be expected if, due to this price increase, consumers were to significantly reduce their purchases of the product concerned.

*Id.*

were higher than the Community manufacturing industry.<sup>190</sup> Nevertheless, the interests of the Community industry prevailed and anti-dumping duties were imposed.<sup>191</sup>

## 2. *Effect of Measures on Upstream Suppliers*

In normal circumstances, refraining from imposing duties will adversely affect upstream suppliers (*i.e.*, suppliers of raw materials, components, etc.) since their economic well-being depends, in part, on the prosperity of the relevant Community industry.<sup>192</sup> The Commission has gone so far as to link the need to protect the suppliers for Community industries with the need to protect the Community industry itself.<sup>193</sup> The impact of antidumping measures is only limited in two circumstances: first, where the volume or value of the materi-

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190. *Id.*

191. *See* Council Regulation 393/98 of 16 February 1998 Imposing a Definitive Antidumping Duty on Imports of Stainless Steel Fasteners Originating in the People's Republic of China, India, Korea, Malaysia, Taiwan, Thailand, 1998 O.J. (L 50) 1, 11 (arguing that since a greater number of people were employed by importers and traders of the dumped product, it would be in the Community's best interest not to impose duties as higher prices because the imposition of duties decrease demand and cause employment cuts). The Commission, however, reasoned that since importers and traders have optional sources of supply, the effect of measures could be minimized by reducing profit margins and slightly increasing prices to customers. *See id.* Moreover, given the continued need for imported products and the fact that all products are sold to users through a well-established network of traders, the Commission considered that employment would not be adversely affected if measures were imposed. *See id.*

192. *See, e.g.*, Commission Regulation 1023/97 of 6 June 1997 Imposing a Provisional Antidumping Duty on Imports of Flat Wooden Pallets Originating in Poland, 1997 O.J. (L 150) 4, 12 (noting that the upstream raw material supplier to the Community pallet industry was highly dependent upon its sales to the Community industry and that downsizing the Community pallet industry would have direct effects on the profitability and employment of the upstream industry). Thus, if anti-dumping duties were not imposed, the dumped imports from Poland would decrease the Community pallet industry's market share in wooden pallets and, in turn, negatively effect the Community wooden pallet industry's upstream suppliers. *See id.*

193. *See* Commission Regulation 2211/96 of 20 November 1996 Imposing a Provisional Antidumping Duty on Imports of Unbleached Cotton Fabrics Originating in the People's Republic of China, Egypt, India, Indonesia, Pakistan and Turkey, 1996 O.J. (L 295) 3, 15 (stating that it would be in the interest of Community upstream industries to safeguard the Community cotton fabrics industry because it is an indispensable part of the European textile sector).

als provided by upstream industries is relatively low; and second, where Community producers source the bulk of their raw materials from outside the Community.<sup>194</sup>

### 3. *Effect of Measures on User Groups*

The commercial and economic effect of antidumping measures on industrial user groups is one of the strongest factors weighing against the imposition of duties. User groups will absorb the price increases caused by imposing additional duties, which will increase the respective cost of production.<sup>195</sup> The Commission needs to pay substantial attention to the commercial and economic effects as the user groups mount most of the lobbying efforts against the adoption of antidumping measures.<sup>196</sup> Conversely, when these groups do not lobby or protest against the imposition of duties, the Commission assumes that antidumping measures will have a limited effect upon the user groups.<sup>197</sup> If the Commission chooses to ignore the effects of antidumping measures on user groups though, it will expose itself to criticism from the Member States in which the groups are prevalent.<sup>198</sup>

The Commission again appears to examine three main factors in measuring the effect of antidumping measures on user industries: (a) the competitive conditions in these markets, (b) the input costs, and (c) the range of possible responses open to suppliers.

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194. See *supra* notes 170, 192 and accompanying text (describing cases in which the Commission restrained antidumping measures on account of the limited value of materials from upstream industries and external sourcing capacity).

195. See, e.g., Commission Regulation 1732/97, *supra* note 178, at 17, 23 (claiming that the Commission believes that consumers will bear the increase in relevant product prices caused by imposing measures, although the extent will depend on the industry's pricing strategy as well as the importers and distributors).

196. See *supra* notes 68-70 and accompanying text (illustrating the lobbying efforts of user groups to deter antidumping measures in *Soda Ash from the U.S.A.*).

197. See, e.g., Commission Regulation 720/2000 of 27 April 2000 Imposing a Provisional Antidumping Duty on Imports of Color-television Picture Tubes originating in India, Malaysia, the PRC, and Korea, 2000 O.J. (L 102) 15 (concluding that since user industries lacked interest in participating in the antidumping investigation, antidumping measures taken against the concerned countries would not significantly deteriorate their situation).

198. See Corr, *supra* note 12, at 83 (explaining that an expanding membership of the EU has resulted in diverging interests among constituent Members).

(a) *The effects on the competitive conditions in these markets.*

From the supply side, the imposition of antidumping duties will have an anti-competitive impact inside the Community market.<sup>199</sup> In turn, this will affect the competition between user industries and their suppliers. The question is whether this anticompetitive effect will be sufficiently disproportionate to the benefits to the Community suppliers from the imposition of antidumping duties.

The Community institutions have developed a repertoire of excuses for dismissing the adverse economic, commercial, and financial consequences of imposing antidumping duties. One claim is that imposing measures will restore competition to a natural level since, previously, users benefited from an artificially suppressed market.<sup>200</sup> Users' concerns that the imposition of duties will result in a shortage of future supplies are dismissed on the basis that alternative sources of supply will remain available. These sources include: (a) existing Community suppliers accessing a production capacity that has been unused because of inadequate financial return;<sup>201</sup> (b) domestic suppliers that will emerge once market conditions have returned to 'normality';<sup>202</sup> and (c) suppliers in other countries not accused of dumping.<sup>203</sup>

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199. See STANBROOK & BENTLEY, *supra* note 31, at 153 (explaining that, although some argue that imposing duties reduces competition in the supply market, Community authorities maintain that higher prices actually increase competition). The authors further note that Community authorities have focused greater attention in recent cases on available alternative sources of supply and access to competitive suppliers. *See id.*

200. *See id.* at 153 (noting how the Commission dismissed the idea that antidumping measures could result in a monopolistic market, instead holding that measures were pro-competitive because they actually maintained the same number of suppliers).

201. *See, e.g.*, Council Regulation 368/98 of 16 February 1998 Imposing a Definitive Antidumping Duty on Imports of Glyphosates Originating in the People's Republic of China, 1998 O.J. (L 47) 1, 6 (asserting that antidumping measures would maintain, or even increase, the number of competitors in the Community market).

202. *See id.* at 6.

203. *See* Commission Regulation 1465/96, *supra* note 128, at 47 (arguing that the imposition of antidumping measures would lead to the development of a duopolist supply market, which may in turn have adverse effects on price). The Commission refuted the argument, reasoning that the imposition of antidumping measures on the country that was dumping would not prevent exporters in third

In many cases, these assumptions are far from the economic reality. Duopolies have been reinforced, tight supply conditions exacerbated, and frequently there is little evidence of the emergence of new market entrants. In the same vein, often supplies from countries not covered by the investigation cannot be relied upon due to the prediction that many Community industries will present consecutive complaints against producers in different countries, allowing them to isolate progressively the Community market from external competition.<sup>204</sup> The dismissal of these important concerns is not a constructive policy to follow if proper and effective reform of the Community interest test is to be implemented. The Community institutions should realize that such superficial examinations of the economic market will undoubtedly draw unwanted political attention.

*(b) The impact of imposing measures on input costs*

The Commission's continued approach of calculating the cost of imposing duties on the basis of the cost of the component part as a percentage of a finished product and determining the cost of increased duties on that basis is unfortunate. In *Ringbinder Mechanism*,<sup>205</sup> for example, the cost of the ringbinder mechanism as part of a finished binder was established as 10.8 percent of the finished product. The average antidumping duty imposed was twelve percent. Therefore, the additional cost borne by the manufacturers of the finished product was 1.3 percent. The adoption of this approach makes it highly unlikely that measures would ever be refused, because even if the cost element of a component was as high as twenty-five percent, and the duties proposed were fifty percent, the additional

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countries from entering the Community market. *See id.*

204. *See, e.g.*, Council Regulation 2861/93 of 18 October 1993 Imposing a Definitive Antidumping Duty on Imports of Certain Magnetic Disks (3.5" microdisks) originating in Japan, Taiwan, and the People's Republic of China, 1993 O.J. (L 262) 4; Council Regulation 2199/94 of 14 October 1994 Imposing a Definitive Antidumping Duty on Imports of Certain Magnetic Disks (3.5" microdisks) originating in Hong Kong and the Republic of Korea, 1994 O.J. (L 236) 2; Council Regulation 663/96 of 2 June 1996 Imposing a Definitive Antidumping Duty on Imports of Certain Magnetic Disks (3.5" microdisks) Originating in Malaysia, Mexico and the United States, 1996 O.J. (L 92) 1; Commission Regulation 431/96 of 17 April 1996 Imposing a Provisional Antidumping Duty on Imports of 3.5" microdisks originating in Indonesia, 1996 O.J. (L 63) 4.

205. Commission Regulation 1465/96, *supra* note 128.

charge would only be 12.5 percent.<sup>206</sup>

This approach is unrealistic for three reasons. First, it ignores the inflationary effects of imposing duties on the market. Once anti-dumping duties are in place, Community prices for the product under investigation tend to rise, especially if a high duty has been imposed. The proportion of the cost of protection attributable to the component will therefore rise commensurably, as will the overall input cost after duties have been imposed.

Second, cutting alternative sources of supply from non-Community producers can lead to problems in supply reliability. This problem is particularly acute when the product is not a commodity or when only a few countries supply the product. Imposing antidumping duties can effectively cut off these supplies, leaving industrial users with an unhealthy dependency on the Community industry.<sup>207</sup> This predicament is often further exacerbated when the complainants turn their attention to other countries and lodge anti-dumping complaints against them.<sup>208</sup>

Third, many Community industries operate in an internationally competitive environment where it is important to control and, if possible, cut product costs. Plants and production facilities are built according to certain specifications and budgeted costs in order to maintain competitive positions. An unforeseen increase in costs of production as small as one percent can lead industrial producers to cut down on costs elsewhere. Frequently, this means cuts in the level of the workforce or the level of proposed investment, suggesting that the knock-on effect of imposing measures can be significant.<sup>209</sup>

Thus, additional input costs cannot be quantified adequately by a simple calculation based on an estimate of the input cost multiplied by the proposed level of duty. To determine this factor on such a basis is a gross over-simplification of a complex issue. Minimizing the

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206. See generally STANBROOK & BENTLEY, *supra* note 31, at 147.

207. See Commission Regulation 823/95, *supra* note 32, at 15-16 (noting that after definitive measures were imposed on imports of soda ash from the USA in October 1995, exports of this product in the subsequent year fell to one-tenth of their level during the investigation period).

208. See *supra* note 204 and accompanying text.

209. See STANBROOK & BENTLEY, *supra* note 206, at 148.

costs to user groups in this way will very rarely, if ever, counterbalance those of the complaining Community industry. Instead, the Community institutions expose themselves to criticism by employing an obviously defective and oversimplistic approach. This is unfortunate because failing to weigh the additional costs of imposing measures on industrial users properly is one of the most sensitive and controversial aspects of the Community interest evaluation process.

*(c) The ranges of possible responses open to user groups.*

Faced with the prospects of the imposition of duties, user groups have a series of options available for dealing with the additional costs, which the Commission also considers. In particular, the Commission has considered four commercial responses to the imposition of antidumping duties that appear to mitigate the harshness of imposing duties from the point of view of industrial user groups.

First, there is the possibility that the user industry can pass the additional costs of the duties to the ultimate consumer. If this were relatively simple, parties would tend to assume that it would be in the overall interest of the Community to impose the duties.<sup>210</sup> However, it can be commercially difficult to pass on these costs to the ultimate consumer. Where market conditions are tight, price increases may be unacceptable in the market place.<sup>211</sup> In any event, a market's response to price increases is usually declining demand, which, in turn, leads to lower turnover and profits.

Second, there is the likelihood that industrial users can absorb these costs into their profit margins. Obviously, where margins are relatively high, the overall costs of absorption would not outweigh the benefits to the Community industry of imposing duties. Again, however, there is an assumption made on the part of the Community institutions that absorption of the cost of duties can still lead to profitability. This assumption is often made without express knowledge of the level of profits being made in the user industry.<sup>212</sup>

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210. *See id.* at 147 (acknowledging that the Community authorities consider the ability of the user industry to remain unharmed by passing the antidumping duties on to the end consumer).

211. *See id.*

212. *See, e.g.,* Council Regulation 2320/97 of 17 November 1997 Imposing Definitive Antidumping Duties on Imports of Certain Seamless Pipes and Tubes of Iron or Non-Alloy Steel Originating in Hungary, Poland, Russia, the Czech Re-



Third, the industry can downsize the workforce. In balancing job losses in the complaining industry against those in downstream industries, the Commission has taken a skeptical view of representations that the employment consequences for downstream industries would be greater than for the complaining industry.<sup>213</sup> The Commission tends to assume that job losses in the downstream sector will be more than compensated by job savings in the complaining industries.<sup>214</sup> Neither of these assumptions can be made without careful contemplation and analysis.

Finally, the Commission also considers the relative ease with which the user industry can seek alternative sources of supply from countries not subject to dumping.<sup>215</sup> Where sources of supply can be easily switched, there is a strong likelihood that the imposition of duties will not be refused on grounds of Community interest. Generally, the availability of this course of action would almost always defuse the impact of any duties on an industrial user group.<sup>216</sup>

*(d) Carrying out the assessment of the impact on industrial users*

As a general proposition, the Commission has continued its policy of subjugating the commercial interests of user groups in favor of those of the complaining Community industry.<sup>217</sup> In the overwhelming majority of cases, it has ignored representations made by such groups and dismissed the argument that downstream user groups will

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public, Romania, and the Slovak Republic, 1997 O.J. (L 322) 1.

213. See Commission Regulation 165/97, *supra* note 157, at 3, 14 (emphasizing the lack of concrete evidence showing that antidumping measures would lead to job losses for users but that, if such a loss existed, the Community would be compensated by the preservation of jobs in the manufacturing sector and in upstream industries).

214. See *id.* (emphasizing the extreme consideration used by the Commission to consider all involved parties).

215. See Council Regulation 495/98, *supra* note 202, at 15 (emphasizing that antidumping measures remove unfair obstacles to free trade, thus allowing other producers to compete at a fair level).

216. See *id.* (explaining that, generally, effects on users caused by antidumping measures would be negligible).

217. See Commission Regulation 2352/95 of 6 October 1995 Imposing a Provisional Antidumping Duty on Imports of Coumarin Originating in the People's Republic of China, 1995 O.J. (L 239) 4, 11-12 (stating that there would only be a minimal effect from the increased price of coumarin due to antidumping duties on the production cost of most fragrance compounds).

be penalized by the imposition of duties on the basis that these users have benefited from the price advantages that dumped products bring and that there is no justification for allowing unfairly low prices to persist.<sup>218</sup>

This refusal amounts to the most significant limitation on the new approach taken by the Commission towards the reform of the Community interest test. It completely undermines the policy objective that these reforms were presumably intended to achieve. Ultimately, it confirms that the overriding need to protect complaining Community industries is sacrosanct in the Community's antidumping policy.

#### 4. *Impact of Measures on Consumers*

Consumer organizations play an increasingly active part in antidumping proceedings.<sup>219</sup> The arguments of the final consumer, however, have never carried much weight with the Community institutions, despite the fact that they ultimately pay the full cost of the measures imposed.

There has been no significant change in the Commission's approach. Little weight is attached to the concerns of the general consumer, even when consumer organizations submit formal representations to the Commission. This is because the impact of the additional costs caused by the antidumping duties is invariably considered minor or insignificant.<sup>220</sup> The Community authorities assume that the maintenance of a viable Community industry is in the consumer's best interest.<sup>221</sup>

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218. See Council Regulation 2208/96, *supra* note 74, at 16 (emphasizing that without corrective measures to address dumping, the Community industry would suffer greatly).

219. See *supra* notes 40-44 and accompanying text (detailing the attempts by consumer unions to improve its status in antidumping proceedings).

220. See, e.g., Commission Regulation 1069/97 of 12 June 1997 Imposing a Provisional Antidumping Duty on Imports of Cotton-type Bed Linen Originating in Egypt, India and Pakistan, 1997 O.J. (L 156) 11, 28 (explaining that an antidumping duty of ten percent would pass an ultimate price increase of three percent to the consumer if the duty was passed fully through the supply chain to the ultimate consumer). The Commission considered this impact of the proposed measures to be minor, especially as high competition would ensure lower consumer prices. See *id.*

221. See, e.g., Commission Regulation 2380/95 of 2 October 1995 Imposing a

In some cases, however, the price increases that consumers must bear as a result of antidumping measures are substantial. For example, in *Personal Fax Machines from the PRC*,<sup>222</sup> the Commission itself accepted that the duties imposed would result in price increases to the consumer of more than twenty percent. Nevertheless, the Commission observed that the long-term advantages to the consumer, resulting from the development of alternative supply sources from the Community producers, would outweigh the price increases.<sup>223</sup>

The reception of earlier views of the Commission attracted much controversy.<sup>224</sup> Combined with its approach to dealing with the interests of user groups (*i.e.*, passing additional cost of duties to the consumer), the blanket approach—that consumers must always be willing to bear the costs of protecting complaining Community industries—indicates that the new methodology towards the Community interest test is not sufficiently radical.

A notable exception to this general approach is the termination of antidumping investigations in *Disc-changers from Japan, Korea, Malaysia, Taiwan, and Thailand*.<sup>225</sup> In this case, the Commission examined the likely costs and benefits that the imposition of measures

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Provisional Antidumping Duty on Imports of Plain Paper Photocopiers Originating in Japan, 1995 O.J. (L 244) 1, 28 (stating that it is in the long-term interest of consumers to maintain a variety of sources of supply and competition).

222. See, *e.g.*, Commission Regulation 2140/97, *supra* note 125, at 61, 76 (basing the twenty percent price increase on a static scenario in which the common gross margins for traders and retailers established during the investigation).

223. See *id.* (stating that, while resulting price increases will be unavoidable, the long-term advantages to the consumer should be considered). The Commission suggested that the development of alternate supply sources would lead to a complete range of products and, ultimately, more sophisticated product types. See *id.*

224. See STANBROOK & BENTLEY, *supra* note 31, at 150 (suggesting that Community Authorities assume that maintaining a competitive industry is within the best interests of the consumer).

225. See Commission Decision 1999/55 of 21 December 1999 Terminating the Antidumping Proceeding Concerning Imports of Certain Laser Optical Reading Systems, and the Main Constituent Elements Thereof, for use in Motor Vehicles, Originating in Japan, Korea, Malaysia, the People's Republic of China, and Taiwan, 1999 O.J. (L 18) 62 (opting against the adoption of antidumping measures against imports of disc changers from concerned countries).

would have on the economic operators concerned.<sup>226</sup> The Commission held that the imposition of duties would limit consumer choice, thereby encouraging many exporters, particularly those with high duties, to withdraw from the Community market.<sup>227</sup> The Community industry could not compensate this loss of choice in the foreseeable future.<sup>228</sup> The Commission, though, also took several other factors into account.<sup>229</sup> First, while the market share of the Community industry was zero percent in 1996, it had reached 1.4 percent by the investigation period.<sup>230</sup> Second, about eighty-one percent of the disc-changers sold in the Community originated in the countries under investigation.<sup>231</sup> Third, the level of employment in the relevant Community industry was low.<sup>232</sup> Ultimately, the Commission considered that the imposition of antidumping measures would disproportionately affect importers, traders, and consumers of the product concerned.<sup>233</sup>

Although this decision represents a positive application of cost-benefit analysis by the Commission, it also suggests that consumer interests will never be given the same weight as the Community industry, and only in the exceptional case might consumer interests play a bigger role.

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226. *See id.* at 64 (acknowledging the existence of injurious dumping, but forgoing the opportunity to detail such findings).

227. *See id.* at 65 (explaining that the product had a large growth potential that should be free of the imposition of duties).

228. *See id.* (demonstrating a concern for the potential effect consumers would experience if deprived of the advantages of technological variety and development).

229. *Id.* at 64-65.

230. *See id.* at 64 (suggesting that, assuming an average duty of twenty percent on the imports value of the product concerned, duties imposed on product imports would account for between six and ten times the total value of production of the Community industry).

231. *See* Commission Decision 1999/55, *supra* note 225, at 64 (explaining why potential expansion of production in accordance with Community industry plans would only be a fraction of duties imposed).

232. *See id.* (explaining that resulting Community industry gains would be minimal due to the low employment level).

233. *See id.* (acknowledging that the interests of consumers are of higher importance than the interests of the Community industry).

### 5. *Considerations of External Economic Policy*

In some cases, the interests of maintaining good trade relations have been raised.<sup>234</sup> The argument over this aspect of Community interest is usually dismissed based on the underlying assumption that international commerce between two countries will be conducted in accordance with the principles of fair trade.<sup>235</sup> Nevertheless, the Community institutions examine the issue and look at the size of the trade affected in proportion to the total trade, as well as other similar factors. The Community institutions have thus far concluded that the measures will not materially affect the trade relationship between the Community and the country concerned.

Article 15 of the WTO Antidumping Agreement requires the Community to consider the individual economic situations of developing countries when implementing antidumping policies.<sup>236</sup> The Community must explore the possibilities of constructive remedies before applying antidumping measures when the measures would affect the key interests of developing country members.<sup>237</sup> The Community authorities interpret this to mean that while a country's state of development can be taken into account when examining what type of measures are most appropriate, it is not used to consider whether it is appropriate to take protective measures.<sup>238</sup> It is difficult to under-

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234. See, e.g., Council Regulation 137/96, *supra* note 124, at 4 (stating that, while the Community aims to increase economic links with the PRC, it expects that Chinese producers and exporters comply with fair trade principles).

235. See *id.* (stating that the Commission considers it to be unrealistic to assume that antidumping measures imposed to restore fair trade in this market sector will have a significant impact on the trade relationship between the Community industry and the People's Republic of China).

236. WTO Antidumping Agreement, *supra* note 1, art. XV.

237. *Id.*

238. See, e.g., Commission Regulation 93/521 of 3 September 1993 Accepting Undertakings Given in Connection with the Antidumping Review in Respect of Imports of Binder and Baler Twine Originating in Brazil, 1993 O.J. (L 251) 28, 31 (stating that Brazilian producers argued that it was not in the interest of the Community to take action because the region in Brazil where the concerned industry is situated is highly dependent on the production of the relevant product and, therefore, should be given preferential treatment). The Commission rejected the Brazilian producers' argument, however, considering that the situation should be examined in light of Article 15 of the WTO Antidumping Agreement, which provides that special regard must be given by developed countries to the special situation of

stand why the Commission adopted this narrow interpretation as it would clearly be a factor that they could consider under the general heading of "Community interests."<sup>239</sup>

The Community institutions are sensitive to any accusations that they are applying discriminatory treatment to the exports of one country as against another.<sup>240</sup> As a consequence, when considering the interests of the Community, the fact that antidumping measures have been taken against other countries regarding the same product will militate in favor of taking measures against further countries.

#### D. OVERALL EVALUATION PROCESS

The decision to impose antidumping duties is taken after balancing: (a) the positive and negative effects of imposing measures on the complaining Community industry itself; and (b) the benefits of imposing measures to the complaining Community industry against the negative effects on other industrial groups and interested parties. If the imposition of duties is to be avoided, it must be shown that the likely negative impact of such measures would be clearly disproportionate to the likely benefits of such measures in either of the above scenarios.

Unfortunately, in carrying out this appraisal, it can be strongly argued that the Community institutions give undue credit, on the complainant's side, to the need to eliminate the trade-distorting effects of dumping and the need to restore effective competition to the industry. An almost irrefutable presumption is applied in imposing duties, *i.e.*, that it is in the best interests of the Community. In the absence of such a presumption, more cases would be terminated, for the balance of interests would be tipped to the side of interested parties other

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developing countries when considering the application of antidumping measures. *See id.* The Commission concluded that the stage of development of exporting countries should be taken into account when examining what measures are most appropriate in a particular case, but should not be determinative of the appropriateness of taking protective measures. *See id.* at 33.

239. *See* Kofi O. Kufour, *The Developing Countries and the Shaping of GATT/WTO Antidumping Law*, 32 J. WORLD TRADE 167, 179, 184 (1998) (noting that, during the Uruguay Round negotiations, countries like Korea and Singapore, who are principal targets of antidumping investigations, proposed a public interest clause for the new GATT Antidumping Code).

240. *See* WTO Antidumping Agreement, *supra* note 1.

than the complaining Community industry.<sup>241</sup> The Community institutions, however, have not been able to rid themselves of this bias.

Even in cases where the pool of all other interests combined is extremely significant, the need to give protection to the Community industry remains paramount.<sup>242</sup> The current status results from the Community institutions' tendency to give undue weight to the complaining Community industry's claims, while dismissing genuine and substantial concerns from other affected groups, as well as belittling the need to respect the other side of the equation.

## CONCLUSION

While it is still relatively early to pronounce on the final success or failure of these reforms to the application of the Community interest, preliminary indications suggest that radical reform is necessary. While the Community institutions seem to be going through the motions of conducting a more extensive and exhaustive appraisal of the overall interests of the Community when conducting antidumping investigations, the final results show little difference from the earlier approach that had attracted so much criticism.

Empirically, there is little evidence of a significant policy change on the part of the Community institutions when balancing Community interests.<sup>243</sup> From this perspective, the process seems to embody more style than substance. In the overwhelming majority of cases, the interests of all other interest groups are consistently outweighed when measured against those of the complaining Community industry. This is certainly not the outcome one would have anticipated after a complete restructuring of the procedural, substantive, and even

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241. See VERMULST & DRIESSEN, *supra* note 82, at 157 (suggesting that the Community interest determination will be only of marginal significance).

242. See, e.g., Commission Regulation 209/97, *supra* note 122, at 22 (emphasizing that, if left unregulated, injurious dumping activities would hinder the industry, and potentially encourage such industries to relocate outside the Community).

243. From 1997 to July 2000, only one antidumping investigation was terminated because the imposition of duties would not have been in the Community interest. See Commission Decision 1999/55, *supra* note 225, at 65 (noting that the imposition of measures would disproportionately affect traders, importers, and consumers).

methodological approach to making these assessments.

The refusal or unwillingness to take into account adequately the interests of other relevant economic operators, even when these are extremely significant, is the major identifiable shortcoming of this restructuring. In addition, there are other deficiencies. First, Article 21(1), which embodies the Community interest clause itself, allows for Community authorities to make a cost-benefit analysis before imposing antidumping measures. The provision, however, does not mandate how the Commission is to analyze the overall effects of antidumping duties on the Community. When no effective representations are made on behalf of user groups or other interested parties, the Commission may choose which factors it wishes to include in its assessment of the Community interest. This lack of empirical economic analysis in the assessment of Community interest will invariably mean that claims and allegations made by the complaining Community industry will appear more readily accepted than those of other interested parties. Therefore, in assessing the impact of antidumping measures on the economy as a whole, the Community authorities should not only rely on the resources and arguments provided by the private parties to a case.

Second, the law is vague. Rather than contemplating a comprehensive analysis and specifying the different factors and values that have to be weighed against one another, the Community interest clause is drafted more as a grant of discretion to the administering authorities. It is in sharp contrast with the detail given by the provision setting forth the analysis to be undertaken for determining the injury suffered by the Community industry.<sup>244</sup> A provision requiring a mandatory cost-benefit analysis would provide more balance and fairness. A cost-benefit analysis under the Community interest test could provide a helpful framework for determining and distinguishing acceptable from unacceptable cost-levels.<sup>245</sup> With a more comprehensive picture, the Community interest test will become more meaningful and over time more detailed criteria can be developed on how to balance the different components of the Community interest.

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244. See Council Regulation 384/96, *supra* note 2, art. 3.

245. See Bronckers, *Cost-Benefit Analyses*, *supra* note 35, at 26 (explaining that a cost-benefit analysis should extend to encompass qualitative factors).



Currently, the weight given to the interests of the complaining Community industry is excessive. In part, this arises from having to apply the two overriding considerations, *i.e.*, that the trade-distorting effects of dumping should be eradicated, and that effective competition be restored. It is in the public interest for the Community to make every effort to ensure that regulatory interventions are proportionate, yet limited to what is strictly necessary to achieve the intended common-policy goal. It is also worth recalling that the proportionality principle is an unwritten, general principle of Community law.<sup>246</sup>

Third, the law is incomplete. Community interest is not considered a relevant factor during reviews of existing antidumping measures. There is no good reason for this omission. Once a measure is in place, its effects on the economy (*e.g.*, effects on users and consumers) may be different than originally anticipated due to changed circumstances.

Finally, when proceeding from the adoption of provisional antidumping measures to definitive measures, more often than not the question of Community interest seems already resolved in the minds of the Community institutions. It is rare indeed for a change of heart to occur once provisional findings of Community interest have been made.<sup>247</sup> This indicates that the Community interest issue is *de facto* closed as early as the provisional stage of the investigation.

The Commission, therefore, appears to have failed to take advantage of the opportunity to address the criticisms that were leveled against its earlier approach to the Community interest test. The change of methodology will not defuse the tensions that continue to exist among the Member States. In the absence of effective and substantial reform to this part of antidumping investigations, the substantive and institutional problems that have afflicted Community antidumping policy can be expected to continue unabated.

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246. See generally Case 66/82, *Fromançais v. FORMA*, 1983 E.C.R. 395 (1983) (holding that provisions in question, which applied to a minor infringement, should have been reserved for a more serious breach, and were therefore contrary to principle of proportionality).

247. The only notable exception was Council Regulation 1567/97, *supra* note 167, at 31.