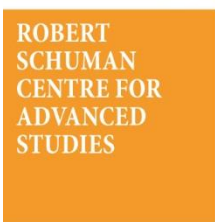




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EU Anti-Circumvention Rules:
Do They Beat the Alternative?

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European University Institute
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Abstract

This article discusses EU law and practice with regard to tackling circumvention of trade defence instruments, notably anti-dumping measures.

The author considers that, while strong legal arguments can be made that anti-circumvention rules are WTO-illegal, as a practical matter transparent and predictable anti-circumvention rules are to be preferred over vague and multi-interpretable non-preferential origin rules that vary from country to country. Furthermore, the many findings of transshipment in EU anti-circumvention investigations show that circumvention may constitute a real problem which warrants quick and effective relief.

Therefore, the article suggests that the way forward is to agree on detailed anti-circumvention rules within the WTO with focus on further improvements in transparency and predictability.

Keywords

Circumvention; trade remedies; trade defence instruments; dumping; anti-dumping measures; rules of origin

Introduction*

Circumvention of anti-dumping duties is a phenomenon that started to attract attention in the second half of the 1980s, notably as the result of the success of Japanese multinationals active in the assembly sector. In the EU, different tests were originally applied for determining the occurrence of circumvention through production within the EU and through production in third countries.¹ Only with respect to the former did a specific anti-circumvention provision exist. Other forms of diversion, including third country diversion, were dealt with under the customs laws (origin and customs classification rules). In Regulation 3283/94, however, anti-circumvention rules were adopted which cover both importing country and third country circumvention.

Under the former Article 13(10), seven proceedings concerning assembly operations in the EU were initiated from 1987 to 1989,² all of them aimed at Japanese manufacturing operations in the EU. While no cases were initiated from 1989 through mid-1995, the first Article 13(1) anti-circumvention investigation was initiated relatively quickly, in October 1995. Most anti-circumvention investigations initiated since that time have involved investigations originally targeting China and have often resulted in findings of transshipment.

These and other forms of circumvention such as importation of slightly altered merchandise and channelling will be discussed in more detail in this article. Furthermore, this paper will briefly discuss the non-preferential origin rules of the EU as well as Rule 2(a) of the General Rules of Interpretation of the Harmonized System because these provide mechanisms to deal with certain forms of diversion as well.³

* This paper was presented at the Executive Seminar for the Global Governance Program “Anti-Dumping: Yesterday’s Woes and Today’s concerns” held at the European University Institute in Florence on 11 and 12 May 2015.

¹ See for more detail Vermulst, *EU anti-Dumping Law and Practice* (2d. ed. Sweet & Maxwell 2010); Vermulst, Waer, *Anti-Diversion Rules in Anti-Dumping Procedures: Interface or Short-Circuit for the Management of Interdependence?*, 11 *Michigan Journal of International Law*, 201-275 (1990); Vermulst, Waer, *European Community Rules of Origin as Commercial Policy Instruments?*, 24: 3 *Journal of World Trade*, 55-100 (1990).

² In chronological order from date of initiation: (1) Electronic typewriters (assembly operations of Brother, Canon, Matsushita, TEC, Sharp and Silver Seiko), OJ [1987] C235/2, [1988] OJ L101/4 (assembly duties), [1988] OJ L101/26 (termination TEC Werk, Brother), [1988] OJ L123/31 (assembly duty Matsushita suspended), [1988] OJ L128/39 (undertaking Matsushita), [1988] OJ L183/1 (assembly duty Canon Bretagne suspended), [1988] OJ L183/39 (undertaking Canon Bretagne), [1988] OJ L203/1 (assembly duty Sharp suspended), [1988] OJ L203/25 (assembly duty Sharp suspended), [1988] OJ L203/25 (undertaking Sharp); (2) Electronic scales (assembly operations of TEC Keylard and TEC UK), [1987] OJ C235/3, [1988] OJ L101/1 (assembly duty TEC), [1988] OJ L101/28 (termination TEC Keylard), [1988] OJ L244/1 (repeal duty TEC UK), [1988] OJ L189/27 (undertaking TEC); (3) Hydraulic excavators (assembly operation of Komatsu), [1987] OJ C285/4, [1988] OJ L101/24 (termination); (4) Photocopiers (assembly operations of Canon, Konishiroku, Matsushita, Minolta, Ricoh, Sharp and Toshiba), [1988] OJ C44/3, [1988] OJ L284/36 (assembly duty Konica, Matsushita, Toshiba), [1988] OJ L284/60 (undertaking Canon, Develop, Ricoh), [1988] OJ L355/1 (assembly duty suspended Matsushita, Toshiba), [1988] OJ L355/66 (undertaking Matsushita, Toshiba), [1989] OJ L43/1 (Konica repeal), [1989] OJ L43/54 (undertaking Konica); (5) Ball bearings (assembly operations of Nippon Seiko and NTN Toyo Bearing), [1988] OJ C150/4, [1989] OJ L126/38 (assembly duty), [1989] OJ L25/90 (undertaking); (6) Serial impact dot matrix printers (assembly operations of Brother, Citizen, Fujitsu, Juki, Matsushita, NEC, OKI, Seiko Epson, Seikosha, Star Micronics and TEC) [1988] OJ C327/8, [1989] OJ L291/57 (undertakings, termination); (7) Video cassette recorders (assembly operation of Orion), [1989] OJ C172/2.

³ Whether perceived circumvention is tackled through customs or through trade laws has an impact on the remedies. In the case of trade laws, in principle measures are applied prospectively. However, in the case of customs laws, remedies may be applied retroactively, penalties can be imposed and the importer may even be subjected to a jail sentence. See for more detail Vermulst, McNamara, *Special Trade Law Issues in the EC for Assembly Products*, 28:4 *Journal of World Trade*, 83 - 122 (1994).

1. Article 13 anti-circumvention provisions

The EU Basic Anti-Dumping Regulation⁴ defines circumvention as as a change in the pattern of trade between third countries and the EU or between individual companies in the country subject to measures and the EU, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.

With regard to the definition of circumvention, Article 13 contains both a *general* rule (Article 13(1)) and a *specific* rule for certain types of circumvention, namely through assembly operations (Article 13(2)). It is important to note that the general rule of Article 13(1) is very broad and vague and can be applied *independently* of the specific rule of Article 13(2). Article 13(1) covers any "*practice, process or work*" while Article 13(2) covers only assembly operations. It would seem that the original intention behind Article 13(1) was to cover in particular, simple cases of circumvention such as transshipment, repackaging, minor product alterations, *etc.*

1.1 The general rule of Article 13(1)

Article 13(1) provides that anti-dumping duties may be extended to imports from third countries, of the like product, whether slightly modified or not, or to imports of the slightly modified like product from the country subject to measures, or parts thereof, when circumvention of the measures in force is taking place. Anti-dumping duties not exceeding the residual anti-dumping duty imposed in accordance with Article 9(5) of the Regulation may then be extended to imports from companies benefiting from individual duties in the countries subject to measures.

Article 13(1) lays out five conditions for actionable circumvention:

- practice, process or work;
- change in the pattern of trade;
- insufficient due cause or economic justification;
- undermining the remedial effects of the duty; and
- evidence of dumping.

These five conditions will be discussed below.

1.1.1 Practice, process or work

Article 13(1) provides as non-exhaustive examples of a practice, process or work:

- (1) slight modification of the product concerned to make it fall under customs codes which are normally not subject to the measures, provided that the modification does not alter its essential characteristics;
- (2) the consignment of the product subject to measures via third countries;
- (3) the reorganisation by exporters or producers of their patterns and channels of sales in the country subject to measures in order to eventually have their products exported to the EU through producers benefiting from an individual duty rate lower than that applicable to their products; and
- (4) in the circumstances indicated below under Article 13(2), the assembly of parts by an assembly operation in the EU or a third country.

⁴ Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, [2009] OJ L343/51.

Article 13 (1) therefore covers several forms of possible circumvention, including in any event slight product alterations, transshipment through third countries, exportation through companies benefitting from a lower rate⁵ and importing or third country assembly. The existing anti-dumping duties may be applied both to the 'like product' (finished products) as well as to 'parts thereof.'

In *Zinc oxides*, for example, circumvention was found to take place in the form of the addition of silica to zinc oxide so that the mixture fell under a different CN code.⁶

Similarly, in *Polyester staple fibre*,⁷ the Commission found that the Belarusian producers concerned had replaced exports of polyester staple fibres with exports of the upstream product polyester filament tow and that the only difference between the two products was a cutting operation which took place in the EU.

In *Footwear*,⁸ the Commission concluded from an examination of Macanese import and export statistics that large-scale transshipment operations through Macao had occurred after the imposition of anti-dumping duties on Chinese imports. Similarly, in *Steel ropes and cables*,⁹ the Commission found transshipment of the Chinese origin product via Korean traders on the basis of a comparative analysis of Chinese exports to the EU obtained from Comext as well as a Chinese export database, and Korean exports to the EU obtained from Comext, a Korean export data base and the production of the cooperating Korean companies (that accounted for 81% of the exports to the EU during the investigation period) as well as their exports to the EU. Most of the other circumvention investigations have also involved -- at least partially -- findings of transshipments.¹⁰

1.1.2 Change in the pattern of trade

There needs to be a *change in the pattern of trade* between third countries (or between individual producers in such countries) and the EU. This generally means that imports of the product under investigation from the country concerned will decrease and be replaced by imports of other products¹¹ in the case of importing country circumvention or circumvention by means of alterations to the product or by the same product from different countries in the case of third country circumvention.

⁵ See, for example, Certain plastic sacks and bags from China, [2011] OJ L131/2 (amendment), where the Commission found that two Chinese exporters, subject to the 28.8% residual duty, had channeled their exports through the company Xiamen which benefitted from a 8.4% duty. The residual duty was therefore extended to Xiamen.

⁶ Zinc oxides from China, [2003] OJ L232/1 (extension Vietnam).

⁷ Polyester staple fibre from Belarus, [1997] OJ L346/1 (amendment).

⁸ Footwear with leather uppers from China, Vietnam, [2008] OJ L117/1 (extension Macao).

⁹ Steel Ropes and cables from China, [2010] OJ L117/1 (extension Korea).

¹⁰ See, e.g., Certain open mesh fabrics of glass fibres from China, [2013] OJ L346/20 (extension India, Indonesia); Bicycles from China, [2013] OJ L151/1 (extension Indonesia, Malaysia, Sri Lanka, Tunisia); Certain stainless steel fasteners and parts thereof from China, [2013] OJ L68/1 (extension Philippines; termination Malaysia, Thailand); Certain open mesh fabrics of glass fibres from China, [2013] OJ L11/1 (extension Taiwan Thailand); Certain open mesh fabrics of glass fibres from China, [2012] OJ L196/1 (extension Malaysia); Certain molybdenum wires from China, [2012] OJ L8/22 (extension Malaysia); Certain iron or steel fasteners from China, [2011] OJ L194/6 (extension Malaysia); Biodiesel from the United States, [2011] OJ L122/12 (extension Canada; extension to imports of biodiesel in a blend containing by weight 20% or less of biodiesel from the United States of America; termination Singapore); Hand pallet trucks and their essential parts from China, [2009] OJ L151/1 (extension Thailand); Silicon from China, [2007] OJ L13/1 (extension Korea); Coumarin from China, [2006] OJ L311/1 (extension Indonesia, Malaysia); Coumarin from China, [2004] OJ L396/18 (extension India, Thailand); Steel ropes and cables from China, [2004] OJ L328/1 (extension Morocco); Steel ropes and cables from Ukraine, [2004] OJ L120/1 (extension Moldova); Zinc oxides from China, [2003] OJ L232/1 (extension Vietnam); Certain malleable cast iron tube or pipe fittings from Brazil, [2003] OJ L149/1 (extension Argentina); Certain tube and pipe fittings, of iron or steel, from China, [2000], L94/1 (extension Taiwan).

¹¹ See, e.g., Polyester staple fibre from Belarus, [1997] OJ L102/14 (initiation).

Such substitution may start after the initiation of the original investigation or after the imposition of measures.

In *Ring binder mechanisms*,¹² for example, the Commission considered this condition satisfied because EU imports of slightly modified RBMs started in 2003 after the initiation of the expiry review investigation of the measures applicable to RBMs from China and increased over time.

In the case of importing country circumvention, imports of the finished product will normally be replaced by imports of parts. This happened, for example, in *Bicycles*.¹³

1.1.3 Insufficient due cause or economic justification

The change in the pattern of trade needs to result from a practice, process or work for which there is *insufficient due cause or economic justification*, other than the imposition of the anti-dumping duty. It has been observed that this condition is based on the principle of non-recognition in law of acts without economic justification other than the circumvention of duties.¹⁴

In *Ring binder mechanisms*¹⁵, the Commission found that the modifications made to the product concerned were very minor and effectively did not result in cost savings. All sales of the slightly modified product went to the EU and were essentially made to the company upon whose request they were designed. This meant that the slightly modified RBMs had essentially one buyer worldwide. Furthermore, the group of companies to which the Chinese exporting producer belonged did not produce any wave blade RBMs in their Thai subsidiary and the latter had stated that there was no demand for such types, as RBMs originating in Thailand were not subject to anti-dumping measures. The Commission therefore considered the condition satisfied. In *Polyester staple fibre*,¹⁶ the Commission found that the cutting operation in the EU did not make economic sense.

However, in a few cases, the Commission has exempted companies from the scope of anti-circumvention measures where they could show that the change in the pattern of their trade did make sense.¹⁷

1.1.4 Undermining the remedial effects of the duty

Although it suffices as per Article 13(1) that the remedial effects of the duty are being undermined in terms of prices *or* quantities, the Commission tends to base its findings on both. This requirement is essentially a simplified injury test, focusing on the presence of price undercutting or underselling.

In *Ring binder mechanisms*,¹⁸ for example, the Commission concluded that the change in trade flows, together with the abnormally low export price of the slightly modified products (below the export price and well below the normal value established in the review investigation), had undermined the remedial effects of the anti-dumping measures in terms of both quantities and prices of the like product. In *Biodiesel*, on the other hand, the Commission found that any transshipped quantities from

¹² Certain ring binder mechanisms from China, [2008] OJ L221/1 (amendment).

¹³ Bicycles from China, [1997] OJ L16/55 (amendment).

¹⁴ Mueller, Khan, Scharf, EC and WTO Anti-Dumping Law: A Handbook, 572 (2d ed. 2009).

¹⁵ Certain ring binder mechanisms from China, [2008] OJ L221/1 (amendment).

¹⁶ Polyester staple fibre from Belarus, [1997] OJ L346/1 (amendment).

¹⁷ Glyphosate from China, [2002] OJ L30/1 (extension Malaysia, Taiwan). Compare Biodiesel from the United States, [2011] OJ L122/12 (extension Canada; extension to imports of biodiesel in a blend containing by weight 20% or less of biodiesel from the United States of America; termination Singapore) where two Canadian producers were exempted.

¹⁸ Certain ring binder mechanisms from China, [2008] OJ L221/1 (amendment).

Singapore had been “extremely low” and consequently had not undermined the remedial effects of the duty; the case against Singapore was therefore terminated.¹⁹

1.1.5 Evidence of dumping

The fourth requirement is that there is evidence of dumping in relation to the normal values previously established for the like or similar products. Thus, normal values will not be updated.²⁰ In practice, the Commission compares the export prices during the circumvention investigation with the normal values, established in the course of the Article 5 investigation or the latest review thereof. In *Steel ropes and cables*,²¹ for example, the Commission used the normal value established in the expiry review which was based on analogue country (Turkish) prices, updated it for the development in raw material prices and compared it with the export prices from Korea which were affected by circumvention, to determine the existence of dumping. With regard to the export prices, the Commission took into account only the exports of the circumventing non-cooperating producers/exporters, based on best facts available, *i.e.* on the average export price during the investigation period reported in Comext.

It is noted that the dumping margin found in a circumvention investigation does not need to be similar to the one found in the original investigation. In other words, as long as some dumping is found, this condition will be considered satisfied.²² However, the Commission will often point out that the dumping margin found is ‘significant.’²³

1.2 The specific rule of Article 13(2) for assembly operations

In addition to the general rule under Article 13(1), Article 13(2) provides for a specific rule (*lex specialis*) concerning assembly operations. Article 13(2) provides that an assembly operation in the EU or a third country shall be considered to circumvent the measures in force where:

- (a) the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures;²⁴ and
- (b) the parts constitute 60% or more of the total value of the parts of the assembled product, except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation is greater than 25% of the manufacturing cost;²⁵ and
- (c) the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product; and
- (d) there is evidence of dumping in relation to the normal values previously established for the like or similar products.

¹⁹ Biodiesel from the United States, [2011] OJ L122/12 (extension Canada; extension to imports of biodiesel in a blend containing by weight 20% or less of biodiesel from the United States of America; termination Singapore).

²⁰ See, for example, Hand pallet trucks and their essential parts from China, [2009] OJ L151/1 (extension Thailand).

²¹ Steel Ropes and cables from China, [2010] OJ L117/1 (extension Korea).

²² Mueller, Khan, Scharf, EC and WTO Anti-Dumping Law: A Handbook, 583 (2d ed. 2009). Compare Bicycles from China, [2015] OJ L122/4 (extension Cambodia, Pakistan, Philippines).

²³ See, *e.g.*, Hand pallet trucks and their essential parts from China, [2009] OJ L151/1 (extension Thailand).

²⁴ Mueller, Khan, Scharf, EC and WTO Anti-Dumping Law: A Handbook, 584 (2d ed. 2009) point out that this criterion “...encapsulates the change in the pattern of trade that constitutes circumvention.”

²⁵ Mueller, Khan, Scharf, EC and WTO Anti-Dumping Law: A Handbook, 584 (2d ed. 2009) point out that this criterion “...determines when assembly constitutes a practice of process which has no justification other than the imposition of the duty.” Therefore, this criterion combines the second and third criteria of the more general forms of circumvention covered by Article 13(1).

Article 13(2) therefore covers assembly operations both in the EU and in third countries.

With regard to the first requirement, it should be noted that, contrary to the former Article 13(10) of Regulations 2176/84 and 2423/88, it is not required that the producer carrying out assembly operations is *related* to a producer subject to anti-dumping measures.²⁶ It suffices that the producer uses parts from the country subject to anti-dumping measures.

1.2.1 Timing of the assembly operation

In *Ring binder mechanisms*,²⁷ a third country circumvention investigation, the Commission found that imports from China dropped significantly after the imposition of anti-dumping duties and, particularly, after the imposition of anti-absorption duties in 2000. Assembly in and exports from Vietnam essentially started after the imposition of anti-dumping and countervailing duties on Indonesia in 2002, effectively replacing such and previous Chinese imports. The producers in Indonesia and Vietnam were furthermore related to one of the Chinese producers.

In *Footwear*,²⁸ the Commission found not only that EU imports from China had gone down while EU imports from Macao had gone up following the imposition of the measures on China, but also that exports of footwear parts from China to Macao had gone up.

1.2.2 Value-of-parts test

The value-of-parts test is the same as used in Article 13(10) of Regulations 2176/84 and 2423/88. The EU authorities will generally request a complete list of parts²⁹, broken down into raw materials and semi-finished products, with purchase prices for the one year review period, at an into-factory basis (including transport costs, customs duties, customs clearance fees, *etc.*).³⁰ They will also request information on the origin of each part. The denominator in the value-of-parts test is the total value of parts. This means that manufacturing costs, SGA and profit are not taken into account.³¹

In *Ring binder mechanisms*,³² for example, the Commission found that during the investigation period, the entirety of the parts of the assembled product were purchased by the Vietnamese assembler from its related companies in China, some in semi-assembled form.

It often happens that producers manufacture several models at the same time; they may then meet the 60-40% test for some models, but not for others. Indeed, especially when new models are introduced, it will often happen that sufficient localization of parts may not be achieved at the outset, but only over time. The question then is how the 60-40% test will be calculated and whether some flexibility will be allowed for the timing problem. Under Article 13(10) of Regulations 2176/84 and 2423/88, the Commission routinely calculated the weighted average value of parts of Japanese³³ origin during the investigation period and had little sympathy for developments over time. However, in both

²⁶ Compare Mueller, Khan, Scharf, EC and WTO Anti-Dumping Law: A Handbook, 584 (2d ed. 2009).

²⁷ Certain ring binder mechanisms from China, [2004] OJ L232/1 (extension Vietnam).

²⁸ Footwear with leather uppers from China, Vietnam, [2008] OJ L117/1 (extension Macao).

²⁹ In Certain retail electronic weighing scales from Japan, [1997] OJ L141/61 (termination Indonesia), the Commission noted that it had considered all elements, material or immaterial such as software, as parts.

³⁰ See most clearly Certain retail electronic weighing scales from Japan, Singapore, [1997] OJ L141/57 (termination). Compare Compare Mueller, Khan, Scharf, EC and WTO Anti-Dumping Law: A Handbook, 587 (2d ed. 2009).

³¹ Bicycles from China, [2015] OJ L122/4 (extension Cambodia, Pakistan, Philippines).

³² Certain ring binder mechanisms from China. [2004] OJ L232/1 (extension Vietnam). In Lighters from China, [2013] OJ L82/10 (extension Vietnam), the Commission found that 60-70% of the parts were imported from China, based on facts available.

³³ All circumvention investigations under the former Article 13(10) pertained to only country, Japan.

the *Bicycles*³⁴ and the *Electronic weighing scales*³⁵ investigations, the Commission displayed sensitivity and refrained from imposing measures even though the 60% test had been met on a weighted average basis with respect to producers which could show improvement over time.

1.2.3 Value-added test

The value added test is a 'safe harbour' test and provides that no circumvention will occur where the value added to the parts brought in, during the assembly or completion operation, is greater than 25% of the manufacturing cost.³⁶ The test is interpreted very restrictively and in a different manner than value-added tests, used in, for example, origin rules. It notably excludes local parts, selling, general and administrative [SGA] costs and profit.³⁷ Thus, the test requires that the manufacturing costs other than the material costs (parts value), namely direct labor, indirect labor and manufacturing overheads, should represent more than 25% of the total manufacturing cost including material cost.³⁸ In the first anti-circumvention proceedings concerning *Bicycles*³⁹ and *Electronic weighing scales*,⁴⁰ the Commission indeed adopted this restrictive approach. Thus far, there have been few anti-circumvention investigations where companies were found to have achieved the 25% test.

1.2.4 Undermining the remedial effects of the duty

Article 13(2)(c) requires a finding that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product. In practice, the Commission analyzes both the price and the quantity component.

In most investigations, the Commission will compare the export prices charged by the assembler with the export prices, as established during the original investigation period.⁴¹ In *Ring binder mechanisms*,⁴² the Commission also found that the export prices charged by the assembler were below the injury elimination level established for the EU industry in the original investigation.

1.2.5 Evidence of dumping

In *Bicycles*,⁴³ dumping was checked by making the dumping calculation on the basis of the most popular models of assembled bicycles for each company, which represented from 50% to 100% of their turnover. The normal values determined in the original proceeding were compared with the resale prices thus established, using the same criteria on comparability as in the original proceeding. On this basis dumping margins ranging from 16% to 53% were established. In *Ring binder mechanisms*,⁴⁴ a

³⁴ *Bicycles from China*, [1997] OJ L16/55 (extension bicycle parts).

³⁵ *Certain retail electronic weighing scales from Japan*, [1997] OJ L141/61 (termination Indonesia); *Certain retail electronic weighing scales from Japan, Singapore*, [1997] OJ L141/57 (termination).

³⁶ Article 13(2)(b).

³⁷ *Bicycles from China*, [2015] OJ L122/4 (extension Cambodia, Pakistan, Philippines); *Certain retail electronic weighing scales from Japan, Singapore*, [1997] OJ L141/57 (termination). Compare Mueller, Khan, Scharf, EC and WTO Anti-Dumping Law: A Handbook, 588 (2d ed. 2009).

³⁸ *Bicycles from China*, [2015] OJ L122/4 (extension Cambodia, Pakistan, Philippines).

³⁹ *Bicycles from China*, [1997] OJ L16/55 (extension bicycle parts).

⁴⁰ *Certain retail electronic weighing scales from Japan*, [1997] OJ L141/61 (termination Indonesia); *Certain retail electronic weighing scales from Japan, Singapore*, [1997] OJ L141/57 (termination).

⁴¹ *Certain ring binder mechanisms from China*, [2004] OJ L232/1 (extension Vietnam).

⁴² *Certain ring binder mechanisms from China*, [2004] OJ L232/1 (extension Vietnam).

⁴³ *Bicycles from China*, [1997] OJ L16/55 (extension bicycle parts).

⁴⁴ *Certain ring binder mechanisms from China*, [2004] OJ L232/1 (extension Vietnam).

third country circumvention case, the Commission rejected arguments that normal value should be established in the country of assembly.

In cases where companies are exempted, the Commission will only consider the non-exempted exports for purposes of making the calculation.⁴⁵

1.3 Procedure

Article 13(3) contains the rules on procedure and provides that an AC investigation shall be initiated on the initiative of the Commission or at the request of a Member State or any interested party on the basis of sufficient evidence regarding the factors set out in paragraph 1. It further provides that an investigation will be initiated by a Commission Regulation which may also instruct the customs authorities to make imports subject to registration⁴⁶ in accordance with Article 14(5).⁴⁷ This means that in fact anti-circumvention duties can be imposed *retroactively* from the date of initiation of the proceeding and indeed this is normally the case.

Article 13(3) provides that investigations will be carried out by the Commission, which may be assisted by customs authorities (this rarely happens) and must be concluded within nine months. The relevant procedural provisions of the basic Regulation with regard to initiations and the conduct of investigations apply in circumvention proceedings.

The Commission has self-initiated AC investigations on several occasions. In *Hand pallet trucks*,⁴⁸ for example, the Commission self-initiated an anti-circumvention investigation involving possible circumvention of the Chinese measures by means of assembly in Thailand. Similarly, in *Footwear*,⁴⁹ the Commission self-initiated an anti-circumvention investigation against Macao, following the imposition of anti-dumping duties on footwear with leather uppers from China.

For the remainder, the procedure to be followed is essentially the same as in a normal anti-dumping investigation, although the Commission will only impose definitive measures. In other words, provisional measures will not be imposed.

It should also be noted that the Commission will not adjust the anti-dumping duty rate when the dumping margins found in the anti-circumvention proceeding are lower than those found in the original anti-dumping investigation. In *Bicycles*,⁵⁰ for example, the Commission imposed the original 30.6% duty, even though the dumping calculation had, in some cases, shown dumping margins well below 30.6%.

⁴⁵ Bicycles from China, [2015] OJ L222/4 (extension Cambodia, Pakistan, Philippines).

⁴⁶ Certain magnetic disks (3.5" microdisks) from Japan, Taiwan, China, [1995] OJ L252/9 (initiation Canada, Hong Kong, India, Indonesia, Macao, Malaysia, Philippines, Singapore, Thailand).

⁴⁷ Article 14(5) contains the general provision on registration procedures (which is not limited to application of Article 13) and provides that "*the Commission may...direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently be applied against these imports from the date of such registration. Imports may be made subject to registration following a request from the Community industry which contains sufficient evidence to justify such action. Registration shall be introduced by Regulation which shall specify the purpose of the action and, if appropriate, the estimated amount of possible future liability. Imports may not be made subject to registration for a period longer than nine months.*"

⁴⁸ Hand pallet trucks and their essential parts from China, [2008] OJ L252/3 (initiation Thailand); [2009] OJ L151/1 (extension Thailand).

⁴⁹ Footwear with leather uppers from China, Vietnam, [2008] OJ L117/1 (extension Macao). See also Certain iron or steel fasteners from China, [2011] OJ L194/6 (extension Malaysia); Certain plastic sacks and bags from China, [2011] OJ L131/2 (amendment).

⁵⁰ Bicycles from China, [1997] OJ L16/55 (extension bicycle parts).

In AC investigations, the Commission selects both an investigation period and a reporting period. The Commission will then request information for the relatively long investigation period to investigate any change in the pattern of trade following the imposition of the original measures and the existence of a practice, process or work for which there was insufficient due cause or economic justification other than the imposition of the duty. More detailed data will be collected for the one year reporting period in order to examine if imports were undermining the remedial effect of the measures in force in terms of prices and/or quantities and the existence of dumping.⁵¹

1.4 Exemptions

Article 13(4) provides for a procedure whereby goods can be exempted from the registration procedure or from anti-circumvention measures. To that end, the Commission will normally include a provision in the notice of initiation of the anti-circumvention investigation that interested parties may apply for exemption within 40 days from the date of initiation.⁵²

Where the circumventing practice, process or work takes place outside the EU, exemptions may be granted to producers of the product concerned that can show that they are not related to any producer subject to the measures and that are found not to be engaged in circumvention practices as defined in Article 13(1) and 13(2). Where the circumventing practice, process or work takes place inside the EU, exemptions may be granted to importers that can show that they are not related to producers subject to the measures and that are found not to have circumvented.

In *Glyphosate*, for example, one company in Taiwan and one company in Malaysia were exempted from the extension of the duties on imports of glyphosate originating in China, to imports of glyphosate consigned from Malaysia and Taiwan.⁵³ In *Certain tube and pipe fittings*⁵⁴ three Taiwanese exporters were exempted from the extension of the duties imposed on China. The exemptions granted applied to products manufactured by the three cooperating Taiwanese producers, irrespective of the identity of the operator responsible for exporting the goods to the Community.⁵⁵ The exemptions granted to two of these exporters were later repealed.⁵⁶

As noted above, Article 13(4) expressly provides that in the case of third country circumvention, exemptions may be granted to producers of the product concerned that are found not to be engaged in circumvention practices *and* that can show that they are *not related* to any producer subject to the measures. Nevertheless, it seems that in applying this provision, the EU will check the nature of the relationship and may decide that a company that is related may still benefit from an exemption under certain circumstances. In *Steel ropes and cables*, for example, the EU noted that four producers in Korea were related to Chinese companies. However, the EU nevertheless granted an exemption to

⁵¹ In *Bicycles from China*, [2015] OJ L122/4 (extension Cambodia, Pakistan, Philippines), for example, the investigation period ran from 1 January 2011 to 31 August 2014 while the reporting period ran from 1 September 2013 to 31 August 2014.

⁵² See, for example, *Hand pallet trucks and their essential parts from China*, [2008] OJ L252/3 (initiation Thailand); *Certain magnetic disks (3.5" microdisks) from Japan, Taiwan, China*, [1995] OJ L252/9 (initiation Canada, Hong Kong, India, Indonesia, Macao, Malaysia, Philippines, Singapore, Thailand).

⁵³ *Glyphosate from China*, [2002] OJ L30/1 (extension Malaysia, Taiwan).

⁵⁴ *Certain tube and pipe fittings, of iron or steel, from China*, [2000] OJ L94/1 (extension Taiwan).

⁵⁵ *Certain tube and pipe fittings, of iron or steel, from China*, [2000] OJ L267/15 (extension Taiwan).

⁵⁶ *Certain tube and pipe fittings, of iron or steel, from China and Thailand, and those consigned from Taiwan*, [2009] OJ L 233/1 (repealing the exemption granted to Chup Hsin Enterprise Co. Ltd. and Nian Hong Pipe Fittings Co. Ltd). See also *Bicycles from China*, [2015] OJ L122/4 (extension Cambodia, Pakistan, Philippines).

these four companies because “*there is no evidence that such relationship was established or used to circumvent the measures in place on imports originating in China.*”⁵⁷

2. Origin investigations

As far as manufacture of a product in third countries is concerned, we have seen above that the same test now applies to importing country and third country circumvention. However, in the case of assembly operations in third countries, the EU authorities in fact have two additional choices.⁵⁸

They can wait until they receive a new complaint from the EU industry alleging that exports from the third country are entering the EU market at dumped prices with injurious consequences. The EU will then normally open a new anti-dumping proceeding and determine in the course of that proceeding whether imports from the third country actually have the origin of the country with regard to which the original ADD have been imposed. If so, the Commission will terminate the investigation against the third country and the products coming from the third country will be subjected to the ADD originally imposed. This occurred in *Ball bearings from Thailand*⁵⁹ and *Electronic typewriters from Taiwan*.⁶⁰ In these cases,⁶¹ the Commission terminated the anti-dumping proceedings it had initiated on the grounds that the production processes carried out in such countries were not sufficient to confer Thai and Taiwanese origin respectively on the products manufactured in such countries. The practical consequence of these findings was that the products assembled in Thailand and Taiwan continued to have Japanese origin and therefore *de facto* were subjected to the anti-dumping duties imposed with respect to such products originating in Japan.⁶² In the *Electric typewriters* case, the customs authorities in some Member States even took the position that anti-dumping duties should be levied retroactively.

Rather than opening a new anti-dumping proceeding, the EU (or Member States’ customs authorities) may also dispute the origin of the products coming from the third country and conduct an origin investigation.⁶³ Such investigations are covered by the EU’s non-preferential origin rules as contained in the EUCC.

The classic examples of such origin investigations involved the photocopiers plants of Ricoh in California and Mita in Hong Kong in the aftermath of the imposition of an anti-dumping duty on photocopiers from Japan. Following an on-the-spot investigation in California by officials of DG

⁵⁷ Steel ropes and cables from China, [2010] OJ L117/1 (extension Korea; termination Malaysia). In the same case, the Commission subsequently granted another exemption, but it is not clear whether the new exporter was related to a Chinese exporter, see [2012] OJ L168/3 (amendment). See also Bicycles from China, [2015] OJ L122/4 (extension Cambodia, Pakistan, Philippines).

⁵⁸ It should be noted that the decision which procedure to apply is very much inspired by factual circumstances over which the Commission perhaps has little control. Thus, if the EU industry brings an anti-dumping complaint against the product now coming from the third country and such complaint contains sufficient evidence of dumping and resulting injury, DG Trade would open an anti-dumping proceeding and only in the course of such an investigation find out that actually the products manufactured in country Y have the origin of country X. Origin investigations by DG TAXUD or OLAF, on the other hand, may start as a result of identical products being subjected to different treatment by the EU Member States’ customs authorities, as a result of a complaint or a request by a producer concerned or for a variety of other reasons.

⁵⁹ Certain ball bearings from Thailand, [1985] OJ L59/30 (notice of termination).

⁶⁰ Electronic typewriters from Taiwan, [1986] OJ L140/52 (notice of termination).

⁶¹ See Vermulst, Waer, *European Community Rules of Origin as Commercial Policy Instruments?*, 24:3 *Journal of World Trade*, 55-100 (1990) for more detail.

⁶² As an illustration: the proceeding against the exporter Brother was terminated on 23 May 1986. On 5 June 1986, the Commission sent a memorandum to all the Member States advising them to apply the anti-dumping duty applicable to Brother's exports of typewriters from Japan to Brother's typewriters coming from Taiwan as well.

⁶³ See also Rovetta, Vermulst, *Origin Rules in EU Anti-Dumping Law and Practice: An Update*, 3:10 *GTCTJ*, 337-348 (2008).

Trade and DG TAXUD, the Commission took the view that the photocopiers produced by Ricoh in the United States should be denied United States origin. In the absence of a qualified majority within the Origin Committee and the Council, the Commission enacted Regulation (EEC) No 207/89 on the origin of photocopiers⁶⁴ which — although couched in general terms — was essentially tailor-made for the Ricoh situation. This Regulation provides that the manufacture of photocopiers accompanied by the manufacture of the harness, drums, rollers, side plates, roller bearings, screws and nuts shall *not* confer origin. On the basis of an origin investigation conducted at Mita's Hong Kong premises, the Commission arrived at the conclusion that the photocopiers made by Mita in Hong Kong *did* possess Hong Kong origin and advised the members of the Origin Committee accordingly. As the members of the Origin Committee agreed unanimously with the conclusions of the Commission, the case was dealt with informally.

Less visible origin investigations in connection with products subject to anti-dumping measures include those conducted with respect to *Car radios*, assembled in Indonesia (in the aftermath of anti-dumping duties imposed on Korean car radios), *Compact disc players* assembled in Singapore and Malaysia by Japanese producers (in tandem with anti-dumping investigations of the same producers), *Steel wire ropes* assembled in the United Arab Emirates (following imposition of anti-dumping measures on India and later on China), *Persulphates* from various countries (following imposition of measures on China), *Ring binder mechanisms* from Thailand (following imposition of measures on China), *Energy saving lamps*, initially from Macao and later from Indonesia, Malaysia, Pakistan, the Philippines, Sri Lanka, Thailand, Tunisia, the United Arab Emirates and Vietnam (following imposition of measures on China), *Non-refillable lighters* from Indonesia and Malaysia (following imposition of measures on China), and *Certain Footwear with leather uppers* from Macao (following the imposition of anti-dumping duties on China and Vietnam). At the time of writing, origin investigations are going on in the PV sector.

2.1 Substantive concepts

Where two or more countries are involved in the production of goods, Article 24 of the EUCC provides that:

"[the goods] shall be deemed to originate in the country where they underwent their last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture."

The EUCC also contains an anti-circumvention provision in Article 25 stipulating that:

"[a]ny processing or working in respect of which it is established, or in respect of which the facts as ascertained justify the presumption, that its sole object was to circumvent the provisions applicable in the Community to goods from specific countries shall under no circumstances be deemed to confer on the goods thus produced the origin of the country where it is carried out within the meaning of Article 24."

Thus far, Article 25 has been invoked only once in the context of enforcement of anti-dumping duties,⁶⁵ presumably because of the difficult burden of proof. Thus, while the avoidance of payment of anti-dumping duties may be one reason for the shift in production, it will seldom be the *sole* reason.

⁶⁴ Commission Regulation (EEC) No 2971/89 of 11 July 1989 on determining the origin of photocopying apparatus, [1989] OJ L196/24.

⁶⁵ The case concerned a producer of video tapes which switched production of video tapes from China to Macao following imposition of anti-dumping duties on China. Reportedly, the case concerns not only retroactive collection of anti-dumping duties but also of regular customs duties as the producer did not qualify for GSP treatment.

2.2 Problematic product specific origin regulations of the EU

To implement Article 24 EUCC the EU authorities may adopt product specific origin Regulations. The product specific origin rules are designed to provide clarity about the substantive rules of Regulation 802/68 in concrete cases in order to ensure uniform application of the rules of origin by the EU Member States customs authorities.

Of the product specific origin rules adopted thus far, the ones on *Integrated circuits* [ICs] and *Photocopiers* drew criticism from Japan and the United States respectively. These countries charged that the regulations were protectionist because they calibrated the nature of manufacturing operations carried out by European producers in the Common Market rather than providing objective criteria for determining origin (*ICs*)⁶⁶ and/or because they indirectly promoted *manufacture in Europe* policies (*Photocopiers*).

In the *Integrated circuits* Regulation, the Commission ruled that diffusion rather than assembly made up the last substantial process or operation for purposes of Article 5 of Regulation 802/68, despite the facts that diffusion is always followed by assembly and testing, that assembly and testing are more labour-intensive than diffusion and that the value added in the assembly and testing process can be as high as, and sometimes even higher than, the value added in the diffusion process. This Regulation worked to the advantage of major European companies such as Siemens which (at the time of adoption) performed the diffusion process in the EU and testing and assembly in third countries and to the disadvantage of especially Japanese producers which (at the time of adoption) assembled and tested ICs in the EU.⁶⁷

The ICs Regulation came at a convenient time for the pending anti-dumping proceedings concerning *DRAMs*⁶⁸ and *EPROMs*⁶⁹ from Japan. Until the adoption of the Regulation, some Member States' customs authorities had held that the process of assembly and testing constituted the *last substantial transformation*. This position could have been disastrous for the outcome of the anti-dumping proceedings because it would have led to the inescapable conclusion that the only EU industry which existed was Japanese-owned!

The *Photocopiers* Regulation, although couched in general terms, was essentially aimed at the photocopier production facilities of the Japanese company Ricoh in California as it describes the assembly operations carried out by Ricoh in the United States at that time and provides that such operations do *not* confer origin.

2.3 Value-added calculation methods

The EU product specific Regulations on televisions, radios and tape recorders refer to value-added tests. These tests are often interpreted analogously for other assembly products. To calculate the value-added as a percentage, the Commission will divide the local value-added (the *numerator*) by the ex-works price (the *denominator*) (x 100). The ex-works price is the price of the product at the moment that it leaves the factory; it is equal to the sales price with the exception of outgoing charges if such

⁶⁶ The United States' objections against the EU's determination to consider diffusion as the last substantial process or operation for determining the origin of ICs seem opportunistic. The United States Commerce Department for purposes of applying the anti-dumping law has explicitly held that diffusion rather than assembly constitutes the last substantial transformation, thereby overruling established practice of the United States Customs Service which for its purposes had previously ruled that assembly and testing conferred origin.

⁶⁷ See also Montagnon, Brussels Chip Pricing Plan Floors Computer Makers, *Financial Times*, at 3 (27 July 1989); Chip Makers Begin to Conform with EC Policy on Full Manufacturing in Europe, *The Japan Economic Journal*, at 6 (26 August 1989).

⁶⁸ Dynamic random access memories from Japan, [1987] OJ C181/3 (initiation).

⁶⁹ Erasable programmable read-only memories from Japan, [1987] OJ C101/10 (initiation).

charges are included in the price. Such costs must then be deducted from the sales price in order to arrive at the ex-works price.

The *numerator*, *i.e.* the local value-added, consists of:

- the value of parts with local origin, calculated on an into-factory basis;
- incoming (border and post-border) costs;
- assembly costs and overheads;
- SGA to the extent incurred in the factory; and
- profit.

Non-originating parts are valued on the basis of their CIF export price, importing country border.⁷⁰ This means that all costs incurred in sending the parts from the factory to the importing country border (pre-border costs) will be included in the CIF export price (and therefore counted as non-originating value); all border and post-border costs, such as inland freight, customs duties⁷¹ and indirect taxes in the importing country, will be excluded from the CIF export price (and therefore will count as local value-added).

The value of the non-originating parts will then be deducted from the ex-works price. The remainder, divided by the ex-works price and multiplied by 100 will give the percentage local value-added. [Of course, the local value-added can also be calculated by adding up all local value components, as described above].

In many cases, parts will consist of sub-parts. Questions may then often arise about the origin of the parts or even about the origin of the sub-parts. In theory, one could go all the way down until one reaches the raw materials. In practice, this is unworkable. In the EU, it is common to go down two levels, *i.e.* to the level of the origin of the sub-parts.

2.4 The interpretation of the origin rules by the ECJ

The ECJ has had the opportunity to give its views on EU origin rules and the interpretation thereof by the EU institutions in several cases of which the most relevant are *Brother*,⁷² *ASDA* and *Thomson-Vestel*.⁷³

The *Brother*⁷⁴ case followed the 1986 Commission decision to terminate the anti-dumping proceeding concerning *Typewriters from Taiwan*. The justification for the termination had been that the production operations carried out by the Japanese producer Brother in Taiwan were insufficient to confer Taiwanese origin on the typewriters produced there.

Following the decision, the German customs authorities decided to levy the Japanese anti-dumping duty applicable to Brother *retroactively*. Brother appealed against this decision on the ground that the typewriters produced in Taiwan should be considered as originating in Taiwan on the basis of the application of the EU's non-preferential origin rules because although most of the parts came from

⁷⁰ Compare Article 40 of the Implementing Regulation.

⁷¹ Of course, the local producers often will not have to pay such duties as they will benefit from a duty drawback or duty exemption scheme on imported materials if such materials are incorporated in the exported finished products.

⁷² Case 26/88, *Brother International GmbH v. Hauptzollamt Giessen*, [1989] ECR 4253.

⁷³ See Joined cases C-447/05 and C-448/05, *Thomson Multimedia Sales Europe and Vestel France v Administration des douanes et droits indirects*, judgment of 8 March 2007, [2007] ECR 2049; Case C-372/06, *Asda Stores Ltd v Commissioners of Her Majesty's Revenue and Customs*, judgment of 13 December 2007.

⁷⁴ Case 26/88, *Brother International GmbH v. Hauptzollamt Giessen*, [1989] ECR 4253.

Japan, they were mounted and assembled in Taiwan, in a fully equipped factory, into ready-for-use typewriters.

With reference to the third standard of Annex D.1. of the Kyoto Convention,⁷⁵ the ECJ distinguished between *simple* assembly operations and other types of assembly operations. It defined simple assembly operations as operations which do not require staff with special qualifications for the work in question or sophisticated tools or specially equipped factories for the purposes of assembly. Such simple operations could never confer origin because they do not "*contribute to the essential characteristics or properties of the products in question.*"

Other types of assembly operations *could* confer origin depending on the fulfilment of one of the two tests, in order of precedence:

- an assembly process representing from a technical point of view and having regard to the definition of the goods in question the decisive production stage during which the use to which the component parts are to be put becomes definite and the goods in question are given their specific qualities; or
- where the above technical test does not lead to a decisive answer, the technical test plus a value-added test as an "*ancillary criterion.*"

Specifically with respect to the value-added test, the Court held that the assembly operations as a whole must involve an appreciable increase in the commercial value of the finished product at the ex-factory level. The ECJ did not lay down a concrete percentage of value-added sufficient to confer origin, but noted that in a production process where only two countries are involved, a value-added of less than 10% in the assembly process is insufficient.⁷⁶

The German Finanzgericht of Hessen subsequently ruled that the operations performed by Brother in Taiwan fell into the category of 'simple assembly' because the assembly operations of Brother in Taiwan did not employ staff with special qualifications for the work in question, did not involve use of sophisticated tools and did not involve specially equipped factories for the purposes of the assembly of the typewriters.⁷⁷

In the *ASDA* and *Thomson-Vestel* cases, the companies challenged, among others, the product specific origin rule for televisions.⁷⁸ Following the imposition of anti-dumping measures on televisions originating in China, Korea and Thailand, the French and UK customs authorities, actively supported by OLAF, investigated television imports from Poland and Turkey and determined on the basis of the product specific origin rule for televisions that the televisions in fact had Chinese, Korean or Thai origin. They therefore issued post clearance recovery orders. Contrary to the vast majority of such cases which end with administrative findings, *Asda* and *Thomson-Vestel* challenged the origin determinations by customs before the national courts that eventually referred the matter to the ECJ.

The companies argued that the Commission's reliance on a purely value added criterion for origin purposes in Annex 11 of the Implementing Regulation was incompatible with Article 24 of the EUCC because the former amounted to a 'quantitative' test while the EUCC requires a 'qualitative test' for

⁷⁵ International Convention on the simplification and harmonization of customs procedures, accepted on behalf of the EU by Council Decision 77/415/EEC, [1977] OJ L166/1.

⁷⁶ In Case 93/83, *Zentralgenossenschaft des Fleischnegewerbes e.G. (Zentrag), v. Hauptzollamt Bochum*, [1984] ECR 1095, the Court issued a similar judgment in a situation where only two countries were involved and the value-added in the last country was 22%.

⁷⁷ Hess. FG, Urteil vom 25.5.1992 - 7 K 552/91; rechtskräftig, reproduced in 6 *Recht der Internationalen Wirtschaft*, 522 - 524 (1993).

⁷⁸ See Joined cases C-447/05 and C-448/05, *Thomson Multimedia Sales Europe and Vestel France v Administration des douanes et droits indirects*, judgment of 8 March 2007, [2007] ECR 2049; Case C-372/06, *Asda Stores Ltd v Commissioners of Her Majesty's Revenue and Customs*, judgment of 13 December 2007.

origin purposes. The ECJ, however, ruled that the choice of the value added criterion was not per se incompatible with the provisions of the EUCC and the mere fact that the Commission had relied on such a criterion in Annex 11 was no reason to annul the validity of the product specific origin rules concerned.

One of the issues the ECJ had to decide in *ASDA* concerned the determination of the origin of separate parts of a television manufactured in-house for the purposes of performing the value added test, particularly the application of the so-called *absorption principle* in such situations. Asda's supplier, the Turkish company Vestel, had made the chassis in-house. Asda argued that the chassis had obtained Turkish origin on the basis of the 45% value added test and therefore should be counted as 100% Turkish origin, even though it contained imported parts.

The ECJ disagreed and considered that neither Article 24 EUCC nor Annex 11 of the Implementing Regulation envisaged taking account, in the manufacturing process, certain assembly operations to the detriment of certain others or artificially isolating a certain part which itself came from an assembly operation carried out by the same producer.

“To accept, as Asda maintains, that one of the parts assembled by the supplier of the television sets, in this case the chassis, must be considered separately in the assembly process, because it might then itself acquire the status of an original product, would amount to leaving to the assessment of the importer or its supplier the function of determining at what stage of the assembly process one of the components of the imported product acquires the status of a finished product used as a part in the process of manufacturing, in the same undertaking, another product. Such an approach, which would thus make the origin of a product depend on a subjective assessment, incompatible with the objective and foreseeable nature of the legislative provisions at issue, would deprive the contested provisions of Annex 11...of all useful effect.”⁷⁹

Therefore, the ECJ effectively held that the absorption principle does not apply to parts manufactured in-house by the producer of the finished product. The ECJ acknowledged that this ruling leads to different treatment of parts, depending on whether they are manufactured in-house or by a third party, because in the latter case, the absorption principle will apply. However, it considered such different treatment justified because where parts are produced by a third party, the commercial transaction in which they are obtained from the third party allows objective determination of the point at which they acquired their status as a finished product and at which their origin may be determined.⁸⁰ While this ruling might lead producers to establish a third party in order to perform the assembly of certain parts, the ECJ considered that this could be tackled through application of Article 25 EUCC.⁸¹

3. General rule 2(a)

Faced with the imposition of an anti-dumping duty, the affected producers could decide to export the product concerned in unassembled or disassembled form and declare it to the customs authorities as parts. As parts generally fall under a different CN code, they normally are not covered by the anti-dumping duty imposed with respect to the finished product.

As is the case for the Harmonized System, the EU's Combined Nomenclature [CN] provides general rules for the interpretation of the CN. General Rule 2(a) provides that:

“Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference

⁷⁹ Asda, para. 59.

⁸⁰ Asda, para. 63.

⁸¹ Asda, para. 64.

to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.”

In the context of circumvention, rule 2(a) is particularly important because importation of completely knocked down [CKD] or semi knocked down [SKD] parts and components and subsequent assembly in the importing country can be an obvious form of circumvention. Indeed, it was this form that originally led the EU to adopt its parts amendment. Rule 2(a) covers both disassembled articles and articles which have not yet been assembled. The general rules of the Customs Cooperation Council specify that such articles are “*articles the components of which are to be assembled either by means of simple fixing devices...or by riveting or welding, for example, provided that only simple assembly operations are involved.*”

However, the ‘*as presented*’ qualification inherently limits the scope of application of the provision to cases where kits are presented in CKD or SKD form. Where this is not the case, for example because the parts are imported in separate consignments, the provision arguably would not apply:

"[b]icycle components which are imported together in the form of a complete kit, whether or not partially assembled, are classified as a complete bicycle under CN Code 871200 and are accordingly liable to the anti-dumping duty imposed...if originating in China. Bicycle components which are not imported in this format are correctly declared and entered at importation as bicycle parts under the various appropriate CN Codes, and the current anti-dumping measures do not apply."⁸²

In *Develop Dr Eisbein*,⁸³ the question arose when an article is to be considered as imported 'unassembled or disassembled' for purposes of customs classification. Eisbein, which imported kits of photocopiers in parts for assembly in its factory in Germany, argued that these should be classified as 'parts and accessories' of photocopiers. German customs on the other hand, considered that Rule 2(a), second situation, was applicable and that the imports were to be considered as disassembled or unassembled photocopiers. The kits imported by Eisbein contained all the individual parts of photocopiers from Japan. On the basis of Eisbein's customs declaration, the Hauptzollamt Stuttgart-West initially classified the goods as parts and cleared the goods into free circulation without charging ADD. On the basis of Rule 2(a), however, that classification was amended: the Hauptzollamt considered the goods to be 'unassembled' photocopiers and therefore subject to the anti-dumping duty. Thus, the Finance Court Baden-Württemberg asked for a preliminary ruling on the interpretation of Rule 2(a).

The ECJ held that the second situation of Rule 2(a) must be interpreted as meaning that an article is to be considered to be imported unassembled or disassembled where the component parts are all presented for customs clearance at the same time. The ECJ considered that the number of parts to assemble, the complexity of the method or the necessity of processing parts to complete assembly therefore are all irrelevant to the applicability of Rule 2(a).

⁸² Answer given by Sir Leon Brittan on behalf of the Commission (6 May 1994) to Written question E-696-94 by Karla Peijs, [1994] OJ C362/41. Compare Answer given by Sir Leon Brittan on behalf of the Commission (22 April 1994) to Written question E-266/94 by Bruno Gollnisch, [1994] OJ C349/27:

"[w]ith regard to dumping from China, the Community has imposed on imports of bicycles originating in China an anti-dumping duty of 30.6%...The Regulation does not cover bicycle parts. However, if knocked down bicycle kits as presented to the customs authorities, have the essential character of finished bicycles, the customs authorities may apply the tariffs of complete bicycles, including anti-dumping duties. Furthermore, the Community has commenced an anti-dumping proceeding concerning imports of bicycles originating in Indonesia, Malaysia and Thailand...The European producers of bicycle parts have not yet submitted evidence that dumping of bicycle parts occurs. However, if there is sufficient evidence that parts of bicycles are being dumped into the Community from third countries which cause injury, an anti-dumping complaint could be considered."

⁸³ Case C-35/93, *Develop Dr Eisbein GmbH & Co v. Hauptzollamt Stuttgart-West*, [1994] ECR I-2655.

4. WTO compatibility of Article 13

In the Uruguay Round negotiations no agreement was reached on anti-circumvention measures. The Marrakesh Final Act, however, contains a 'Decision on anti-circumvention' which states that:

"Ministers,

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

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

Decide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution."

In the absence of any WTO agreement on the issue, the question arises whether the EU and other WTO signatories can unilaterally adopt and enforce anti-circumvention provisions. In this respect, reference can be made to the GATT Panel decision on the former Article 13(10). In that case, the GATT Panel examined whether anti-circumvention measures could be justified under GATT Article XX(d).⁸⁴

The Panel examined whether anti-circumvention measures could be considered necessary in order to secure compliance with the regulations imposing a definitive anti-dumping duty on the importation of the finished product. In this respect, the EU argued that the term 'secure compliance with' should be broadly construed to cover not only the enforcement of laws and regulations *per se* but also the prevention of actions which have the effect of undermining the objectives of laws and regulations. The Panel did not accept this broad interpretation. The Panel noted that the text of Article XX(d) GATT does not refer to objectives of laws or regulations but only to laws or regulations. As for the purpose of Article XX(d), the Panel found that acceptance of such a broad interpretation would mean that:

"...whenever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement would then be justified under Article XX(d) on the grounds that this secures compliance with the objectives of that law. This cannot, in the view of the Panel, be the purpose of Article XX(d): each of the exceptions in the General Agreement — such as Article VI, XII or XIX — recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective. These conditions would no longer be effective if it were possible to justify under Article XX(d) the enforcement of obligations that may not be imposed consistently with these exceptions on grounds that the objective recognized to be legitimate by the exceptions cannot be attained within the framework of the conditions set out in the exception."

Therefore, it would appear to follow from this GATT Panel decision that GATT Article XX(d) cannot be invoked as a general legal basis for adopting anti-circumvention measures which would deviate from the conditions set forth in Article VI. It thus seems clear that anti-circumvention measures can only be adopted in full compliance with the procedural and substantive conditions of the WTO Anti-Dumping Agreement.

As regards the substantive conditions, first, Article 13(1) and 13(2) merely require *evidence of dumping in relation to normal values previously established for the like or similar products*. Thus, no normal value will be determined for the producer in question alleged to be circumventing the anti-dumping measures. This seems to be in violation of Article 2 of the ADA. Second, Article 13 does not require a finding of injury. The fact that Article 13 requires a finding that the remedial effects of the duty are being undermined cannot be equated with a finding of injury in accordance with the

⁸⁴ Article XX(d) GATT provides in relevant part that nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.

provisions of Article 3 of the ADA. It could therefore be argued that the anti-circumvention provision of Article 13 of the basic Regulation is in violation of GATT Article VI and the provisions of the ADA, including Articles 2 and 3 as well as various procedural provisions.⁸⁵

Conclusions

Strong legal arguments can be made that imposition of anti-circumvention measures pursuant to unilaterally adopted anti-circumvention legislation is not allowed under WTO rules.⁸⁶

Furthermore, one could argue that anti-circumvention rules are not necessary because circumvention can be tackled through existing instruments of trade and/or customs law. Thus in case of third country circumvention, a new AD case can be initiated against the third country or non-preferential origin rules can be used. In the case of importing country circumvention, authorities can start an AD case against the imported parts or they can use Rule 2(a) GRI.

This having been said, experience has shown that transparent and predictable anti-circumvention rules are to be preferred over vague and multi-interpretable non-preferential origin rules.⁸⁷ Furthermore, the many findings of transshipment in EU anti-circumvention investigations show that circumvention may constitute a real problem which warrants quick and effective relief.

Fourth, the remedies to act against importing country circumvention have inherent shortcomings making them difficult to use. Thus, there may be many parts involved and these parts may be sold at transfer prices. This makes it difficult to calculate dumping margins and to determine injury. And as we have seen above, Rule 2(a) is easily evaded.

Thus it seems to me that the way forward is to agree on detailed anti-circumvention rules with focus on further improvements in transparency and predictability. As regards the value of parts test, important elements to be addressed would need to include rules to treat in-house and third party assembly of parts on a par and the level of the breakdown that authorities can require as well as definitions of raw materials and semi-finished products. As regards the value-added test, it would appear to make sense to include parts with local origin.

82 Compare the analysis in *United States-1916 Act (EC)*, United States–Anti-Dumping Act of 1916, WT/DS136/R of 31 March 2000; *United States-1916 Act (Japan)*, United States–Anti-Dumping Act of 1916, WT/DS162/R of 29 May 2000; *United States-1916 Act AB*, United States–Anti-Dumping Act of 1916, WT/DS136/AB/R and WT/DS162/R of 28 August 2000. For a different perspective, see Mueller, Khan, Scharf, EC and WTO Anti-Dumping Law: A Handbook, 575 (2d ed. 2009):

“As this [Ministerial] declaration was made whilst several WTO Members already had their own anti-circumvention legislation, both the Community and the US interpret it as permitting individual members to adopt or maintain unilaterally provisions in this respect, pending a multilateral solution within the framework of the WTO.”

⁸⁶ Thus far, however, no WTO challenges have been raised against anti-circumvention rules, whether as such or as applied.

⁸⁷ This is especially so in light of the 20 years’ failure of the WTO members to agree on harmonized non-preferential rules of origin.

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