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I. GENERAL INTRODUCTION

Most industrialized countries recognize the problem of local industries that are threatened by cheap imported products. Like most of these countries, the European Economic Community (EEC) has special trade protection legislation designed to protect its industries from these "dumped," i.e., extremely cheap, imports. The most popular protective measure in EEC anti-dumping legislation is the undertaking.

An anti-dumping undertaking is a deal between the exporters of a dumped product and the Commission of the European Communities. In the undertaking, the exporters promise to stop dumping, in other words, to raise their prices. In return, the Commission will not impose financial penalties on the imported products. When properly used, the Commission, the protected EEC industries and the exporters can all benefit from the use of undertakings.

Yet these useful devices give rise to interesting legal problems. For instance, if the Commission encourages a number of exporters to conclude an undertaking and to raise their prices, it is, in effect, encouraging the collective setting of a minimum price. This competition tactic is normally forbidden by article 85(1) of the Treaty Establishing the European Economic Community (EEC Treaty),[1] without the possibility of the waivers cited in article 85(3).[2] Another competition problem is that as soon as foreign products are subjected to minimum prices, EEC producers will be able to undercut these prices systematically.

A second category of problems is formed by undertakings that eliminate dumping, or the injury to the EEC industry resulting thereof, through quantitative limitations on exports, for example through obligations to limit imports or to cease imports in the EEC altogether. It is not certain whether and to what extent the Commission has the authority to conclude undertakings containing quotas or import stopage.

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1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (*entered into force* Jan. 1, 1958) at art. 85(1) [hereinafter EEC Treaty].
2. *Id.* art. 85(3).

This article will try to clarify the legal situation with regard to undertakings in EEC anti-dumping law. It will examine the current law and practice of the EEC with regard to undertakings in general and to the specific questions concerning undertakings that were introduced above.

To achieve this end, this article is divided into two main parts. Part I provides background information on the EEC system of anti-dumping law. It describes the legislative history of anti-dumping law, its relationship to other forms of trade protection law, its main substantive and procedural features relevant to undertakings, and the possibilities for judicial review.

Part II concentrates on undertakings. It describes how undertakings fit into the framework of substantive and procedural law, and judicial protection described in part I. It will also examine the relationship between undertakings in anti-dumping law and competition law on one hand, and the Commission's powers to negotiate quotas on the other.

II. Part I: Economic and Legal Background of Undertakings

A. *Introduction*

Part I provides general information on EEC anti-dumping law that is necessary to fully understand the legal aspects of undertakings. It describes the economic and legal environment in which EEC anti-dumping law operates. This environment can be divided into three aspects, each of which has its own relevance to the main subject of undertakings: (1) its legal foundation;[3] (2) its economic foundation;[4] (3) its legal constraints.[5]

Secondly, part I describes the substantive relevance to the anti-dumping law of EEC undertakings. This paragraph contains two main parts: (1) the conditions that must be fulfilled before anti-dumping

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3. This covers the Treaty basis of anti-dumping law and the other forms of EEC trade protection legislation. This will show the special importance of anti-dumping legislation and therefore also of undertakings, since these are the most often used anti-dumping measures.

4. This covers the reasons both for dumping and for taking anti-dumping action. This will show why anti-dumping protective measures, such as undertakings, are adopted, but also their potential for abuse.

5. This covers the international legislation designed to counter that abuse. This will show the importance of the so called GATT Anti-Dumping Code, with which all EEC anti-dumping measures must comply.

measures can be taken and the way they are elaborated;[6] (2) the anti-dumping protective measures themselves.[7]

Thirdly, part I describes the anti-dumping procedure used by the EEC, and the EEC institutions that play a role in the procedure. This part also describes the different phases of an anti-dumping proceeding, including the initiation of an investigation usually through a complaint, the conduct of the investigation itself, and the conclusion of the investigation.

Finally, part I describes the possibilities for judicial review of the outcome of an anti-dumping procedure. This paragraph briefly describes the different ways of obtaining judicial review in the EEC and the various possible outcomes of an anti-dumping procedure. A comparison is then made between the possibilities for judicial review of undertakings on one hand, and of the other ways to end an anti-dumping proceeding on the other.

B. *The Origins of Anti-Dumping in the EEC*

1. Treaty Basis of Trade Protection Legislation

Article 3(b) of the EEC Treaty lists as one of the objectives of the Community "the establishment of a common commercial policy towards third countries."[8] The legal basis of anti-dumping legislation is article 113(1) declaring this common commercial policy to be an exclusive power of the Community.[9] According to article 113(1), "measures taken to protect trade such as those to be taken in cases of dumping or subsidies" are among the subjects of the common commercial policy.[10] The same article makes it clear that these trade protection measures must be taken by the Council, acting by a qualified majority on proposals from the Commission.[11]

2. Types of Trade Protection Legislation

Article 113 has given rise to five types of trade protection measures: (1) anti-dumping measures;[12] (2) countervailing, or anti-subsidy, meas-

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6. This will show the large discretionary powers of the Commission.
7. Undertakings described in part II are not included in this section.
8. EEC Treaty, *supra* note 1, art. 3(b).
9. *Id.* art. 113(1).
10. *Id.*
11. *Id.*
12. *See* EEC Reg. 2423/8 (O.J. 1988, L209/1) (a copy of this regulation is included *infra* at Appendix 1) [hereinafter Appendix 1].

ures;[13] (3) safeguard measures;[14] (4) the so-called "New Trade Policy Instrument" (NTPI);[15] and (5) measures against unfair pricing practices in maritime transport.[16] Two of these measures do not concern imports in the EEC. The NTPI is aimed primarily at protecting access by EEC firms to third country markets. The purpose of measures against unfair pricing in maritime transport speaks for itself. Therefore, these measures will not be discussed further.

Among these trade protection measures, anti-dumping measures are of special importance. First, they are frequently used. In the period of 1977 through 1984, no less than 301 anti-dumping proceedings were initiated, and protective measures were taken in 226 cases.[17] By contrast, only six anti-subsidy proceedings were initiated in this period.[18] Safeguard measures have also been taken less frequently, at an average of only two per year.[19] In fact, some experts consider anti-dumping measures to be one of the most common obstacles facing non-agricultural exporters to the EEC.[20]

Second, anti-dumping measures are discriminatory. By contrast, safeguard measures work through the imposition of quotas, which are, in theory at least, non-discriminatory.[21] Anti-dumping and countervailing measures can be tailored not only to a specific country, but even to a specific firm. Third, anti-dumping measures are aimed against the unfair trade practices of private parties. This contrasts the countervailing measures aimed at subsidies such as government actions, and safeguards measures aimed at exports in general.

3. Reasons For and Against Anti-Dumping Legislation

Generally speaking, dumping is the sale of an imported product at an abnormal, unreasonably low price. Determining when a given price for a given product is unreasonably low is one of the most important issues in anti-dumping law.

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13. *Id.*

14. *See* EEC Reg. 288/82 (O.J. 1982, L35/1); EEC Reg. 176⅝2 (O.J. 1982, L195/1); EEC Reg. 1766/82 (O.J. 1982, L195/21).

15. *See* EEC Reg. 2641/84 (O.J. 1984, L252/1).

16. *See* EEC Reg. 4056/86 (O.J. 1986, L378/14).

17. I. VAN BAEL & J. BELLIS, INTERNATIONAL TRADE LAW AND PRACTICE OF THE EUROPEAN COMMUNITY 12-13 (1985).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Compare* arts. XIII *and* XIX of General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

From the point of view of a dumping firm, selling at unreasonably low prices may make sense for a variety of reasons, that may be divided into two groups. First, "firm-oriented" reasons related to circumstances within the firm. For instance, the dumping firm may simply want to get rid of old stock, or of excess supply due to a decrease in demand. Second, "market-oriented" reasons related to the firm's position on the foreign market. A firm may be willing to accept initial low profits or even losses in order to gain a foothold in the market, to increase its market share, or drive out its competitors.

It is the market-oriented group that creates the need for anti-dumping legislation. Two different lines of reasoning can be distinguished. First, "pro-competitive" reasoning is based on parallels between dumping and the so-called "predatory pricing" or "cut-throat" competition. This is the practice of eliminating competitors by deliberately starting a price war. It is seen as anti-competitive, and consequently is prohibited by many competition laws.[22] Following this line of reasoning, dumping in international trade is the equivalent of cut-throat competition in domestic trade, and must be combated to maintain free competition. This argument is widely used but is rather suspect. Economic research seems to point out that predatory pricing in international trade is actually very rare.[23] Moreover, if dumping is only a form of anti-competitive conduct, one might ask why specialized anti-dumping legislation is needed instead of competition legislation.

Second, "simple protectionist" reasoning is based on the theory that few governments will be willing to stand aside while their industries are being injured by cheap foreign imports. As a method of protection, anti-dumping measures offer several advantages. They are highly selective, and can be aimed at a specific country or a specific firm. They are seen as a legitimate form of defense, and thus they can avoid some of the stigma attached to other forms of protectionism.

Notwithstanding these reasons, anti-dumping legislation can be easily abused as a device for plain protectionism. Any industry injured by imported goods is usually quick to complain about unfair competition and to demand protection through anti-dumping measures. However, if anti-dumping laws were to satisfy all such demands, it would become an instrument of protectionism, and a serious hindrance to international trade.

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22. *See, e.g.*, Sherman Act, 15 U.S.C. § 1 (1890); EEC Treaty, *supra* note 1, art. 85.

23. *See* Stegemann, *Anti-Dumping Policy and the Consumer*, J. WORLD TRADE L. 466-67 (1985).

4. GATT Legislation

The threat of anti-dumping provisions being used as protective devices against foreign imports materialized during the great economic crisis of the interbellum. The problem had already been recognized at the time, and the League of Nations investigated the problem.[24]

After the Second World War, the issue of dumping and the abuse of anti-dumping provisions was raised again during the negotiations on the General Agreement on Tariffs and Trade (GATT).[25] As a result, the first international rules on dumping were incorporated in the GATT in 1948.[26] These have subsequently been worked out in two "Anti-Dumping Codes." The first was created in 1967 as a result of the Kennedy Round of negotiations in 1967.[27] The second was created in 1979 after the Tokyo Round of negotiations.[28]

5. Community Legislation

The first anti-dumping legislation in the EEC[29] entered into force in 1969, about seven months after the first GATT Anti-Dumping Code. The original Commission proposal was modified to take the GATT Code provisions into account. It was amended a number of times as experience was gained and new problems were encountered. A major review of EEC anti-dumping legislation took place in 1980.[30] The aim of this review was mainly to take into account the Tokyo Round of GATT negotiations: the 1979 GATT Anti-Dumping Code. This regulation was replaced in 1984,[31] and was later modified by the "Screwdriver Regulation"[32] aimed at preventing evasion of anti-dumping measures by assembling imported components in the EEC. Finally, a new regulation was adopted in 1988[33] to unify all anti-dumping legislation in a single text (1988 Regulation). This regulation also introduced certain measures to enhance the effectiveness of anti-dumping duties.[34] This regulation is currently in force.

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24. *See* J. VINER, A MEMORANDUM ON DUMPING (1966).
25. GATT, *supra* note 21.
26. *Id.* art. VI.
27. Basic Instruments and Selected Documents 15 GATT Supp., at 24.
28. Agreement on Implementation of Article VI of the GATT (O.J. 1980, L71/72) [hereinafter GATT 1979 Anti-Dumping Code].
29. EEC Reg. 459/68 (O.J. 1968, L93/1).
30. EEC Reg. 3017/79 (O.J. 1979, L339/1).
31. EEC Reg. 2176/84 (O.J. 1984, L201/1).
32. EEC Reg. 1761/87 (O.J. 1987, L167/9).
33. Appendix 1, *supra* note 12.

The fact that new EEC legislation tended to follow new GATT legislation suggests that GATT rules influenced EEC law. In fact, the current EEC legislation is modeled after the 1979 Anti-Dumping Code, although the amendments of 1987 and 1988 have no counterpart in the GATT Code. The influence of the GATT rules on EEC anti-dumping law is further illustrated by the fact that the current GATT-based Regulation is also used against imports from states that are not GATT members.

C. *Substantive Anti-Dumping Law in the EEC*

1. The Three-Criteria System

According to the 1988 Regulation, anti-dumping protective measures are not justified by the mere existence of low-priced imports.[35] Three conditions must be fulfilled before anti-dumping measures can be taken: (1) there must be dumping;[36] (2) there must be injury caused by the dumping to an established Community industry;[37] and (3) taking measures must be in the interests of the EEC.[38] Each of the three criteria will be discussed separately.

2. First Condition: Dumping

The existence of dumping as a condition for the application of anti-dumping measures is obvious. Dumping is defined in article 2(2), and appropriately named "PRINCIPLE."[39] It gives the following definition of a dumped product: "A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product."[40]

According to article 2(8), the export price is the price actually paid for the product in the Community.[41] It is, in other words, the EEC price. The value of a product is normally its domestic price or the price on the market of the country of origin.[42] Put simply, a product is dumped when it is sold in the EEC at a lower price than in its country of origin.

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34. *See* part I, § C(5).
35. Appendix 1, *supra* note 12, art. 2.
36. *Id.* art. 2(1).
37. *Id.*
38. *Id.* arts. 11(1) and 12(1).
39. *Id.* art. 2(2).
40. *Id.* (following GATT 1979 Anti-Dumping Code, *supra* note 28, art. 2(1)).
41. *Id.* art. 2(8).
42. *Id.* art. 2(3)(a).

The amount by which the normal value exceeds the export price is called the "dumping margin."[43] This is an indication of how serious the dumping is. The dumping margin also serves as an upper limit to the anti-dumping measures.

This simple rule gives way to a bewildering variety of alternatives in practice. Article 2, which lays down detailed rules for the determination of the normal value, lists three special occasions on which alternatives to the rule given above are used.[44] These are all derived from the GATT Anti-Dumping Code.[45] The first of these special occasions is when the product is not sold on the domestic market at all, or when its price is not a proper indication of its value.[46] This may be the case when the domestic market is closed for international competition, when there is a monopoly, or when the domestic prices are government-determined or subsidized. The second special occasion is if the product is systematically sold on its domestic market at a price below production costs.[47] The third occasion is if the product originates in a non-market economy, so that its domestic price is determined by considerations different from those in a market economy and cannot be used.[48]

In these cases, a variety of alternatives may be used instead of the domestic market price: (1) a suitably modified actual price to compensate for sales below cost price; (2) the market price in a representative third or "reference country;"[49] (3) the constructed value, a price calculated by adding the costs of raw materials, labor, depreciation, transport, and reasonable profit margin measured at the price level of the country of origin;[50] or (4) the price of a like product in the Community. Where more than one alternative pricing technique can be used, there is no special hierarchic order: the Commission may use its discretion to choose a particular alternative.

Other exceptions apply to both the normal value and the export price. Article 2 covers cases in which exporter and importer manipulate prices by mutual consent to hide dumping or to evade taxes.[51] This is

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43. *Id.* art. 2(14)(a).

44. *Id.* art. 2(3)-2(6).

45. *Cf.* GATT 1979 Anti-Dumping Code, *supra* note 28, art. 2(4).

46. Appendix 1, *supra* note 12, art. 2(3)(b).

47. *Id.* art. 2(4).

48. *Id.* at art 2(5); I. BAEL & J. BELLIS, *supra* note 17, at 12 (note that some 45% of all anti-dumping proceedings between 1970 and 1984 involved non-market economies).

49. This is often used for imports from non-market economies.

50. This is not the case for non-market economies where the domestic prices of raw materials, labour, etc. suffer from the same defect as the domestic price of the product itself and the prices in a reference country are used instead.

51. Appendix 1, *supra* note 12, arts. 2(7) and 2(8)(b).

known as transfer pricing. In some cases, the Commission may even use its discretion to establish an export price on "any reasonable basis."[52]

After the normal value and the export price are determined, they must be compared with each other to establish the size of the dumping margin, if there is one. If more exporters and importers, or if several closely related products are involved, the Commission may use various averaging and sampling techniques.[53] In this way, a more or less generalized dumping margin may be established. There are also some provisions that ensure proper care is taken with differences in quality, quantity, terms of sale, time of the year, relevant taxes and import duties.[54]

3. Second Condition: Injury

The purpose of EEC anti-dumping legislation is not to prevent or punish dumping, but to protect Community industries from being harmed. Consequently, protective action is not allowed in cases where dumping does not cause injury to Community industries. This is the background of the "injury criterium," which is prescribed by the GATT Code.[55] The 1988 Regulation recognizes three types of injury: (1) actual injury which has already been suffered; (2) the threat of future injury; and (3) material retardation of the development of an industry.[56] This was probably included in the GATT Code for the benefit of developing nations.[57] It has been faithfully copied in Community legislation, but has never been used as basis for finding injuries.[58]

Article 4 of the 1988 Regulation also describes various methods to determine injury, such as looking at quantitative increases in imports, decreases in prices, and trends in the Community industry.[59] An investigation into a threat of injury follows more or less the same methods. Some of these include extrapolating imported quantities, prices, and growing production capacity in the country of origin.

Injury is normally measured in terms of harm to the industry of the EEC as a whole. However, when a particular region forms a

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52. *Id.* art. 2(8)(b).
53. *Id.* art. 2(13).
54. *Id.* art. 2(9)-2(11); *cf.* GATT 1967 Anti-Dumping Code art. 2(b).
55. GATT 1979 Anti-Dumping Code, *supra* note 28, art. 3.
56. Appendix 1, *supra* note 12, art. 4(1).
57. *Cf.* GATT 1979 Anti-Dumping Code, *supra* note 28, art. 13.
58. J. BESELER & A. WILLIAMS, ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES 165 (1986); I. BAEL & J. BELLIS, *supra* note 17, at 80.
59. Appendix 1, *supra* note 12, art. 4.

separate sub-market with regard to a particular product, injury to the producers in that region is measured.[60] A region constitutes a separate sub-market when there is no trade in that product between the region and the rest of the EEC.

4. Third Condition: Community Interest

The criterium of Community interest is also an elaboration of a principle from the GATT Code that protective measures are never obligatory: they are left to the discretion of the competent authorities. Concretely, this means that the EEC authorities may at all times refrain from taking measures when they judge it in the interest of the Community.

Note that Community interest does not have to be proven: if dumping and injury exist, it is assumed to be in the interest of the Community to take protective measures, unless some special reasons exist. In the past, the following reasons have been given for not taking protective measures: (1) because the benefit of protective measures to Community producers was outweighed by the detriment that measures would cause to Community industries that used the product as raw material;[61] (2) because measures would be unnecessary, such as when the dumping was likely to stop without them;[62] (3) because measures would be ineffective, or not help the injured parties.[63] Reasons that have not been used in the past but may be used in the future include the foreign policy interests of the Community and the interests of the consuming public.

5. Protective Measures

The standard protective measures in EEC anti-dumping law are anti-dumping duties collected in the same way as import duties. They are only "standard" in the sense that they are considered to be ordinary measures while undertakings are considered to be deviations. In practice, undertakings are by far the most frequently used protective measures. In the period 1983-1985, 58 procedures were concluded by undertakings and only 33 by duties.[64]

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60. *Id.* art. 4(5).

61. *See, e.g.*, Wrought Titanium Case (Japan), Notice of Termination (O.J. 1979, C207/4).

62. *See, e.g.*, Aluminium Case (Norway and others), EEC Comm'n Decision 84/103 (O.J. 1984, L110/19).

63. *See, e.g.*, Codeine Case (E. Europe), EEC Comm'n Decision 83/9 (O.J. 1983, L16/30).

64. Fourth Commission Report to the European Parliament on the Anti-Dumping and Anti-Subsidy measures of the European Community, COM (87) 178 final, at 10 [hereinafter Fourth Report].

There are two types of anti-dumping duties under EEC law. The first are definitive duties imposed only at the end of an investigation. While they are in force, the product is released from the customs area only upon payment of the duties. They have to be proportional to the seriousness of the dumping and the injury: they may not be higher than necessary to eliminate the dumping margin or the injury.[65] The maximum duration is five years, after which they must be reviewed.[66] The second are provisional duties that can be imposed during an anti-dumping investigation. They are meant as interim measures preventing evasion of protective measures by dumping during short intermittent periods. While they are in force, the product concerned is released from the customs area only if a bank security is provided for the amount of the duties. They have a maximum duration of four months, but can be extended for two months.[67] Both definitive and provisional duties are paid by the importer like ordinary import duties.

Definitive duties can have a retroactive effect referring back to the date on which a provisional duty was imposed. In such a case, collecting the definitive duty includes collecting the bank security for the provisional duty. Partial collection, when the definitive duty is lower than the provisional one, is also possible.[68]

Duties with a retroactive effect before the imposition of provisional duties are normally not allowed. However, there are four exceptions, all of which have a certain punitive character: (1) if there has been a case of intermittent dumping; (2) if there has been a history of dumping causing injury; (3) if the importer was, or should have been, aware that the exporter dumped and caused injury; and (4) if a previously existing undertaking was broken.[69]

Since the adoption of the "Screwdriver Regulation,"[70] anti-dumping duties can be imposed on products assembled in the EEC from foreign components. This Regulation, now article 13 of the 1988 Regulation, lists three cumulative conditions for the imposition of "screwdriver duties:" (1) the producer must be related to or associated with a foreign producer whose products are already subject to an anti-dumping duty; (2) the assembling must have started or increased significantly after the imposition of the duty; and (3) more the 50% of the components by value must be imported from the country whose prod-

65. Appendix 1, *supra* note 12, art. 13(3).
66. *Id.* art. 15(1).
67. *Id.* art. 11(5).
68. *Id.* art. 12(2)(a).
69. *Id.* art. 13(4). The fourth exception will be further discussed in part II.
70. *See supra* note-32 and accompanying text.

ucts are subjected to the anti-dumping duty.[71] Note that the components do not have to be made by the firm who is subjected to the duty. It is sufficient if they originate in that firm's country. The amount of the "screwdriver duties" must be proportional to the percentage of imported components.

A further refinement of the EEC's anti-dumping duty system was recently introduced. It addressed a major drawback of anti-dumping duties: they do not actually stop or prevent dumping. The dumping firm can always choose to pay the duties and absorb the losses rather than to lose part of the market share. Indeed, experience showed that dumping firms often compensated their importers who had to pay duties.

This problem is solved by article 13(11), which enables additional anti-dumping duties to be imposed when the existing duties are borne by the exporter.[72] This is supposed to be the case when the imposition of the existing duty has not led the importer to increase his price correspondingly, and when the importer cannot show that this is due to reductions in his costs or profit margins. This provision was introduced very recently and has not yet been used. Potentially, it can greatly increase the effectiveness of anti-dumping duties, but it could also lead to a *de facto* minimum price for imported goods set by the Community.[73]

D. *EEC Anti-Dumping Procedural Law*

1. Community Institutions

The Community institution most involved in anti-dumping proceedings is the Commission. The Commission enjoys nearly complete autonomy in anti-dumping matters. The role played by the Council and the Advisory Committee is very limited.

The role of the Council is limited to the formal imposition of definitive duties. However, it can also overturn certain findings of the Commission.[74]

The Advisory Committee is made up of representatives of member states.[75] Its function is to act as a forum for consultation of member states by the Commission. A Committee member, or member state, can demand that some decisions be made by the Council instead of

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71. Appendix 1, *supra* note 12, art. 13.

72. *Id.* art. 13(11).

73. EEC Reg. 1761/87 (O.J. 1987, L169/9).

74. The term "finding" is used to mean any formal decision or determination in an anti-dumping procedure; *cf.* GATT 1979 Anti-Dumping Code, *supra* note 28, art. 6 n.12.

75. Appendix 1, *supra* note 12, art. 6(1).

by the Commission, and it can request that the Council overturn certain decisions of the Commission. In addition, a number of trade treaties between the EEC and third countries prescribe a consultation procedure involving non-member states.[76]

2. Initiation of Proceedings: Complaints

An anti-dumping proceeding may begin in two ways, only one of which is normally used: (1) by a communication to the Commission from a member state;[77] or (2) by a complaint to the Commission from a natural or legal person on behalf of a Community industry.[78]

The first way is rare: only one procedure has been initiated by a member state.[79] A complaint is the common way in which an anti-dumping proceeding is started. It is not entirely clear whether the Commission can initiate proceedings without a complaint. Article 7(1) states that the Commission can initiate a proceeding when there is "sufficient evidence," and does not mention complaints.[80] On the other hand, article 7(1)(b) seems to suppose that every proceeding has a complainant.[81]

Any person submitting a complaint bears the burden of proving that the person is "acting on behalf of a Community industry."[82] In practice, this is interpreted by the Commission as representing some 25% of the Community production.[83] Most complainants are trade associations, but if a single firm is large enough it can represent a sufficient part of a Community industry by itself.[84]

There is no heavy burden of proof on the complainant. All the person must do is supply sufficient evidence to enable the Commission to decide whether a formal anti-dumping investigation is desirable.[85] The Commission is willing to help formulate complaints and has made a questionnaire for this purpose, which is available on request.[86] Several large European trade organizations have done the same for the benefit of their members.[87]

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76. *See, e.g.*, Wooden Clogs Case (Sweden), EEC Comm'n Decision 86/21 (O.J. 1986, L32/28).
77. Appendix 1, *supra* note 12, art. 5(6).
78. *Id.* art. 5(1).
79. Tube & Pipe Fittings Case (Spain), EEC Comm'n Decision 83/3271 (O.J. 1983, L322/13).
80. Appendix 1, *supra* note 12, art. 7(1).
81. *Id.* art. 7(1)(b).
82. *Id.* art. 5(1).
83. I. BAEL & J. BELLIS, *supra* note 17, at 106 n.7.
84. *Id.* at 106.
85. Appendix 1, *supra* note 12, art. 5(2).
86. J. BESELER & A. WILLIAMS, *supra* note 58, at 180.
87. I. BAEL & J. BELLIS, *supra* note 17, at 14.

If a complaint is withdrawn the proceeding is normally terminated, unless the Commission decides that termination is contrary to the interests of the Community.[88] This is logical, given the Commission's ability to initiate proceedings on its own initiative, but it is rarely done.[89]

3. Preliminary Examination

The examination of a complaint by the Commission is called the preliminary investigation. It requires consultation of the Advisory Committee.[90] It serves to separate the serious, well-founded complaints from the frivolous ones.[91]

If the Commission sees no reason to initiate a proceeding, the complaint is declared inadmissible, and the complainant is so informed.[92] There is no formal rejection, and the complainant may improve the complaint and try again. Some complaints go through several rounds of discussions before being declared admissible.[93]

If, on the other hand, the Commission decides that the complaint offers *prima facie* evidence of dumping and injury, a formal investigation will be started. The investigation is the phase of the proceeding in which the Commission formally examines the existence of dumping and injury. An investigation is started by the publication of a notice of initiation in the Official Journal. Individual notifications have to be sent to the exporters and importers concerned, to the representatives of the country of origin, and to the complainant.[94]

The notice of initiation determines the product and the scope of an investigation. The Commission may limit itself to part of the complaint for reasons such as procedural economy. It may also extend the scope of the investigation to other products or exporters, as a result of a supplementary complaint,[95] or because of its own suspicions.

4. Conduct of Investigations

Due to the specialized and confidential nature of much of the information relevant to anti-dumping investigations, it is nearly impossible

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88. Appendix 1, *supra* note 12, art. 5(4).
89. J. BESELER & A. WILLIAMS, *supra* note 58, at 179.
90. Appendix 1, *supra* note 12, art. 7(1).
91. J. BESELER & A. WILLIAMS, *supra* note 58, at 180.
92. Appendix 1, *supra* note 12, art. 5(5).
93. J. BESELER & A. WILLIAMS, *supra* note 58, at 183-84.
94. Appendix 1, *supra* note 12, art. 7(1)(b).
95. I. BAEL & J. BELLIS, *supra* note 17, at 108.

for the Commission to conduct an investigation by itself. Instead, it is forced to rely heavily on information provided by the complainants, the exporters and importers, and other interested parties. One of the purposes of the notice in the Official Journal is to draw the attention of interested parties such as Community producers and trade organizations. It also prescribes a period in which they may make their views known.[96]

The Commission may request the parties to the investigation to have their offices visited by Commission officials, in order to collect additional information and/or to verify information already in possession of the Commission.[97] The Commission cannot force a party to allow this kind of search or to hand over particular documents.

This stands in marked contrast with the Commission's powers of investigation in competition cases.[98] However, if a party refuses to cooperate, the Commission may take a decision "on the basis of the facts available."[99] In the past, this has repeatedly meant on the basis of information least favorable to the refusing party.[100] Thus, most parties adopt a more cooperative attitude.

If the visited offices are located in a third country, the prior approval of that state is necessary. This obligation flows directly from the international law principle that enforcement jurisdiction is an integral part of a state's sovereignty.[101] However, making a decision based on available facts when a party refuses to cooperate may also be used in case of non-cooperation by states.[102]

If the offices are located within the Community territory, approval is not necessary. The member states are required to tolerate visits because of the loyalty obligation of article 5 of the EEC Treaty.[103] The Commission can also request the member states to supply certain information, or to conduct investigations.[104] The Commission seems to be reluctant to do so since only the control of customs invoices is regularly requested.[105]

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96. Appendix 1, *supra* note 12, art. 7(1)(a).
97. *Id.* art. 7(2).
98. *See* EEC Reg. 17/62 arts. 11, 14 & 15.
99. Appendix 1, *supra* note 12, art. 7(7)(b).
100. I. BAEL & J. BELLIS, *supra* note 17, at 111; *cf.*, The Commission's remarks in the Acrylic Fibers Case (U.S.A.), EEC Comm'n Decision 84/2275 (O.J. 1984, L209/1).
101. *See* Appendix 1, *supra* note 12, art. 7(2)(b).
102. *See id.* art. 7(7)(b).
103. EEC Treaty, *supra* note 1, art. 5.
104. Appendix 1, *supra* note 12, art. 7(5).
105. J. BESELER & A. WILLIAMS, *supra* note 58, at 192.

5. Confidentiality of Information

All information gathered during the investigation is open to inspection by certain interested parties.[106] They have the right to see the Commission's files containing the collected information. This is an important procedural right, and the Commission's failure to observe it may lead to annulment of a subsequent anti-dumping measure.[107] These "certain parties" are: the complainant, exporters and importers known to be concerned, and representatives of the exporting countries. Other interested parties, even if they have contributed information to the file, are not included. However, the Commission can open its files to other parties at its own discretion.[108] Internal documents of the Commission or of member states and confidential information are not included within the Commission's discretion to open information.

As mentioned above, much of the relevant information in an anti-dumping investigation is supplied by the parties. This private business information can be confidential, such as details of production costs or rebates given to particular customers. The parties in a proceeding may therefore face the dilemma of either disclosing their secrets to their competitors or losing the argument. Moreover, interested third parties are unlikely to cooperate with the Commission by supplying their own information without adequate guarantees of confidentiality.

Consequently, EEC anti-dumping procedure has provisions for confidential treatment. "Confidential" is ordinarily defined as "likely to have a significantly adverse effect upon the supplier or the source" when disclosed.[109] A party can request confidential status for particular information, accompanied by either a non-confidential summary or, if this cannot be given, by proper motivation.[110] If the Commission refuses confidential treatment, the supplier may withdraw the information.[111] If the Commission accepts, the information is considered confidential and is no longer open to other parties. Confidential information cannot be used as a basis for a decision, but the Commission may

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106. Appendix 1, *supra* note 12, art. 7(4)(a).

107. Timex Corp. v. Commission of the EC, 1985 ECR 861, case 264/82.

108. *See* J. BESELER & A. WILLIAMS, *supra* note 58, at 193 (a similar system is used in the United States); E. VERMULST, *Dumping in the US and the EC: A Comparative Analysis* in LEGAL ISSUES OF EUROPEAN INTEGRATION 103 (1984).

109. Appendix 1, *supra* note 12, art. 8(3) (there may be instances where disclosure could harm someone else, such as a customer).

110. *Id.* art. 8(2)(b).

111. A similar system exists in Canada; *See* the Canadian Special Import Measures Act arts. 79, 85(1) and 87(1).

formulate non-confidential summaries or extracts and use these instead.[112]

Under no circumstances may any information submitted to the Commission, confidential or not, be used for purposes other than for which it was requested, such as for a competition procedure against the supplier or the source.[113]

6. Imposition of Provisional Duties

During the investigation, it may be necessary to take provisional measures in order to discourage dumping during the investigation. Provisional duties can be imposed when, after preliminary examination, the three conditions for taking measures seem to be fulfilled.

In actual practice, there is a strong tendency for provisional duties to be taken in anticipation of definitive ones. The Commission tends to impose provisional duties during all investigations not only when the threat of dumping is particularly acute, unless an undertaking is accepted.[114] Furthermore, they tend to be imposed rather late: only after on-the-spot verification.[115] They are, on average, imposed after eight months, while the average duration of an anti-dumping investigation is 9.3 months.[116] Consequently, definitive duties are often the same as the preceding provisional ones.

Despite this, provisional duties are interim measures that may have to be taken quickly. Consequently, the decisionmaking method is designed for quick action. Provisional duties are imposed by a Commission Regulation either on the Commission's own initiative or at the request of a member-state.[117] If such a request is received, the Commission must make a decision within five days.[118] Normally, measures are taken only after consulting with the Advisory Committee. In especially urgent cases, the Commission may proceed after notifying the member-states, and consultation must take place within ten days of the decision. A Commission Decision imposing provisional duties can be overturned by the Council acting through a qualified majority.[119]

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112. *See* E. VERMULST, *supra* note 108, at 121 (compare this with the United States' system of partial disclosure under a protective order).

113. Appendix 1, *supra* note 12, art. 8(1).

114. Fourth Report, *supra* note 64, at 4 (earlier Annual Reports contain similar statements).

115. One reason is the limited duration of provisional duties.

116. Fourth Report, *supra* note 64, at 8.

117. Appendix 1, *supra* note 12, art. 11(1).

118. *Id.* art. 11(3).

119. *Id.* art. 12(4).

7. Conclusion by Imposition of Definitive Duties

After a full anti-dumping investigation, if the three conditions of dumping, injury, and EEC interest appear to be fulfilled, definitive duties can be imposed. Definitive duties are imposed by a Regulation of the Council acting through a qualified majority on a proposal submitted by the Commission.[120] The Commission must consult the Advisory Committee when drawing up its proposal. It is very rare for the Council to overturn a proposal of the Commission.[121]

If definitive duties are imposed, the investigation is concluded, but the proceeding continues until the duties expire or are reviewed. Without review, duties expire, if imposed for a specific period, after that period. When no specific period is fixed, duties expire automatically after five years, the so-called "sunset period."[122]

8. Conclusion Without Imposition of Duties

Apart from imposing definitive duties, concluding an investigation may be done by termination or by acceptance of an undertaking. Conclusion by acceptance is discussed in part II.[123]

Termination is a finding by the Commission that there are no reasons to take protective measures. For example, when there is no dumping and/or injury, or when the interests of the Community militate against protective measures. An investigation is terminated by a Commission Decision, unless a member state objects during the obligatory consultation of the Advisory Committee. In that case, the Commission will send a proposal to the Council. This will be deemed to be accepted unless the Council decides otherwise within one month.[124] Referrals to the Council are exceptional since the Committee rarely objects.[125] If an investigation is concluded by termination, the anti-dumping proceeding is concluded automatically as well, and a notice of termination is published in the Official Journal.[126]

9. Review Procedure

An investigation that has been concluded can be re-opened by the Commission on its own initiative at the request of a member state,

120. *Id.* art. 12(1).

121. J. BESELER & A. WILLIAMS, *supra* note 58, at 223.

122. Appendix 1, *supra* note 12, art. 15(1).

123. *See* pt. II, §§ D & E.

124. Appendix 1, *supra* note 12, art. 9(1).

125. J. BESELER & A. WILLIAMS, *supra* note 58, at 223; I. BAEL & J. BELLIS, *supra* note 17, at 117.

126. Appendix 1, *supra* note 12, art. 9(1)-9(2).

or at the request of an interested party. An interested party must bring forward sufficient evidence to justify review.[127] This request for review will be further discussed in part II.[128]

E. *Judicial Review of Anti-Dumping Findings*

1. General Remarks

In contrast to EEC competition law,[129] no special legal regime exists for the judicial review of anti-dumping findings. Therefore, anti-dumping findings of the Council and the Commission must be reviewed under the normal EEC Treaty provisions for judicial review of acts of Community institutions. Generally speaking, there are two ways to challenge the outcome of an anti-dumping proceeding: (1) the action for annulment of article 173 of the EEC Treaty,[130] and (2) the preliminary ruling cited in article 177 of the EEC Treaty.[131] However, actions for annulment have admissibility problems, while preliminary rulings have availability problems.

Theoretically, a third possibility exists: the action for damages cited in article 215 of the EEC Treaty.[132] The action for damages has a purpose different from the other two challenges. It is aimed at compensation for damages resulting from acts of the Community, while the action for annulment[133] or a preliminary ruling[134] are aimed at the annulment of an action. Consequently, the action for damages cannot be used against acts against which an action for annulment is possible.[135] Since the action for annulment is widely available, the use of the action for damages is limited. Since the action for damages has never been used independently against anti-dumping findings,[136] it will not be discussed further.

2. The Action for Annulment

Admissibility has been the main source of problems with the action for annulment. According to article 173(2), only individuals directly

127. *Id.* art. 14.

128. *See* pt. II, § H.

129. EEC Reg. 17/62 (O.J. 1962).

130. EEC Treaty, *supra* note 1, art. 173.

131. *Id.* art. 177; Schoeppenstedt v. Council, case 5/71.

132. EEC Treaty, *supra* note 1, art. 215.

133. Schoeppenstedt v. Council, XVII ECR 975, case 5/71.

134. Merkur v. Commission, XIX ECR 1055, case 43/72.

135. *See* Schoeppenstedt v. Council, case 5/71, at 993 (note the opinion of the Advocate-General Roemer).

136. Nippon Seiko KK v. Council & Comm'n of the EC, 1979 ECR 1303, case 119/77 (the action for damages was used together with the action for annulment).

and individually affected by a Community act have access to the Court.[137] A considerable amount of jurisprudence was required to pinpoint those who have been thus affected by a particular anti-dumping finding and those who have not. The following overview is arranged according to the different findings that conclude an anti-dumping investigation but which may nontheless be challenged: (1) a Commission Decision that initiates a formal anti-dumping investigation, or that refuses to do so; (2) a Commission Decision that terminates an investigation without imposition of duties; and (3) a Council Regulation that imposes definitive duties.

3. Decision Not to Investigate

The first and quickest way to end an anti-dumping procedure is when the Commission rejects the complaint during the preliminary examination. In such a case, the procedure is over almost before it starts.

The complainant might want to challenge such a decision, and clear precedent exists in support of such a challenge. In the FEDIOL case, the Court declared admissible an appeal of an association of oil processors against a Commission decision not to investigate the alleged dumping of soya oil-cake from Brazil.[138] The Court noted that the anti-dumping Regulation gives complainants certain specific rights: the right to complain and to submit evidence, the right to be heard, the right to have their complaint examined with due care, and the right to be informed if the complaint is not pursued.[139] These rights cause the complainant to be directly and individually affected by a decision not to investigate and give him the right to challenge it before the Court.

However, no right of appeal exists in the opposite case: one cannot challenge a finding that initiates an investigation. This can be inferred from the IBM case.[140] In that case, the applicant challenged the Commission's finding to initiate an investigation as a possible violation of article 85 of the EEC Treaty.[141] The Court cited the principle that one can challenge only measures that specifically state the position of the Commission or the Council, and not provisional measures intended to

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137. EEC Treaty, *supra* note 1, art. 173(2).

138. Federation de l'industrie de l'huilerie de la CEE (FEDIOL) v. Commission of the EC, 1983 ECR 2913, case 19/82 ¶ 28 [hereinafter FEDIOL Case] (this was an anti-subsidy case. However, the complaint system for anti-subsidy cases is the same as anti-dumping cases. Consequently, it is a valid precedent).

139. *Id.*

140. IBM v. Commission of the EC, 1981 ECR 2639, case 60/81.

141. EEC Treaty, *supra* note 1, art. 85.

pave the way for a final decision. The finding to initiate a proceeding did not affect the applicants' legal position, and any procedural irregularities could be challenged in an action against the final outcome of the procedure. Consequently, the Court concluded that the initiation could not be considered a decision within the meaning of article 173 of the EEC Treaty, and could not be challenged.[142]

4. Termination Without Measures

The second way in which a proceeding might end is when the Commission decides that there is no dumping, no injury, or no Community interest in taking measures. Only the complainant would have any interest in challenging this decision. Although this has never been done, it is inconceivable that the complainant would not have the right to do so.

First, all arguments used in FEDIOL to justify the complainant's right of appeal against a Commission decision not to pursue a complaint also apply to the Commission's final decision. Second, in the Timex case[143] the Court held that a complainant may challenge the imposition of a definitive duty that he considers too low. Therefore, it would be illogical to deny the complainant an appeal against a decision that imposes no duty at all.

5. Imposition of Definitive Duties

A Council Regulation that imposes a definitive duty is somewhat special since it is the only finding that all parties may want to challenge: the producers/exporters and importers because they consider it too high, and the complainant because he considers it too low. The last case, that of a complainant challenging a Regulation imposing definitive duties, was decided by the Court in the Timex case.[144] Expressly using the same reasoning as in FEDIOL, the Court recognized the complainant's right to challenge a definitive duty considered too low. However, there was a trap in this case: the Court took account of the fact that Timex played a very active role during the investigation, and that the determination of injury was based largely on Timex's position. Without these circumstances, e.g. when a complainant submits a complaint and is never heard of again, the outcome might have been different.

Producers/exporters who want to challenge a Regulation imposing definitive duties face a particular problem. On the one hand, a regu-

142. *Id.* art 173.
143. Timex Corp. v. Commission of the EC, 1985 ECR 861, case 264/82.
144. *Id.*

lation imposing a duty is general in the sense that it applies to all imports of a certain product. In such a case, nobody is individually concerned. On the other hand, it may also single out particular producers/exporters, who are individually concerned as a result. In the Allied Corporation Case,[145] the Court recognized two ways in which producers and exporters can be singled out: "[i]t follows that the acts imposing anti-dumping duties are of such a nature that they concern directly and individually those producers and exporters who are able to show that they have been identified in the decisions of the Commission or the Council or concerned by the preparatory investigation."[146] In other words, a producer/exporter can be directly and individually affected both by being named in the regulation, and by playing a role in the investigation.

An importer who is associated in some way to a producer/exporter can profit from this connection and can claim direct and individual concern as well. This approach was followed by the Court in the Japanese Ballbearings Case,[147] in which the affiliates derived direct and individual effect from the link with their parents.

However, an independent importer is never directly and individually affected, unless he is expressly named in the decision. This flows directly from the Court's decision in the Alusuisse Case.[148] In that case the Court held:

> Such measures constitute, as regards independent importers who, in contrast to exporters, are not expressly named in the regulations, measures having general application within the meaning of the second paragraph of article 189 of the Treaty, because they apply to objectively determined situations and entail legal effects for categories of persons regarded generally and in the abstract.[149]

This limitation of the rights of independent importers has been criticized.[150] However, importers are assured judicial review by way of a preliminary ruling.

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145. Allied Corp. v. Commission of the EC, 1984 ECR 1005, cases 239 & 272/82.

146. *Id.* ¶ 11-12.

147. Nippon Seiko KK v. Council & Comm'n of the EC, 1979 ECR 1303, case 119/77, ¶ 14-15.

148. Alusuisse Italia SpA v. Council & Comm'n of the EC, 1982 ECR 8463, case 307/81.

149. *Id.* ¶ 9.

150. Bellis, *Judicial Review of EEC Anti-Dumping and Anti Subsidy Determinations after FEDIOL: The Emergency of a New Admissibility Test*, 21 COMMON MKT. L. REV. 539, 550 (1984) (Bellis has pleaded for criteria more like that for exporters in Allied Corp.).

6. Preliminary Rulings

Preliminary rulings as a method of access to the Court are only to importers protesting duties. Only in this case can the parties in anti-dumping decisions come into contact with a national judicial authority who can request a preliminary ruling. Since the importers have to pay the duties to the national customs authorities, they can request a preliminary question via the national judicial system for customs affairs. This possibility was one of the considerations that led the Court to deny admissibility in actions for annulment to independent importers in the Alusuisse Case.[151] Complainants and producers/exporters do not have recourse to preliminary rulings.[152]

7. Review Standard

All parties in an anti-dumping proceeding usually have access to the Court in one way or another. However, this is somewhat counterbalanced by the fact that the Court seems to leave to the Commission extremely wide discretion in conducting the proceedings. Given the nature of the Commission's task, judging highly complex economic matters, the Court is naturally reluctant to second-guess the Commission. Consequently, as illustrated by the Remia Case,[153] the Court tends to limit its review to "verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error or a misuse of powers."[154]

The Advocate-General gave similar exhaustive list of reasons for annulment, in the Miniature Ballbearing Cases: (1) non-compliance with procedural rules; (2) insufficiency of motivation; (3) material incorrectness of the facts; (4) manifest errors of judgment; and (5) misuse of powers.[155]

The Court recently reaffirmed its decision, referring explicitly to the Remia Case:

> It should be noted that the choice between the different methods of calculation . . . requires an appraisal of complex

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151. Alusuisse Italia SpA v. Council & Comm'n of the EC, 1982 ECR 8463, ¶ 13; *see also* Allied Corp. v. Comm'n of the EC, 1984 ECR 1005, cases 239 & 275/82, ¶ 15.

152. Unless they used an artificial legal construction such as was used in Foglia Novello, 1980 ECR 745, case 104/79; *see also* Foglia Novello, 1981 ECR 3045, case 244/80.

153. Remia v. Commission of the EC, case 42/84 (July 11, 1985 judgment not yet reported).

154. *Id.* ¶ 34.

155. Conclusions of the Advocate-General Mancini, presented to the Court 11 November 1986, in the Miniature Ballbearing Cases, *infra* note 302.

> economic situations. The Court must therefore . . . limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of power."[156]

It appears from these cases that the Court will only check that the facts supporting the finding are correct ("*exactitude materielle des faits*"). It will not annul a finding because a set of facts used, although materially correct, gives a biased or misleading view of the actual situation. However, if the Commission's acts are so outrageous that they amount to a manifest error of judgment, the Court might annul a finding. This is a serious shortcoming, because of the variety of techniques available to prove the existence of dumping and injury. An ill suited method can easily distort the outcome of an investigation, even when using facts that are themselves correct.

F. *Summary of Part I*

The main points of interest for undertakings flowing from the preceding discussion of anti-dumping law in general are:

(1) There are plenty of valid business reasons to engage in dumping, even in the course of normal, fair, competition; consequently, anti-dumping law is not aimed at punishing dumping, but at preventing the damage being caused by it.

(2) Anti-dumping law has a somewhat dual character: on one hand, it promotes competition by preventing unfair forms of competition; on the other, it reduces competition by shielding industries from foreign competition.

(3) EEC anti-dumping law has always closely followed GATT anti-dumping rules; changes in GATT legislation have always been quickly followed by changes in ECC law. This has lead to applying GATT rules to non-GATT members.

(4) Anti-dumping duties in EEC law can only be imposed when there is both dumping and injury resulting from the dumping. A wide variety of techniques exist to prove the dumping and the injury. The Court allows the Commission wide discretion to choose one or more particular techniques.

(5) Anti-dumping duties do not actually prohibit or prevent dumping. Instead, they merely make it more expensive to do so. Since the

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156. Nippon Seiko KK v. Council of the EC, case 258/84, ¶ 21 (May 7, 1987 judgment not yet reported).

adoption of the current Regulation, duties can be raised to the dumping margin when they are borne by the exporter.

(6) The Commission enjoys near-complete autonomy in EEC anti-dumping procedures; the roles of the Council and the Advisory Committee are limited in practice.

(7) Any finding that ends an anti-dumping proceeding can be challenged before the Court. Generally speaking, those parties singled out in the findings have access to the Court via the action for annulment, and those who have to pay the duties via preliminary rulings.

(8) The right of complainants to challenge anti-dumping findings depends mainly on the role they played during the investigation: if they influenced the finding by actively participating, they can challenge.

III. Part II: Undertakings in EEC Anti-Dumping Law

A. *Introduction*

While part I dealt with anti-dumping law in general, this part will concentrate on undertakings in particular. It will describe the law and practice of the European Community with regard to the use of undertakings in anti-dumping law. It is divided into seven sections.

The first section will describe the general concept of undertakings: that of an agreement between a firm and the Community which replaces normal protective duties. It will also describe the advantages and disadvantages of undertakings, and their use in other forms of EEC trade protection legislation.

The second section will describe the substantive law with regard to anti-dumping undertakings as set out in the 1988 Regulation. This paragraph can be subdivided into two parts. The first part describes the contents of an undertaking covering both the legal requirements to the contents of undertakings and the "typical" contents, i.e. the clauses that normal undertakings tend to contain. The second part describes the results of an undertaking, i.e. the changes in the legal position of the Community and of the undertaking firms resulting from undertakings.

The third section will describe the procedural law with regard to undertakings. Like the section dealing with EEC Anti-Dumping Procedural Law in part I, section D, it is divided according to the different phases of an anti-dumping undertaking: (1) the offering of undertakings, covering who may offer undertakings, and at what time during the anti-dumping investigation undertakings may be offered; (2) the acceptance of undertakings, and subsequent termination of the anti-dumping investigation; (3) the refusal of undertakings; and (4) the termination of undertakings due to lapse, withdrawal, or review.

The fourth section will describe several aspects of the Commission's practice with regard to accepting or refusing undertakings. This covers five different issues: (1) the Commission's policy towards tacit undertakings, i.e. undertaking-like agreements between the Commission and firms, concluded outside the normal procedural framework for undertakings; (2) the Commission's policy towards undertakings offered by exporters other than those of the dumped product; (3) the Commission's reasoning behind the acceptance of undertakings; (4) the Commission's reasoning behind the refusal of undertakings; and (5) a possible change of the Commission's policy towards undertakings in 1985.

The next two sections will describe two specific problems with regard to undertakings. Section F will describe a particular type of undertaking. As mentioned in the general introduction, undertakings usually oblige a firm to maintain a certain minimum price. However, quantitative undertakings contain limitations on the volume of imports into the EEC. This section will discuss these quota undertakings. Section G will describe the relation between undertakings and competition law. According to the conventional view, anti-dumping measures are competition neutral. In other words, they do not influence the competitive situation. This section will show that view cannot be sustained, and that competition law and anti-dumping undertakings influence each other.

Finally, section H will describe the possibilities for judicial review of anti-dumping findings dealing with undertakings. Like the discussion of judicial review of anti-dumping findings in general in the preceding part, it will be split into a section on admissibility problems and a section on the review standards used by the Court.

B. *The Concept of Undertakings*

1. The Idea Behind Undertakings

As was shown in part I, the system of anti-dumping protective duties has a somewhat confrontational character: a conflict between the EEC industries and the Community on one hand, and the producers, exporters, and importers of the allegedly dumped product on the other. This "conflict approach" to anti-dumping ultimately may not satisfy anybody: the dumping firms because of the financial penalties, and the EEC industries and the Community because they cannot be sure that anti-dumping duties will actually stop the dumping.

This unsatisfactory state of affairs could be avoided by adopting a more "consensual approach" to the problem. Instead of imposing duties, the Community authorities could convince the exporters or producers that they should raise their prices "voluntarily." With the

threat of duties in the background, this should not be too difficult. The EEC authorities and industries could be sure that prices would rise to the required level, and the dumping firm could escape financial penalties.

This is the general idea behind anti-dumping undertakings. As mentioned previously, undertakings are agreements between the dumping firms and the EEC authorities. The firms agree to stop dumping, i.e. to raise their prices, and in return are not subjected to anti-dumping duties.

2. Similar Agreements in Other Forms of EEC Trade Protection

Similar agreements between exporters and the Commission are widely used in other forms of EEC trade protection.

Countervailing or anti-subsidy measures are governed by the same regulation as anti-dumping measures, and have the same provisions as undertakings.[157] However, since the offender in an anti-subsidy case is not a firm but a state, an anti-subsidy undertaking is not concluded with a private firm but with a state. As mentioned in part I, section B, anti-subsidy cases are rather rare. As a result there has been only one anti-subsidy undertaking. In a case involving women's shoes, Brazil undertook to eliminate the effects of a subsidy program by imposing an export tax.[158]

Safeguard measures under the 1988 Regulation normally take the form of quotas. The 1988 Regulation does not contain any explicit reference to undertakings. However, the Commission accepted a voluntary export restraint agreement (VERA) in one case involving stoneware.[159] This was an agreement with a state: the exporting country, South Korea, undertook to impose an export quota on exports to the EEC.[160]

The New Trade Policy Instrument (NTPI) of the 1984 Regulation[161] does not envisage any concrete protective measures. Instead, it outlines a consultation procedure to investigate complaints. However, with regard to agreements, article 9(a) of the NTPI states that the procedure may be terminated if the third country against which the procedure is used "take(s) measures which are considered satisfac-

157. *See* Appendix 1, *supra* note 12.

158. (O.J. 1981, L327/39).

159. EEC Reg. 873/83 (O.J. 1983, L96/8).

160. Interestingly, the Federal Republic of Germany challenged the Commission's power to accept the VERA, but the Council confirmed the acceptance in EEC Reg. 2050/83 (O.J. 1983, L200/43). This disagreement has not led to proceedings before the Court.

161. EEC Reg. 2641/84 (O.J. 1984, L252/1).

tory."[162] This could be used as the legal basis for an agreement, probably in the form of a VERA such as that in South Korea.

The regulation on unfair maritime pricing practices[163] contains explicit provisions on undertakings that generally resemble those of the 1988 Regulation. These undertakings can be concluded both with states and with shipping companies. Only a single measure has been taken under this regulation, so an examination of the Commission's practice with regard to undertakings is not possible.

3. Advantages and Disadvantages of Undertakings

If properly used, undertakings offer considerable advantages for all parties involved: the undertaking firms, the industries that need protection, and the EEC authorities that administer the anti-dumping law of the Community. First, an undertaking does not constitute a financial penalty. Instead of paying duties, the importers receive extra revenues as a result of the higher prices, and this may compensate for a possible decrease in the volume of sales. This advantage is the main incentive for dumping firms to offer undertakings.

Second, undertakings are an effective way to stop dumping. A disadvantage of anti-dumping duties is that they may not have the desired effect on the pricing policy of the dumping firm. It may, after all, choose not to increase its prices and to absorb its losses rather than lose its customers. By contrast, undertakings affect prices directly. This is an incentive for the EEC authorities and industries to encourage the use of undertakings.

Third, undertakings provide a way to end an anti-dumping proceeding quickly and with a minimum of legal and administrative costs. This argument will appeal to all parties concerned, but especially to the Commission, since it bears the lion's share of the costs of an investigation. However, this cost advantage in the investigation is offset by the cost of monitoring possible violations of undertakings. This point will be further discussed in part II, section E.

Unfortunately, these benefits come at a price. Undertakings have disadvantages to the undertaking firms, the EEC authorities, and the Community industries. First, an undertaking may be violated, i.e. its obligations can be dodged. This does not necessarily mean that the firm concluding the undertaking is deliberately cheating. It may mean that the firm has insufficient control over its product and cannot prevent parallel imports or discounts by individual importers. This risk

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162. *Id.* art. 9(a).

163. EEC Reg. 4056/86 (O.J. 1986, L378/14), art. 10.

can be kept at a minimum by the following measures: (1) by allowing quick replacement of violated undertakings by normal anti-dumping duties, limiting the damages when they occur; (2) by a system of penalties for firms that willfully violate their undertakings; (3) by building a control system into the undertaking. The undertaking firm can also be made to submit periodic reports on its compliance with the provisions of the undertakings.

A second related disadvantage is that undertakings must be monitored to prevent violations. As mentioned above, an obligation to submit periodic reports can be part of the undertaking, but the reports still have to be verified. By contrast, an anti-dumping duty requires no further attention once it has been imposed, since it is administered by the national customs authorities.

Third, the provisions of the undertaking may become outdated by inflation, changes in exchange rates, or market developments. This risk can be minimized by the use of inflation or currency adjustment systems, or by defining prices in basket currencies. Allowing periodic reviews of the undertaking may also minimize the risk.

Fourth, undertakings limit the freedom of the undertaking firms to lower their prices in response to their competitors' price cuts. This problem is especially acute when competitors have actively participated in the anti-dumping investigation and have, as a consequence, a fairly good idea of the minimum price. It would be unreasonable to force a firm to stand by while its competitors take over its market share. Moreover, few would be willing to offer undertakings under such circumstances.

Therefore, undertakings ideally should have an "emergency exit:" a way in which the firm can withdraw from the undertaking after proper notification, without breaking it outright and incurring the penalties for violation. Thus, assessing the advantages and disadvantages of undertakings demonstrates that in a properly designed undertaking, the advantages can be made to outweigh the disadvantages.

4. Use of Undertakings by the EEC

Undertakings are favorably looked upon by the EEC authorities. The Commission has admitted that it often considers undertakings the most flexible way to eliminate the injury caused by dumping.[164] This is reflected in the large number of investigations that are concluded by the acceptance of undertakings.[165]

164. Third Commission Report to the European Parliament on the Anti-Dumping and Anti-Subsidy Measures of the European Community, COM (86) 308 final, at 4 [hereinafter Third Report].

165. Fourth Report, *supra* note 64, at 2, table 1.

TABLE[166]

	1982	1983	1984	1985	1986
Imposition of Duties	7	20	5	8	4
Acceptance of Undertakings	35	27	27	4	25
Terminated for Other Reasons	9	11	10	20	18
Investigations Concluded	51	58	42	32	47

More than 50% of all investigations are concluded by undertakings, and except for 1985, undertakings always outnumbered definitive duties.[167]

5. Undertakings and the GATT Anti-Dumping Rules

Part I illustrated the importance of the GATT anti-dumping rules and their influence upon the EEC legislation. That influence extends to the law concerning undertakings as well. The GATT Anti-Dumping Code contains the following provisions on undertakings: (1) an undertaking does not have to consist of an obligation to raise prices; it can also contain an obligation "to cease exports to the area in question at dumped prices;"[168] (2) the price increases under an undertaking may not be higher than necessary to eliminate either the dumping or the injury caused by it;[169] (3) an undertaking cannot remain in force longer than would be possible for an anti-dumping duty;[170] (4) an undertaking can only be accepted as part of a formal anti-dumping investigation;[171] (5) an undertaking need not be accepted if the authorities consider it impractical;[172] (6) an undertaking may include an obligation for the firm to submit periodic reports to the authorities;[173] (7) an undertaking may not be forced upon a firm, but may be suggested; if a firm refuses to offer an undertaking it may not be penalized;[174] (8) if an undertaking is broken, the authorities may impose provisional duties immediately; subsequent definitive duties may have a retroactive effect for up to 90 days before the imposition of provisional duties.[175] All of these

166. *Id.*

167. Possible reasons for the sudden change of practice in 1984 are discussed in part II, § E.

168. GATT 1979 Anti-Dumping Code, *supra* note 28, art. 7(1).

169. *Id.* (same limitation applies to anti-dumping duties in art. 8(3)).

170. *Id.* art. 7(6).

171. *Id.* art. 7(2) (under art. 5(1), initiation of such an investigation requires prima facie evidence of dumping or injury).

172. *Id.* art. 7(2).

173. *Id.* art. 7(5).

174. *Id.* art. 7(4).

175. *Id.* art. 7(5).

provisions have been incorporated in the EEC anti-dumping legislation currently in force, the 1988 Regulation.

C. *Substantive Law Concerning Undertakings*

1. Legal Requirements to Undertakings

One of the most important issues with regard to undertakings is the contents, the provisions required in an undertaking. The 1988 Regulation allows maximum freedom in this area. The only legal requirements of an undertaking are that the dumping firm must revise its prices or cease its exports to the extent that the Commission is satisfied that the dumping margin, or the injurious effects thereof, are eliminated.[176]

Three observations follow from these requirements. First, an undertaking is similar to an anti-dumping duty in that it is supposed to eliminate either the dumping or the injury. Like a duty, an undertaking cannot be required to eliminate both. Since the purpose of an undertaking is to make a duty unnecessary, it is not surprising to see that it is aimed at the same result. Second, there are two types of undertakings: one that leads to price increases and is called "price undertaking," and one that leads to quantitative limitations of exports and is called "quantitative undertaking." Quantitative undertakings are rarely used and doubts about their legality may arise. They will be discussed further in section G of part II. For this section, assume that undertakings are price undertakings, unless otherwise specified. Third, the Commission has a very wide margin of discretion in accepting or refusing undertakings. The only criterium is that it must be "satisfied" that the dumping or the injury is eliminated.[177]

2. Typical Contents of Undertakings

The actual contents of undertakings are confidential. They are known only to the Commission and to the undertaking firms. However, several authors have written from their experiences working for or with the Commission providing a general picture.[178]

A typical undertaking is said to contain provisions on: (1) minimum prices; (2) the period of application; (3) the supply of information; and (4) evasion by firms other than the undertaking firm. The minimum

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176. Appendix 1, *supra* note 12, art. 10(1).

177. Compare this with the Court's interpretation of this margin of discretion in the Miniature Ballbearings Cases, *see infra* note 302 and accompanying text.

178. *See, e.g.*, I. BAEL & J. BELLIS, *supra* note 17; J. BESELER & A. WILLIAMS, *supra* note 58.

price provisions are the heart of the undertaking. It is usually fixed in two stages. First, a "base price" is laid down, serving as a reference for all following calculations. It can be expressed in a currency basket.[179] Then, a series of percentage price increases are specified, or spread out over a certain period of time. This system is usually further refined by: (1) adjustments for different quality grades, terms of sale, conditions of payment; (2) an inflation compensation mechanism; and (3) transitional provisions for goods that are already in transit or have to be delivered under existing contracts.

The minimum price provisions can be limited to a certain region if the injury caused by the dumping was also limited to a certain region.[180] Regional dumping is relatively rare, and only two regional undertakings have been concluded.[181]

Since 1987, Screwdriver Duties can be imposed on products assembled in the EEC from imported components. There is no reason why an undertaking could not be used to remove the need for Screwdriver Duties, and such an undertaking has indeed been accepted.[182]

The provisions relating to the period of application consist of the starting date and the term for which the undertaking is concluded. The starting date is usually the date of acceptance by the Commission, but there may be partial exceptions for goods that are in transit or have to be delivered under existing contracts. The term of the undertaking is usually either one year or an unspecified period of time. If it is a fixed period, an automatic renewal clause is usually included. Often a notification period, usually 20 days, is included. During this period the undertaking firm or the Commission may withdraw the undertaking or its acceptance.

The provisions on information usually oblige the undertaking firm to submit periodic reports to the Commission, and to allow verification by on-the-spot investigations.[183] The provisions on evasion usually oblige the undertaking firm to do all they can to prevent evasion of the undertaking by parallel imports or by discounts or rebates from independent importers or dealers.[184]

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179. This currency basket need not be the ECU, which is a universal currency unit.

180. Appendix 1, *supra* note 12, art. 4(5).

181. Plasterboard Case (Spain), EEC Comm'n Decision 85/209 (O.J. 1985, L89/65); Glass Case (Turkey & E. Europe), EEC Comm'n Decision 86/36 (O.J. 1986, L51/73).

182. Electric Typewriters (Japan), EEC Comm'n Decision 88/300 (O.J. 1988, L128/39).

183. The 1988 Regulation expressly allows the Commission to insert these requirements into an undertaking. Appendix, *supra* note 12, art. 10(5).

184. *Id.* art. 13.

Sometimes the cooperation of the exporting state is sought to combat evasion. An example can be found in the Swedish hardboard case.[185] In that case, the Commission accepted the undertaking only when the Swedish government took steps to prevent parallel imports.[186] Note that such an involvement of the exporting state distracts somewhat from the Commission-to-firm character of anti-dumping undertakings.

3. Results of Acceptance

Part I illustrated that the existence of dumping and injury to an EEC industry were conditions for the imposition of protective duties. When an undertaking is accepted, the Community authorities consider either the dumping or the injury eliminated.[187] Consequently, the justification for protective measures is removed and anti-dumping duties do not have to be imposed.

However, this does not imply that the Commission is in any way bound by the undertaking. It should be borne in mind that an undertaking is an unilateral commitment: only the firm undertakes to meet certain obligations. The Commission is prevented from imposing duties only by its own conviction that these are no longer necessary. Whenever the Commission considers an undertaking no longer satisfactory, either because of changed circumstances or because it chooses another method of determining whether or not the dumping or injury has been eliminated, it can re-open the case for review, withdraw its acceptance from the undertaking, and impose anti-dumping duties.[188]

Such a review is initiated when the Commission is convinced that: (1) the undertaking firm is violating the undertaking; (2) the undertaking firm withdraws its undertaking; or (3) other circumstances, such as market developments, make the undertaking ineffective. A review may lead to replacement of the undertaking by anti-dumping duties.[189] Alternatively, sometimes a new, revised undertaking can be accepted.[190] However, this is only likely in the third case, since prior violations are often a reason for refusing an undertaking.

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185. (O.J. 1983, L361/47).

186. *Id.*

187. Appendix 1, *supra* note 12, art. 10(1).

188. *See infra* discussion on the Miniature Ballbearing Cases in pt. II, § H.

189. *Id.*

190. *See, e.g.*, Fibre Board Case (Finland & Sweden), EEC Comm'n Decision 86/35 (O.J. 1986, L46/23).

191. Appendix 1, *supra* note 12, art. 13(4)(b)(iii).

4. Penalties for Violating Undertakings

When the violation of an undertaking is due to the fault or the negligence of the undertaking firm, even though a violation may be due to circumstances outside the undertaking firm's control, such as parallel imports by independent importers, the EEC authorities have a powerful punitive instrument at their disposal. If the Commission believes an undertaking has been violated, it may re-open the investigation and impose provisional duties immediately. When subsequent definitive duties are imposed, these may be applied retroactively to goods imported before the imposition of provisional duties.[191] This retroactive imposition of anti-dumping duties is limited in two ways: (1) it may not be imposed on products released into free circulation in the Economic Community before the violation; and (2) it may not reach back more than 90 days before imposing the provisional duties.[192]

These retroactive duties are a powerful deterrent against violation. The goods on which they are imposed will usually be brought into free circulation and be outside the importers' control. This means that they cannot compensate the duty through price increases and must therefore bear the financial consequences themselves. This gives even independent importers an incentive to comply with the provisions of an undertaking.

However, retroactive duties do not seem to be used in practice.[193] This is probably due to two reasons. First, anti-dumping duties can discriminate between different producers, but not between different importers. This means that the retroactive imposition will hurt all importers, irrespective of whether they actually broke the undertaking or not. It would be unfair to punish the innocent importers for the violations committed by others. Second, the Commission has wide discretionary powers in assessing the amount of anti-dumping duties. When the Commission wants to punish an exporter for a violation, it has ample opportunity to do so without resorting to retroactive duties.

D. *Procedural Law Concerning Undertakings*

1. Offering Undertakings

It is a characteristic of undertakings that they must be offered by a firm to the Commission. They cannot be imposed by the Commission on the firm. The Commission may make suggestions concerning under-

192. *Id.* art. 13(4)(b).

193. Research conducted by the author revealed no cases involving the retroactive imposition of anti-dumping duties.

194. Appendix 1, *supra* note 12, art. 10(3).

takings, but the firm may not be penalized for not following these suggestions.[194]

This provision was prescribed by the GATT Anti-Dumping Code[195] to prevent the Commission from dictating undertakings to firms. However, it is doubtful if it has any effect. One of the conclusions from part I was that the Commission has wide discretionary powers in anti-dumping proceedings. If it would ever want to take revenge upon an unwilling exporter, it would have ample opportunity to do so.

Under older anti-dumping legislation, there were no time limits concerning the offering of undertakings. Apparently this led to abuses, because the 1984 Regulation,[196] the precedessor of the current regulation, introduced a time limit.[197] According to article 7(4)(b), exporters and importers have a right to see the information on which the Commission intends to propose definitive duties.[198] They may comment on these facts during a time period specified by the Commission. Except in urgent cases, this period is at least ten days. This period is the outer limit for offering undertakings. Later offers are, as a rule, not taken into consideration.[199]

This does not imply that undertakings may not be offered earlier. According to article 10(1), undertakings may be offered "during the course of an investigation."[200] Therefore, undertakings can theoretically be offered immediately after the notice of initiation of article 7(1)(a). The reason for such an early offer is that an undertaking in an early stage of the proceeding may remove the need for provisional duties.

2. Acceptance of Undertakings

Once an undertaking has been offered, the Commission can accept it and take no further measures, or reject it and impose anti-dumping duties.[201] Strictly speaking, the acceptance of an undertaking is not a trade protection measure. It is not the Community that imposes restrictions, but rather the firm itself. Consequently, the acceptance of an undertaking is not the adoption of a trade protection measure in the sense of article 113 of the EEC Treaty, and does not have to be taken by the Council.

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195. GATT 1979 Anti-Dumping Code, *supra* note 28, art. 7(4).

196. EEC Reg. 2176/84 (O.J. 1984, L201/1).

197. *Cf.* Third Report, *supra* note 164, at 11.

198. Appendix 1, *supra* note 12, art. 7(4)(b).

199. *Id.* art. 10(1).

200. *Id.*

201. For a discussion on the Commission's practice of accepting or refusing undertakings, *see* pt. II, § D(3).

Instead, the acceptance of an undertaking is seen as a form of termination. As discussed in part I, section D, an anti dumping investigation can be terminated when there is no dumping, no injury, or no Community interest. Undertakings are required to eliminate either the dumping or the injury, so it is no longer in the interest of the Community to impose duties. In other words, undertakings create the circumstances under which an investigation can be terminated.

Consequently, the acceptance of an undertaking follows the same procedure as an ordinary termination.[202] It is a Commission Decision taken after consultation with the Advisory Committee. If a member state raises objections in the Committee, the Commission submits a proposal to the Council. If the Council does not decide upon the Commission's proposal within one month, the proposal is considered to be accepted.

There are, however, exceptions to this rule. Sometimes, the acceptance of an undertaking is closely linked to the imposition of duties. This is the case when some exporters offer acceptable undertakings and others do not. Despite the undertakings of some exporters the investigation cannot be terminated, because duties still have to be imposed on the others. In such a case, a single regulation can impose duties on the products of some exporters, and accept undertakings and terminate the investigation concerning the products of the others. Such a regulation can be made by the Commission, when the duties are provisional,[203] or by the Council, when the duties are definitive.[204]

The acceptance of undertakings can also be linked to the collection of provisional duties imposed before the acceptance. In that case, the collection of duties makes termination impossible. However, two separate legal instruments are used: a decision for the acceptance, and a regulation for the imposition of duties.[205] As a consequence, an undertaking can be accepted by no less than four different legal instruments: (1) a Commission Decision in normal cases; (2) a Council Decision when the Advisory Committee objects; (3) a Commission Regulation when linked to provisional duties; and (4) a Council Regulation when linked to the imposition of definitive duties, or the collection of provisional ones.

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202. Appendix 1, *supra* note 12, art. 10(1).

203. *See, e.g.*, Deep Freezers Case (E. Europe), EEC Comm'n Reg. 2800/86 (O.J. 1986, L259/14).

204. *See, e.g.*, Ureum Case (Libya), EEC Council Reg. 3339/87 (O.J. 1987, L317/1).

205. *See, e.g.*, Copper Sulphate Case (Poland), EEC Comm'n Decision 85/104 (O.J. 1985, L41/13) (the commission accepted the undertaking); Council Reg. 357/85 (O.J. 1985, L41/11) (imposing the duty).

3. Refusal of an Undertaking

Contrary to acceptance, refusal of an undertaking does not constitute a separate finding. When an undertaking is refused, the proceeding will continue in the normal way and will usually be concluded by the imposition of duties.[206] The refusal then forms part of the regulation imposing provisional or definitive duties.[207] As discussed in part I, provisional duties are imposed by a Commission Regulation, and definitive duties by a Council Regulation upon a proposal from the Commission.

4. Conclusion of Investigation

Under older anti-dumping legislation, investigations were often immediately concluded after the acceptance of an undertaking, i.e. without a formal determination of dumping and injury. This possibility still exists.[208] However, currently the Commission invariably completes the investigation with at least a preliminary determination of dumping and injury.[209] Article 10(4) enables an exporter who has offered an acceptable undertaking to demand completion of the investigation.[210] Given the Commission's practice of doing this anyway, this provision is of little practical importance. It should be noted that acceptance of an undertaking concludes the investigation but not the proceeding. The proceeding lasts until the undertaking is terminated.[211]

5. Termination of Undertakings

There are three ways in which an undertaking may be terminated: lapse, withdrawal, and review. Lapse is the termination of an undertaking by the passage of time. According to article 15(1) of the 1988 Regulation, an undertaking expires after five years.[212] The Commission must place a notice in the Official Journal to warn interested parties

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206. However, investigations may be terminated if no dumping, injuries, or community interest exists in taking such measures.

207. Appendix 1, *supra* note 12, arts. 11 & 12.

208. *Id.* art. 10(4).

209. *See* J. BESELER & A. WILLIAMS, *supra* note 58, at 221; *see also* Third Report, *supra* note 164, at 4.

210. Appendix 1, *supra* note 12, art. 10(4).

211. *Id.* art. 15(1).

212. *Id.* The maximum duration of definitive duties is also five years; the GATT 1979 Anti-Dumping Code prohibits undertakings that last longer than duties. GATT 1979 Anti-Dumping Code, *supra* note 28, art. 7(6).

of the impending expiry.[213] They may want to request a review procedure.[214]

Withdrawal is the unilateral termination of an undertaking by the undertaking firm itself. On the basis of market developments, a firm may decide that the financial losses due to anti-dumping duties are preferable to the loss of market share caused by the undertaking's minimum prices.[215] Most undertakings contain a notification period, usually 20 days, in which the firm may withdraw its undertaking. A failure to comply with the notification provisions is considered a violation of the undertaking and may expose the firm to penalties for violation. When an undertaking is withdrawn, the Commission can initiate the review procedure in article 14.[216]

The review procedure is the only method by which the Commission can terminate an undertaking. The review procedure is, in fact, a re-opening of the investigation.[217] The initiation of the review procedure is similar to the initiation of an ordinary proceeding and may be initiated by the Commission acting on its own initiative, by the request of a member state, or by the request of an interested party.[218] When a review is requested by an interested party, two conditions must be met: (1) the party must submit sufficient evidence to justify the review; and (2) one year must have passed since the undertaking was accepted.[219]

Contrary to the complainant who initiates an ordinary investigation, the interested party does not have to represent the EEC industry. The undertaking firm itself may do so, claiming that changed circumstances justify changes in terms of the undertaking.

If the investigation is re-opened as a result of a withdrawal or violation of an undertaking, the Commission can impose provisional duties immediately on the basis of the facts established before the acceptance of the undertaking. This provision is expressly allowed by the GATT Code,[220] and enables quick action to be taken. In the re-opened investigation, new facts can be established. It is concluded in the same way as the original one: by the imposition of duties, the acceptance of a revised undertaking, or by termination.

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213. Appendix 1, *supra* note 12, art. 15(2).
214. *See* pt. II, § H.
215. *See* pt. II, § B (describing the need for an "emergency exit").
216. Appendix 1, *supra* note 12, art. 14; *see* pt. II, § H.
217. Appendix 1, *supra* note 12, art. 14(2).
218. *Id.* art. 14(1).
219. *Id.*
220. GATT 1979 Anti-Dumping Code, *supra* note 28, art. 7(5).

E. *Commission Practice Concerning Undertakings*

1. Tacit Undertakings

Under older EEC anti-dumping legislation, firms would often raise their prices unilaterally during an anti-dumping proceeding. The Commission would then respond by terminating the investigation, thereby resulting in a kind of tacit undertaking. "Under the Community's earlier legislation investigations were sometimes concluded because of changes in the market situation when the exporter raised its prices over a considerable period of time to levels which eliminated the margins of dumping without giving a formal price undertaking."[221]

This practice had a number of disadvantages: (1) it was often unclear whether there had been any dumping or injury at all;[222] (2) anti-dumping proceedings were in danger of being abused as instruments to pressure foreign firms;[223] (3) if a firm broke its tacit undertaking, it was impossible to take quick action;[224] and (4) a number of firms which raised their prices without official acceptance might incur penalties under EEC competition law.[225]

As a consequence, this practice has been discontinued. Unilateral price revisions by firms in order to escape anti-dumping duties are only taken into account as part of a formal undertaking:

> It is no longer the Commission's practice to conclude an investigation on those grounds and now they are only concluded without protective measures being applied when it has been established that the imports were not dumped . . . during the period under investigation, or that they had not caused or threatened to cause material injury to a Community industry, or for other reasons when it is not in the Community's interest to continue the investigation or to apply protective measures.[226]

2. Undertakings on Behalf of Exporters

Normally, undertakings are offered by exporters who have participated in the anti-dumping investigation and expect duties to be im-

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221. Second Commission Report to the European Parliament on the Anti-Dumping and Anti-Subsidy measures of the European Community, COM (84)741 final, at 5 [hereinafter Second Report].

222. I. BAEL & J. BELLIS, *supra* note 17, at 26.

223. *Id.*

224. *Cf.* pt. II, § D(5) (remarks on the conclusion of the investigation).

225. *See* pt. II, § G.

226. Second Report, *supra* note 221, at 5.

posed on their products. However, no formal obligation exists to this effect in the 1988 Regulation. In fact, in two situations, undertakings have been offered by others on behalf of the exporter.[227]

In the first situation, an exporter authorized his agents and importers to offer undertakings on its behalf.[228] The Commission accepted these undertakings, but made it clear that this was exceptional and should not constitute a precedent for the future:

> Whereas, . . . the Soviet exporter, Energomachexport, authorized its imports and agents . . . to do what was necessary to create normal conditions for the sale of motors on the market and to take the appropriate measures;
>
> Whereas, on the basis of these authorizations, undertakings . . . have been offered . . . by the agents and imports of Energomachexport in the Community, acting on the behalf of that firm as well as on their own behalf;
>
> Whereas, in view of the complexity of the authorization procedure, it must be regarded as exceptional, and the acceptance of such a procedure in this case does not prejudice the future attitude of the Commission in similar situations.[229]

One may wonder why Energomachexport took this unusual course, and why the Commission went along. One reason might have been that the USSR has been rather reluctant to grant recognition to the EEC and the offering of undertakings by a state trading organization was seen as a form of recognition.[230]

In the second situation, undertakings were offered by firms related to the exporter, such as a parent company or member of the same concern. These have also been accepted. For example, the Court in the Fluid Cracking Catalysts Case (USA) stated: "Whereas . . . Grace GmbH, on behalf of itself, Grace Italiana SpA, The Davidson Chemical Division of Grace and Co. and any other affiliates of Grace GmbH which may sell fluid cracking catalysts in the Community has offered undertakings which would prevent a recurrence of injury to Community producers."[231]

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227. *See infra* notes 228-30 and accompanying text.

228. Standardized Electric Multi-Phase Motors Case (USSR), EEC Comm'n Decision 80/599 (O.J. 1984, L31126).

229. *Id.*

230. This argument is at least partially contradicted by the fact that many other Soviet state trading organizations have shown no hesitation in concluding undertakings with the Commission.

231. EEC Comm'n Decision 82/31 (O.J. 1982, L11/15).

The offering of an undertaking by a parent company can be an efficient way of including a large number of subsidiaries. However, there are some problems from a competition point of view against undertakings concluded on behalf of several firms. These are further discussed in part II, section G.

3. Undertakings by Prospective Exporters

In addition, undertakings have been offered by firms that did not actually export the product but planned to do so in the near future. Anti-dumping duties can be imposed on all exporters from a given country, including those who did not export at the time the duty was imposed. Prior to 1984, these undertakings were treated as ordinary undertakings. In that year, however, the Commission changed its practice: undertakings from prospective exporters are, as a rule, no longer accepted. The turning point was a case involving chemicals from the United States, in which the Commission extensively justified its change of practice:

> (8) Two producers of dense sodium carbonate . . ., who had never exported to the Community, offered undertakings regarding possible future exports.
>
> (9) On previous occasions where non-exporters offered undertakings in respect of possible future exports to the Community, these undertakings were accepted or refused on the merits of each case. This practice has been reviewed and, as a result, it has been concluded that, in general, undertakings from potential exporters should not be accepted, on the following grounds:
>
> (a) it is difficult to determine an appropriate export price for a company that has not exported to the Community, since any date . . . [is] likely to relate to another period or to another destination and would therefore be of questionable relevance.
>
> (b) it is also likely to be difficult or impossible . . . to determine the volume of any possible future exports to the Community. This is important in cases where . . . a price level is set . . . to eliminate injury to the Community industry and where the volume of sales . . . is likely to be a decisive element in the computation of this price level.
>
> (10) For both companies, the difficulties outlined in respect of the determination of an appropriate export price and the assessment of the impact of future additional imports in the

> Community were encountered. This has led to the conclusion that a departure from the approach now adopted, namely that undertakings from non-exporters should, in general, be refused, is not warranted.[232]

Note the last sentence: undertakings from non-exporters, prospective exporters and importers, are now refused as a rule.

4. Motivation for Acceptance of Undertakings

When an undertaking is accepted, the Commission seems to be rather reluctant to publish its reasons for doing so in the Official Journal. There are three reasons for this: (1) the Commission has very wide discretionary powers for accepting undertakings, so there is little necessity to justify the acceptance by extensive reasoning; (2) the parties involved in an anti-dumping proceeding have access to more information than the general public, so the parties most affected by the acceptance do not have to rely on the Official Journal for information; and (3) the contents of an undertaking are often of a confidential nature. It would be very hard to give extensive reasoning for accepting an undertaking without giving away the essential contents.

Occassionally, the Commission does not give the most basic information and even leaves it unclear whether the undertaking eliminates the dumping margin or the inquiry. For example, one Commission Regulation stated: "he offered a satisfactory undertaking, of which the effect is that the import prices . . . have been increased."[233] However, it is more usual that the way the undertaking works is made clear.[234] For Example:

> An undertaking was subsequently offered . . . . The effect of the said undertaking will be to increase import prices to the Community to the level necessary to eliminate the dumping found.[235]
>
> The effect of the said undertaking will be to increase export prices to the Community to a level which the Commission . . . considered necessary to eliminate injury.[236]

The last of these two possibilities is the most frequent, because eliminating the injury usually requires a smaller price increase than

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232. Sodium Carbonate Case (USA), EEC Comm'n Reg. 3337/84 (O.J. 1984, L311/48).

233. Pentoerythritol Case (Sweden), EEC Comm'n Reg. 2681/84 (O.J. 1984, L254/5).

234. *See infra* notes 235-36 and accompanying text.

235. Copper Sulphate Case (Poland), EEC Comm'n Decision 85/104 (O.J. 1985, L41/13).

236. Horticultural Glass Case (E. Europe), EEC Comm'n Decision 84/406 (O.J. 1984, L224/26).

eliminating the dumping margin. In this respect, undertakings resemble duties since the increase is also usually aimed at eliminating the injury rather than the dumping. If an undertaking eliminates the injury, it is often remarked upon acceptance that the increase does not exceed the dumping margin. This underlines the requirement that undertakings have to eliminate either the dumping or the injury, but not both. Some indication may be given of how a price level was calculated or of the factors taken into account.[237]

The actual obligations contained in the undertaking are rarely given. Yet, the obligation is sometimes clearly indicated: "[t]he effect of this undertaking will be to increase the export price by an amount equivalent to the anti-dumping duty provisionally imposed and will be sufficient to eliminate the injury caused by the dumped product."[238]

The only other motivation given when an undertaking is accepted concerns the controllability of the undertaking, or the extent to which its performance can be monitored by the Commission. This often takes the form of a standard phrase: "it appears that correct operation of the undertaking can be effectively monitored."[239] Sometimes, this argument is reinforced by the fact that previous undertakings have been successful: "it appears that correct operation of the undertaking can be effectively monitored, in particular since the Commission in its investigation did not observe any violations of the undertakings previously in force."[240] This practice seems to have started in 1985. All undertakings accepted in that year contain this argument. By contrast, it does not occur in any of the undertakings concluded in 1984.

5. Reasons for Acceptance of Undertakings

Despite the Commission's scanty motivation for the acceptance of undertakings, the following observations can be made with respect to the Commission's reasoning. There are more undertakings eliminating

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237. "For this purpose the Commission took into account the selling price necessary to provide an adequate return to the currently sole Community producer and to make it possible for the other Community producers which have suspended production to start production again . . . ." Container Corner Fittings Case (Austria), EEC Comm'n Decision 85/443 (O.J. 1985, L 256/44); "[t]he Commission [took] into account on the one hand, the selling price necessary to provide an adequate return to Community producers and, on the other hand, the purchase price of the Community importers and their costs and profit margin . . . ." Asbestos-Cement Corrugated Sheets Case (Czechoslovakia & the DDR), EEC Comm'n Decision 84/465 (O.J. 1984, L259/48).

238. Roller Chains for Cycles Case (USSR), EEC Comm'n Decision 85/542 (O.J. 1985, L335/63) (note that the amount of the provisional duty is known).

239. *See, e.g.*, Phasterboard Case (Spain), EEC Comm'n Decision 85/209 (O.J. 1985, L89/65).

240. Outboard Motors Case (Japan), EEC Comm'n Decision 87/210 (O.J. 187, L82/36).

the injury than eliminating dumping.[241] This is not surprising, since eliminating injury usually requires smaller price increases than eliminating dumping. For the same reason, anti-dumping duties usually eliminate the injury, not the dumping that caused it. An important factor in deciding whether the injury is eliminated or not is the future profitability or economic viability of the injured EEC industry. The possibilities for monitoring undertakings seem to be an increasingly important factor in deciding whether or not an undertaking is accepted. This is probably related to the Commission's increasingly heavy workload.

6. Motivation for Refusal of Undertakings

Just as the Commission often fails to provide reasons for its acceptance of undertakings, the Commission tends to be equally reluctant to give full reasons for their refusal of undertakings.[242] Quite often, undertakings are refused with only the standard statements: "After consultation, this undertaking was not considered acceptable by the Commission. The exporter was informed of the reasons thereof."[243]

Even the identity of the firm that offered the undertaking may be kept confidential: "Certain producer/exporters offered to give undertakings to the Commission concerning their future exports to the Community. The Commission did not accept those undertakings. It informed the producers/exporters of the reasoning behind that decision."[244]

Sometimes the language of the Commission is so cryptic that the motivation only raises more questions: "[The exporters] raised the possibility of offering a price undertaking or an undertaking on quantities. The Council shares the Commission's opinion that, regardless of other considerations, the two formulae for undertakings put forward are not appropriate to this case in point."[245] This is totally unintelligible. One wonders what other formula the Council could have had in mind, given the fact that undertakings on price or quantities are the only

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241. From the author's own observations, undertakings that eliminate dumping seem to be rather rare.

242. I. BAEL & J. BELLIS, *supra* note 17, at 99.

243. Ferro-Silico-Calcium Case (Brazil), EEC Council Reg. 336%7 (O.J. 1987, L322/1); Sometimes the name of the exporter is used, *see, e.g.*, Ferro-Silicon Case (Brazil), EEC Council Reg. 3650/87 (O.J. 1987, L343/1) (using "the association"); Deep Freezers Case (USSR), EEC Council Reg. 29/87 (O.J. 1987, L6/1) (using "Technointorg").

244. Housed Bearings Case (Japan), EEC Council Reg. 374/87 (O.J. 1987, L35/32) (numbering omitted).

245. Polystyrene Sheet Case (Spain), EEC Council Reg. 2109/85 (O.J. 1987, L198/1).

two possible formulas for an undertaking allowed under article 10(1) of the 1988 Regulation.

7. Reasons for Refusal of Undertakings

If reasons are given for refusing an undertaking, they fall into five categories. The first category is effectiveness. This covers cases in which the Commission decided that the proposed price increases would not lead to an end of either the dumping or of the injury, or that proposed implementation of the price increases would take too much time. The second category is controllability. This covers cases in which the Commission decided that compliance with the terms of the undertakings could not be effectively controlled, because an effective monitoring system was impossible, impractical or prohibitively expensive. The third category is past experience. This refers to cases in which the Commission had bad experiences with undertakings concerning that firm or that industry. Violations of past undertakings fall both into this category, and into the category in which undertakings proved to be ineffective. This might be the case when the undertaking firms were replaced by other dumping firms.

The fourth category is insufficient data. This refers to cases in which the offered undertaking is not taken into account, but will be decided upon at a later stage of the investigation. For instance, in the Plain Paper Photocopiers Case (Japan),[246] Kyocera offered an undertaking before a provisional duty could be imposed. In the Regulation imposing provisional duties, the Commission remarked: "This undertaking was not accepted by the Commission at the provisional stage and acceptance will be reconsidered should definitive measures be proposed."[247]

Article 7(2) of the GATT Anti-Dumping Code allows the refusal of undertakings when they are considered "impractical."[248] Effectiveness, controllability, past experience and insufficient data are all elaborations of this impracticality criterion. The fifth reason for refusal has been the possible negative effects on competition within the Community. This is treated more fully in part II, section G.

According to Le Lièvre and Houben,[249] there exists a sixth reason for refusing an undertaking: trade relations. This made its first and

246. EEC Comm'n Reg. 2640/86 (O.J. 1986, L239/5); *see* EEC Comm'n Decision 87/135 (O.J. 1987, L54/36) (accepting the undertaking).

247. Plain Paper Photocopiers Case (Japan), EEC Comm'n Reg. 2640/86 (O.J. 1986, L239/5), at ¶ 106.

248. GATT 1979 Anti-Dumping Code, *supra* note 28, art. 7(2).

249. Le Lièvre & Houben, *EC versus Japan: The Community's Legal Weapons*, 24 COMMON MKT. L. REV. 428, 440 (1987).

only appearance in the Hydraulic Excavators Case (Japan).[250] In that case, the Commission had originally recommended accepting an undertaking, even though it was offered after the deadline of article 7(4) of the 1984 Regulation. However, the Council imposed a duty instead:

> Moreover, the Council considers that, in this particular case, in view of the remaining doubts on the possibilities to effectively monitor price undertakings in this particular market and in the light of the present trade relations with Japan, it is not in the interests of the Community to have recourse to price undertakings as an appropriate remedy for the injury resulting from the dumped imports.[251]

However, the Council is probably not saying that the trade relations themselves were a factor in deciding against undertakings. It is saying that the trade relations have been taken into account when assessing the possibilities for monitoring. The undertakings have been refused because they were unmonitorable due in part to special circumstances in that particular market and to the trade relations with Japan. Apparently, this made full cooperation by the Japanese authorities unlikely. In other words, the trade relations criterion is a variant of the controllability criterion.

8. Possible Change in Commission's Policy

It was noted in part II, section B, that in 1985 there was a marked decrease in the number of accepted undertakings. In that year, the proceedings concluded by the imposition of anti-dumping duties for the first time outnumbered those concluded by the acceptance of undertakings.

This was probably accidental since only 12 anti-dumping measures were taken that year and chance played a large role in producing the small numbers. The number of undertakings rose from four in 1985 to eleven and six in 1985 and 1987, respectively.[252] This did not match the pre-1985 level, but the number of cases in which duties were imposed also decreased. In 1986, duties were imposed in only five cases. This suggests that 1985 was a temporary aberration. If the number of accepted undertakings appears to have decreased, this is probably because the number of anti-dumping measures decreased.

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250. EEC Council Reg. 1877/85 (O.J. 1985, 1176/1) (the case is also peculiar because the Commission first sent a proposal to the Council, and then modified the proposal in anticipation of the Council's finding).

251. *Id.*

252. *See infra* Appendix 2.

Le Lièvre and van Houben suggest another reason for the low number of undertakings in 1985. They maintain that the refusal of several undertakings offered by Japanese firms that year was part of a change in the Commission's policy towards Japan.[253] As a result of the continuing trade problems with Japan, the Commission would have adopted a hard-line policy, and would have underlined this by refusing a number of undertakings.

Their arguments are not very convincing, mainly because their interpretation of the Hydraulic Excavators Case[254] is erroneous: the refusals of the Japanese undertakings were normal and defensible in there own right,[255] and several Japanese undertakings were accepted in the same period.[256] Although it is not entirely impossible that future troubled trade relations with a country would have a negative influence on the acceptance of undertakings offered by firms from that country, it may be impossible to prove that this played a role in the refusals of 1985.

Another reason for the low number of undertakings concluded in 1985 might have been that the Commission was starting to feel the burden of monitoring the undertakings previously concluded. Recent annual reports mention an increased administrative burden. The 1985[257] and 1986[258] Annual Reports complained that it was impossible to initiate all the proceedings the Commission would have liked to, due to financial difficulties caused by an increased workload. The 1984 Annual Report states that the large number of provisional duties imposed that year was caused by administrative difficulties and problems concerning the monitoring of undertakings.[259] This is significant, because it shows that administrative problems can cause less undertakings to be accepted. This point is underlined by the fact that, beginning in 1985, Commission Decisions accepting undertakings began to contain statements that the undertakings can be effectively monitored. This suggests that the Commission's workload made it necessary to place greater attention on monitoring efficiency.

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253. Le Lièvre & Houben, *supra* note 249, at 439-41; *see, e.g.*, Miniature Ballbearings Case (Japan), EEC Council Reg. 2089/84 (O.J. 1984, L193/1); Glycine Case (Japan), EEC Council Reg. 2322/85 (O.J. 1985, L128/1); Hydraulic Excavators Case (Japan), EEC Council Reg. 1877/85 (O.J. 1985, L176/1); Electronic Scales Case (Japan), EEC Council Reg. 1008/86 (O.J. 1986, L97/5).

254. (O.J. 1985, L176/1).

255. *See* pt. II, § G (the Glycine Case was not entirely normal because it was the first undertaking to be refused for competition reasons).

256. *See* Le Lièvre & Houben, *supra* note 138.

257. Fourth Report, *supra* note 64, at 3-4.

258. Fifth Commission Report to the European Parliament on the Anti-Dumping and Anti-Subsity Measures of the European Community, COM(88) 92 final, at 3-4.

259. Third Report, *supra* note 164, at 4.

F. *The Legality of Quota Undertakings*

1. Concept of Quota Undertakings

The normal form of undertaking is a price undertaking in which a firm undertakes to maintain a certain minimum price. But this is not the only type of undertaking. There are also quantitative undertakings, in which a firm limits the volume of imports in the EEC. Quantitative undertakings can be further divided into total import stops on one hand, and quotas on the other. Quantitative undertakings as a whole seem to be neglected by the literature in this field.[260]

The legality of the quota undertaking has been disputed. Article 10(2)(b) allows undertakings only where "prices are revised or exports cease to the extent that the Commission is satisfied that either the dumping margin . . ., or the injurious effects thereof, are eliminated."[261] Some have argued that the word "cease" can only mean a total cessation of all imports,[262] while others have interpreted the phrase "cease to the extent" as permitting quotas.[263] The GATT Anti-Dumping Code does not provide much guidance on this issue. Its formulation, "to cease exports to the area in question so that the authorities are satisfied that the injurious effect of the dumping is eliminated,"[264] is just as open to different interpretations as the EEC Regulation.

2. Use of Quantitative Undertakings

Despite the question of legality, undertakings containing both export stops and quotas are accepted by the Commission. This is recognized by some authors,[265] but no examples are given.[266]

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260. The following do not even mention the possibility of quantitative undertakings: Dielmann, *Anti-Dumping and Anti Subsidy Measures: The Practice of the European Communities, 1981-1984*, 22 COMMON MKT. L. REV. 697 (1985); E.A. VANDOREN, *The Interface Between Anti-Dumping and the Competition Law and Policy in the EEC*, in LEGAL ISSUES OF EUROPEAN INTEGRATION 1 (1986); Le Liévre & Houben, *supra* note 249. In fact, only I. BAEL & J. BELLIS, *supra* note 17, and J. BESELER & A. WILLIAMS, *supra* note 58, seem to give more on quantitative undertakings than a citation of article 10(2)(b).

261. Appendix 1, *supra* note 16, art. 10(2)(b).

262. I. BAEL & J. BELLIS, *supra* note 17, at 102.

263. J. BESELER & A. WILLIAMS, *supra* note 58, at 215.

264. GATT 1979 Anti-Dumping Code, *supra* note 28, art. 7(1).

265. I. BAEL & J. BELLIS, *supra* note 17, at 102 n.18; J. BESELER & A. WILLIAMS, *supra* note 58, at 215 (No author claims that quantitative undertakings do not occur. They prefer to disregard them instead).

266. *See* J. BESELER & A. WILLIAMS, *supra* note 58, at 215 n.48 (the example given is not a true undertaking); Video Recorders Case (Japan), EEC Comm'n Decision 83/126 (O.J. 1983, L86/23) (this case is not the acceptance of an undertaking, but rather a termination following a finding that it is not in the best interest of the community to take measures).

Because of the general lack of motivation for the acceptance of undertakings, examples of quantitative undertakings are hard to find. The following consideration from the Urea Case (Czechoslovakia)[267] seems to indicate that the firm undertook to impose a quorum on its exports to the EEC: "These undertakings were acceptable to the Commission on the grounds that they were considered to provide adequate relief to the Community industry because they will reduce future imports . . . to a reasonable share of the Community's consumption."[268] The same applies under the legislation of the European Community on Coal and Steel, which is identical to that of the EEC on undertakings: "The Yugoslavian exporter . . . offered an undertaking concerning their imports of plates and sheets, of iron and steel, to the Community. Pursuant to this undertaking exports will be reduced to a level at which there will be no further injury."[269]

It is impossible to determine how many quota undertakings exist because of the Commission's failure to provide adequate reasons for its decisions. However, the examples cited above, evidence the fact that they do occur.

3. Legality of Quota Undertakings

There are two arguments against quota undertakings. First, article 10 of the 1988 Regulation speaks of "ceasing" exports, implying that exports would stop completely.[270] Second, quantitative restrictions on imports normally have to be taken under the 1982 Regulation.[271]

The first argument is based solely on grammatical interpretation and should therefore be rejected. Both the EEC and GATT Code legislation allow some discretion to the anti-dumping authorities, who must be satisfied that the dumping or the injury is eliminated. This provision only makes sense for undertakings involving quotas. After all, total import stops would always eliminate both the dumping and the injury since nonexistent imports cannot be dumped and cannot do harm. The fact that the anti-dumping authorities are allowed the freedom to judge whether a quantitative undertaking is acceptable can only mean that the quantitative undertaking can be something other than a total cessation of imports.

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267. EEC Council Reg. 3339/87 (O.J. 1987, L317/1).

268. *Id.*

269. Iron & Steel Sheets & Plates Case (Yugoslavia), ECSC Comm'n Decision 86/639 (O.J. 1986, L371/84).

270. Appendix 1, *supra* note 12, art. 10 (the same applies to texts of the Regulation in other languages: "beeindigen," "cessation").

271. EEC Reg. 288/82 (O.J. 1982, L35/1).

The second argument should also be rejected, because it does not recognize the differences between anti-dumping measures under the 1988 Regulation and safeguard measures under the 1982 Regulation.[272] Anti-dumping legislation seeks to prevent injury to the EEC industry by certain trade practices. By contrast, safeguard measures are not aimed at any particular behavior, but rather are aimed at preventing damage by a sudden increase in imports.[273] The two regulations also use different conditions for taking protective measures. Anti-dumping measures require dumping, injury, and Community interest. Safeguard measures require imports in greatly increased quantities, serious injury, and Community interest.

In other words, the two Regulations are basically different in their purpose and their field of application. Therefore, one cannot use the existence of measures based on one regulation to establish an argument against measures based on the other.

Apart from these two arguments, no reason to prohibit quotas undertakings exists. Since the Commission has the power to accept undertakings containing total export stops, it should also have the power to accept those containing less drastic quotas.

One can even argue that quota undertakings are the only practical form of quantitative undertakings. After all, undertakings have to be more attractive to a firm than duties, otherwise nobody would offer them. However, paying duties will always be preferable to total export stops. Thus, there seems little use for quantitative undertakings containing total export stops.

G. *Undertakings and Competition*

1. Relation of Competition and Anti-Dumping Law

As discussed in part I, section B, EEC anti-dumping law has two purposes: protectionism by hindering imports, and protection of competition by prevention of predatory dumping. The latter is also the purpose of EEC competition law. Despite this common purpose, anti-dumping and competition legislation have traditionally been considered to be entirely separate entities, operating on different levels of trade. According to this view, competition legislation would take care of distortions of competition within the common market, or the "internal sphere." The function of anti-dumping legislation was to prevent the

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272. *Compare* Appendix 1, *supra* note 12, *with* EEC Reg. 288/82 (O.J. 1982, L35/1); *see* pt. II, § B.

273. *See* EEC Reg. 288/82 arts. 15(1) & 16(1).

anti-competitive effects of international trade practices from influencing that common market, or the "external sphere." Consequently, anti-dumping measures were considered not to influence competition within the common market. Instead, they supposedly protected competition by eliminating anti-competitive "contaminations" resulting from dumping. This view is reflected in the internal organization of the Commission: anti-dumping policy is handled by the Directorate-General for external relations (DG I), while competition policy has its own specialized Directorate-General (DG IV).

2. Mutual Influence of Anti-Dumping and Competition

However, several developments have undermined this tidy division into internal and an external spheres of action. First, competition law itself has become external with the adoption of the "effects doctrine."[274] Fixing prices by firms in a third country may be a violation of article 85(1) of the EEC Treaty, if it has anti-competitive effects within the Community.[275] In other words, anti-competition legislation can be used against predatory dumping, i.e. dumping with the aim or effect of driving competitors from the market. This seems to make anti-dumping legislation superfluous as far as it seeks to prevent destruction of competition by dumping. In practice, the use of competition law against predatory dumping is rare.

A possible reason for this is that predatory dumping itself is rare.[276] First, competition law is potentially a more attractive method of legal protection for the victim.[277] Second, anti-dumping law has become internal with the adoption of the Screwdriver Regulation,[278] which allows anti-dumping duties to be imposed on products assembled in the Community. Such duties have indeed been imposed, and recently anti-dumping undertakings concerning "screwdriving" have been accepted.[279] This regulation has received a lot of criticism, since it leads to anti-dumping measures directed against Community-produced goods and, in effect, rewrites the rules of origin of goods.[280] Third, the Commission itself has admitted that anti-dumping measures can have anti-competitive effects.[281]

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274. V. VAN THEMAAT, INLEIDING TOT HER RECHT VAN DE EUROPESE GEMEENSCHAPPEN 321 (198).

275. EEC Treaty, *supra* note 1, art. 85(1).

276. Stegemann, *supra* note 23, at 466.

277. For example, competition law can be invoked for the national judiciary, independent of the Commission, thereby enabling the victim to recover damages.

278. EEC Reg. 1761/87 (O.J. 1987, L167/9).

279. Electric Typewriters Case (Japan), EEC Comm'n Decision 88/300 (O.J. 1988, L128/39).

280. Bael, *Creeping Protectionism*, J. WORLD TRADE L. 5, 7 (1987).

281. *See* Glycine Case (Japan), EEC Council Reg. 2322/85 (O.J. 1985, L218/1).

3. Types of Mutual Influence

This risk of mixing the spheres of action of anti-dumping and competition law is particularly acute with undertakings. Anti-dumping duties resemble import duties, which are considered to have no influence on competition. However, anti-dumping undertakings resemble price-fixing or quantity-fixing agreements, both of which fall under the prohibition of article 85(1) of the EEC Treaty, without the possibility of an exemption under article 85(3).[282]

Theoretically, price increases or quota resulting from an undertaking could also amount to a violation of article 86 of the EEC Treaty, if the firm had a dominant position.[283] However, in such cases, it is the price increase itself that constitutes the violation, not the undertaking. The undertaking itself is neutral: without the undertaking, the price increase would be just as unlawful. For this reason, this paper will not consider violations of article 86, but will rather concentrate on article 85.

Undertakings and competition considerations can influence each other in two ways. First, they can influence each other by using anti-dumping arguments to justify undertaking-like agreements between firms, and second, by the anti-competitive effects of formal undertakings.

4. Competition Law and Undertaking-Like Agreements

The first way in which anti-dumping and competition law influence each other is when competing firms take concerted actions with the aim of preventing or hindering dumping: a kind of "do-it-yourself" anti-dumping measure. There is very clear precedent for this type of activity. In the IFTRA Case,[284] the Commission took action under article 85(1) of the EEC Treaty against a restrictive agreement among importers of aluminum that was intended to prevent dumping. In the Decision, the Commission took into consideration that:

> It is, moreover, necessary, as far as sales between the common market and third countries . . . are concerned, that the appraisal of whether acts can be considered dumping and the imposition of definitive measures under the existing rules relating to dumping are matters which may be undertaken only by a competent authority, namely, a national authority

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282. EEC Treaty, *supra* note 1, arts. 85(1) & 85(3).

283. *Id.* art. 86.

284. IFTRA Rules for Producers of Virgin Aluminium (IV/27.000), EEC Comm'n Decision 75/497 (O.J. 1975, L228/3).

> or the Commission of the European Communities. Any other method is open to the risk of abuse. Such an authority is the only entity entitled to assess . . . whether the imposition of anti-dumping measures which interfere with the free movement of goods is justified.[285]

Ten years later, the Commission followed the same line of reasoning in another case involving an attempt to channel all imports via certain distributors and impose minimum prices and quota:

> Undertakings are not entitled to make restrictive agreements which damage the interests of competitors and consumers merely because they consider that the existing legislation is not adequate or practical for their purposes. The alleged impracticality of legislation is a matter of legislative correction and does not justify the making of restrictive agreements by undertakings.[286]

These cases show the Commission's position: there is no place for collective anti-dumping measures by firms acting on their own initiative. Anti-dumping measures can only be taken through the proper anti-dumping procedure, and its shortcomings can never be an excuse for restrictive agreements. Any other approach would invite all kinds of restrictive agreements under the guise of anti-dumping agreements. The Commission's line of reasoning applies equally to agreements between EEC producers, between foreign exporters, or between both.

A consequence of these precedents is that the "tacit agreements" discussed in part II, section D, are potentially vulnerable to competition action under article 85 of the EEC Treaty since they have not been approved by the Commission. If several exporters were to enter into tacit agreements, it could be a form of concerted action prohibited by article 85. Therefore, from a competition point of view, the Commission's policy not to conclude tacit undertakings is consistent, and should be favorably looked upon.

5. Competition and Formal Undertakings

One of elements of a violation of article 85(1) of the EEC Treaty is some form of agreement or cooperation between firms. Con-

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285. *Id.*

286. Aluminium Imports from Eastern Europe (IV/26.870), EEC Comm'n Decision 85/206 (O.J. 1985, L92/1) (this was a competition case and the word "undertaking" is used to mean "enterprise" or "firm," instead of "anti-dumping undertaking").

sequently, a single undertaking cannot constitute a violation of article 85(1), since it is an agreement not between firms, but between a single firm and the Commission.

However, there are two ways in which firms can cooperate with regard to undertakings: (1) by using a single undertaking as a basis for concerted action, e.g. a price alignment at the level of the minimum price; (2) by cooperating when concluding undertakings with the Commission. A number of price-fixing agreements with the Commission could, after all, have the same result as an agreement between the firms.

Concerning the first form of anti-competitive conduct, it is not the undertaking but rather the price alignment that is anti-competitive. The undertaking is neutral: if the price alignment had another basis, it would be just as anti-competitive. For this reason, this abuse of undertakings will be left aside, just like the abuse of undertakings by dominant firms described above.

The second form of anti-competitive action can be countered by keeping the various undertakings as separate as possible. This can be achieved in three ways: (1) by keeping the contents of the undertakings secret, (2) by keeping the undertakings independent of each other. Vandoren notes that the Commission will refuse undertakings that make the maintenance of minimum prices conditional upon the maintenance of minimum prices by other firms,[287] (3), by testing undertakings on their possible cumulative anti-competitive effects before they are accepted. Such tests are indeed conducted.[288]

6. Testing Undertakings for Anti-Competitive Effects

The only way to determine if the Commission actually tests undertakings for their anti-competitive effects is to find a precedent: a case in which an undertaking was refused for anti-competition reasons. Such a case indeed exists. The Glycine Case (Japan),[289] concerned the importation of glycine from Japan. This product was only made by two Japanese producers, both accused of dumping, and by one European producer. The two Japanese producers claimed that an anti-dumping duty would be against the interests of the Community, namely the competition policy of the EEC.[290] The duty would enable the European producer to undercut their prices and drive them out of the

287. E.A. VANDOREN, *supra* note 260, at 9.
288. *See* pt. II, § G(6).
289. EEC Council Reg. 2322/85 (O.J. 1985, L218/1).
290. *Id.*

market. The producers offered price undertakings instead. The undertakings were refused because of their potential anti-competitive effect:

> The decision to impose the same anti-dumping duty on both companies was based on a thorough analysis of the nature of the price undertaking offered and of the glycine market. In a market where only a limited number of companies are competing with each other an alignment of prices resulting from undertakings of the kind offered by the Japanese companies, i.e. to respect the same minimum price, would reduce competition. This effect . . . would be less likely to occur as a result of the imposition of the same anti-dumping duty, because existing differences in the prices charged . . . would continue.[291]

For the same reason, the definitive duty was lower than it would otherwise have been: "In view of the probable effect on the competitive situation and structure in the Community market . . ., it is considered in the Community's interest to take protective measures without fully eliminating the injury . . ., but considered to be adequate to enable the said producer, to operate economically the plant . . . ."[292]

This is the only instance in which an undertaking was explicitly refused because of its anti-competitive effect.[293] Given the limited motivation that the Commission gives when an undertaking is accepted or refused, it is impossible to say if it has been used on other occasions. If it has been used before, it could not have been very often. This might be explained by asssuming that the Commission has only recently begun to pay attention to competition considerations.

Yet, this case shows that the Commission recognizes the fact that anti-dumping measures are not competition-neutral. Anti-dumping measures can influence the competitive situation within the common market. It is also recognized that some anti-dumping measures are more anti-competitive than others, and that competition considerations are taken into account when a choice is made between measures such as accepting an undertaking and refusing it and imposing a duty.

H. *Judicial Review Concerning Undertakings*

1. Admissibility

As was shown in part I, section E, there are some admissibility problems associated with the judicial review of anti-dumping findings

291. *Id.* ¶ 22(b).

292. *Id.* ¶ 18.

293. The author has not been able to find another.

that are caused by the requirement of direct and individual concerns of article 173(2) of the EEC Treaty.[294] As was discussed in part II, section C, findings with regard to undertakings can be divided into three categories, which will then be dealt with separately: (1) acceptance of an undertaking, either as part of a Regulation imposing duties or separately, as a Decision; (2) refusal of an undertaking and consequent imposition of duties; and (3) initiation of a review procedure concerning an undertaking, or refusal to do so.

2. Acceptance of Undertakings

When an undertaking is accepted, there are two parties that may raise objections: the complainant who would have preferred duties, and other exporters whose undertakings have not been accepted and who fear a competitive disadvantage against their colleague. Further, the finding itself can be of two different types: a finding as a separate decision to terminate, or as part of a regulation, if definitive duties are imposed or provisional duties collected at the same time.[295]

As was shown in part II, section C, the termination of a proceeding due to acceptance of an undertaking is procedurally the same as the termination due to any other cause. Consequently, the complainant would seem to be able to challenge the Decision according to the reasoning given in part I, section E, and following the Timex[296] and FEDIOL[297] Cases. In this respect, it does not matter whether the acceptance is by decision or by regulation: the complainant is equally affected by both.

Other persons would not be able to challenge the acceptance since they would not be directly and individually affected. This is comparable to the situation with regard to the imposition of duties: dumping firms cannot challenge the undertakings of their competitors, just as they cannot challenge the duties imposed on their competitors, or the termination of the investigation with respect to their competitors.

3. Refusal of Undertakings

When an undertaking has been refused, the exporters and importers might want to challenge the refusal. When an undertaking is refused, an anti-dumping duty is imposed instead. There is no separate finding to refuse: the refusal is part of the regulation that imposes

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294. EEC Treaty, *supra* note 1, art. 173(2).
295. *See* pt. II, § C(3) (explaining the procedural side of undertakings).
296. 1985 ECR 861, case 264/82.
297. 1983 ECR 2913, case 191/82.

the duty. Consequently, it is the regulation that must be challenged. So, in effect, the exporter/importer appeals not against the refusal, but against the duty that the undertaking was supposed to make unnecessary.

Consequently, the rules for appeal against the imposition of anti-dumping duties described in part I, section E, apply here. The complainant has a right of appeal if he participated actively in the investigation. Exporters singled out in the regulation by being named or by being actively involved in the proceeding can also appeal, as can their associated importers. Independent importers have only recourse to the Court via a preliminary inquiry cited in article 177 of the EEC Treaty.[298]

4. Review of Undertakings

It was shown in the previous section that the review procedure is, in fact, a re-opening of the original investigation. The finding to review an undertaking can therefore be likened to the finding to initiate an anti-dumping investigation. This means that it is not a final measure, but a provisional one intended to pave the way for a measure that definitively sets out the Commission's position. Therefore, the undertaking firm cannot challenge the Commission's position. As a consequence, the undertaking firm cannot challenge the Commission's finding to re-open the investigation. The precedent set by the IBM Case[299] shows appeal is only allowed against final measures, not against provisional ones. It also means that a refusal to re-open the investigation must be compared to the refusal of an anti-dumping complaint.

The FEDIOL Case[300] shows that the complainant can challenge such a refusal, because procedural rights caused him to be directly and individually affected. The situation is similar for a third party requesting a review procedure. He has procedural rights that are similar to those that the Court attributed to a complainant in FEDIOL: the right to request, to submit evidence, to have his request examined with due care, and to be informed of the outcome. As a consequence, a third party requesting a review of an undertaking would be able to challenge a refusal by the Commission to do so.

5. Review Standards

Findings that accept, refuse, or review undertakings are subject

298. EEC Treaty, *supra* note 1, art. 177.

299. 1981 ECR 2639, case 60/81; *see* pt. I, § B (discussing the IBM and FEDIOL cases).

300. 1983 ECR 2913, case 191/82.

to the same review standard as anti-dumping findings in general. In other words, such findings will only be annulled if it can be shown that there has been (1) a violation of the rules of procedure, (2) insufficient motivation, (3) material incorrectness of the facts used as a basis for the finding, (4) manifest errors of judgment, or (5) misuse of powers. As stated in part I, section E, this leads to wide discretionary powers for the Commission.

The chances for annulment of a finding concerning undertakings are even less than that for the annulment of anti-dumping findings in general. While, for instance, the establishment of a dumping margin or of injury to an EEC industry is subject to at least some guidelines in the 1988 Regulation, the Commission is completely on its own when assessing the merits of undertakings. The only criterion is that of article 10(1), that the Commission must be satisfied that the undertaking eliminates either the dumping margin or the injury.[301] When this criterion is coupled with the wide margin of discretion allowed to the Commission by the Court, it becomes clear that the chance for annulment of a finding concerning undertakings is very slim. This is well illusatrated by the Court's reasoning in the Miniature Ballbearing Cases.[302]

In these cases, a number of exporters had concluded undertakings in 1981. In 1984, the Commission withdrew its acceptance and reopened the investigation. This time, it used a different method of calculation, and came to the conclusion that the undertakings had not eliminated the injury to the EEC industry, and imposed anti-dumping duties.[303]

The exporters claimed that the Community authorities had not taken into account the undertakings they had offered and their voluntary price increases (as a form of tacit agreement). The Court held in this respect that:

> 51. It must first be stressed that no provision of Regulation No. 3017/70 compels the institutions to accept price undertakings which are offered. On the contrary, it is clear from

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301. Appendix 1, *supra* note 12, art. 10(1).

302. The following cases are collectively known as the Miniature Ballbearing cases: NTN Toyo Bearing Co. v. Council of the EC, case 240/84 (July 5, 1987 judgment not yet reported); Nachi/Fujikoshi Co. v. Council of the EC, case 255/84 (July 5, 1987 judgment not yet reported); Koyo Seiko Co. v. Council of the EC, case 256/84 (July 5, 1987 judgment not yet reported); Nippon Seiko Co. v. Council of the EC, case 258/84 (July 5, 1987 judgment not yet reported); Minibea Co. v. Council of the EC, case 260/84 (July 5, 1987 judgment not yet reported).

303. *Id.*

> Article 10 thereof that it is for the institutions, in the exercise of their discretionary power, to determine whether such undertakings are acceptable. NSK has not shown that the reasons for refusing the undertakings offered set out in paragraph 24 of the preamble to the contested regulation exceeded the margin of discretion conferred on the institutions.
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> 52. Secondly, it must be stated that Regulation No. 3017/79 makes no provision for the taking into account of voluntary price increases made after the period covered by the investigation. The decision-making process includes an investigation, the initiation and course of which are governed by Article 7. It is, at the same time, clear from the fourteenth and fifteenth recitals in the preamble to the regulation that the investigation procedure should not prevent rapid and efficient action by the Community.
>
> 53. It is therefore impossible to accept that the anti-dumping proceeding may not be terminated or a decision to impose a definitive anti-dumping duty may not be adopted merely because the companies which are subject to the provisional anti-dumping duty have made voluntary price increases after the end of the period covered by the investigation period.[304]

This shows that, first, the Commission may use its full discretionary powers in deciding whether or not to accept an undertaking, and second, that the Commission's policy to refuse tacit undertakings is approved by the Court.

The exporters also claimed that the principle of legal certainty prevented the Commission from changing the method of calculation and discontinuing the undertakings:

> 32. In the first place it should be stressed that under Article 14 of Regulation 3017/70 decisions to accept undertakings may be subject to review, which, according to paragraph (3) thereof, may result in the amendment, repeal, or annulment of the measures adopted in connexion with such undertakings. Therefore the principle of legal certainty did not prevent the measures adopted in 1981 from being re-examined.
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> 33. Secondly, it should be recalled that under Article 2(13)(b) of Regulation 3017/79, . . . the transaction-by-trans-

304. Nippon Seiko Co. v. Council of the EC, case 258/84 (July 5, 1987 judgment not yet reported) (citations omitted).

action method is one of the methods which may be adopted by the institutions in order to calculate the dumping margin where, as in this case, prices vary.

34. Consequently, as the Court held in its judgment of 28 October 1982 in case 52/81 (Faust v. Commission, [1982]ECR 3742), where the institutions enjoy a margin of discretion in the choice of the means needed to achieve their policies, traders cannot claim to have a legitimate expectation that the means originally chosen will be maintained, since these may be altered by the institutions in the exercise of their powers.

35. Lastly, the rules of sound administration cannot prevent the institutions from using the powers conferred upon them by the regulations in force.[305]

I. *Summary of Part II*

The main points of interest from the preceding discussion of anti-dumping undertakings are:

(1) From a substantive point of view, undertakings are very much like anti-dumping duties, since they eliminate either the dumping or the injury and they have the same duration.

(2) From a procedural point of view, undertakings are much more like terminations, since they are usually accepted by the Commission according to the same procedure as terminations and do not constitute protective measures in the sense of article 113 of the EEC Treaty.[306]

(3) From a judicial protection point of view, anti-dumping findings associated with undertakings can be treated as ordinary findings not associated with undertakings: the acceptance can be challenged as if it were a termination, the refusal can be challenged because it is a regulation imposing duties, and the review can be challenged as if it were the initiation of an investigation;

(4) The Commission rigidly keeps to the procedural framework for undertakings, and tacit undertakings are no longer taken into account when imposing duties.

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305. *Id.*

306. EEC Treaty, *supra* note 1, art. 113.

(5) Undertakings are normally concluded only by exporters or related firms, and undertakings from prospective exporters are no longer accepted.

(6) Apart from competition considerations, undertakings seem to be refused only when they do not work, according to the impracticality criterium of the GATT Code; this is the case when an undertaking either is itself ineffective or cannot be monitored effectively.

(7) Contrary to anti-dumping duties, that can be left to the customs authorities, undertakings require looking after, and considerable evidence that the Commission has begun to feel the burden of monitoring all the undertakings it has accepted exists.

(8) There is no evidence that Commission has ever used trade relations with a particular country as an argument to refuse undertakings, but it may happen in the future.

(9) The Commission seems to be burdened by its increased workload, but there is no evidence that this has led to the refusal of undertakings, yet more attention is being paid to effective monitoring of undertakings.

IV. General Conclusion

Undertakings in EEC anti-dumping law are of a strangely ambiguous nature. On one hand, they are similar to anti-dumping duties in that they are both aimed at eliminating either the dumping or the resulting injury to the EEC industry. On the other hand, they are not considered trade protection measures under article 113 of the EEC Treaty,[307] and do not have to be enforced by the Council.

From a strictly legal point of view, undertakings are very similar to the termination of investigations when there is no dumping, no injury, or no Community interest in taking measures. The acceptance of an undertaking follows the same procedure as a termination, and so does the refusal of an undertaking: like a refusal to terminate, it is not a separate finding, but part of the imposition of duties. Both the acceptance and the refusal of undertakings are subject to the same rules for judicial review as the ordinary anti-dumping findings they resemble most. The acceptance can be challenged as if it were a termination, and the refusal as the imposition of duties it forms part of.

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307. *Id.*

Undertakings can contain the obligation to maintain a certain minimum price, the obligation to limit exports to the EEC to a certain quota, or the obligation to stop exporting the product to the EEC. In addition, undertakings can contain obligations concerning monitoring the performance of the undertaking. There is some evidence that the Commission is feeling the burden of monitoring all the undertakings concluded in the past, and that the ability to be efficiently monitored might play an increasingly important role in the Commission's decision to accept or reject an undertaking.

The Commission's discretionary powers for such a decision are greater than is normal in anti-dumping proceedings. Undertakings are usually refused because they do not eliminate the dumping or the injury, or because they cannot be monitored efficiently. The Commission is allowed near-complete freedom to choose the methods for determining the existence of dumping and injury. Given the large variety of techniques available, this means that the Commission has a correspondently near-complete freedom to determine whether the undertaking eliminates the dumping or injury. The Commission also has broad discretionary freedom to determine whether it can monitor an undertaking efficiently.

The same applies to the termination of undertakings. The Commission can at all times re-open the investigation either at the request of a member-state or an interested party, or on its own initiative. It can re-calculate the dumping and the injury using a different technique, and can replace the undertaking with a duty.

Undertakings are usually refused because they do not eliminate the dumping or the injury or because they cannot be monitored efficiently. In one case, the undertakings were refused because of their negative effect on the competitive situation in the common market.[308] This refusal puts an end to the traditional fiction that anti-dumping measures are competition-neutral.

The motivation given for the acceptance or the refusal of undertaking is scanty. This is partially alleviated by the fact that the interested parties participating in the anti-dumping investigation have access to more information than is published in the Official Journal. However, it is normal in anti-dumping proceedings that the interests of parties that do not take part in the investigations are generally not taken into account.

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308. FEDIOL Case, 1983 ECR 2913, case 191/82; *see* pt. II, § H(3).

APPENDIX 1

2. 8. 88 Official Journal of the European Communities No L 209 1

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No 2423/88

of 11 July 1988

on protection against dumped or subsidized imports from countries not members of the European Economic Community

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the Regulations establishing the common organization of agricultural markets and the Regulations adopted under Article 235 of the Treaty applicable to goods manufactured from agricultural products, and in particular the provisions of those Regulations which allow for derogation from the general principle that protective measures at frontiers may be replaced solely by the measures provided for in those Regulations,

Having regard to the proposal from the Commission,

Whereas by Regulation (EEC) No 2176/84 (1), as amended by Regulation (EEC) No 1761/87 (2), the Council adopted common rules for protection against dumped or subsidized imports from countries which are not members of the European Economic Community;

Whereas these rules were adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as 'GATT'), from the Agreement on Implementation of Article VI of the GATT (1979 Anti-Dumping Code) and from the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Code on Subsidies and Countervailing Duties);

Whereas in applying these rules it is essential, in order to maintain the balance of rights and obligations which these Agreements sought to establish, that the Community take account of their interpretation by the Community's major trading partners, as reflected in legislation or established practice;

Whereas it is desirable that the rules for determining normal value should be presented clearly and in sufficient detail; whereas it should be specifically provided that where sales on the domestic market of the country of export or origin do not for any reason form a proper basis for determining the existence of dumping, recourse may be had to a constructed normal value; whereas it is appropriate to give examples of situations which may be considered as not representing the ordinary course of trade, in particular where a product is sold at prices which are less than the costs of production, or where transactions take place between parties which are associated or which have a compensatory arrangement; whereas it is appropriate to list the possible methods of determining normal value in such circumstances;

Whereas it is expedient to define the export price and to enumerate the necessary adjustments to be made in those cases where reconstruction of this price from the first open-market price is deemed appropriate;

Whereas, for the purpose of ensuring a fair comparison between export price and normal value, it is advisable to establish guidelines for determining the adjustments to be made in respect of differences in physical characteristics, in quantities, in conditions and terms of sale and to draw attention to the fact that the burden of proof falls on any person claiming such adjustments;

Whereas the term 'dumping margin' should be clearly defined and the Community's established practice for methods of calculation, where prices or margins vary, codified;

Whereas it seems advisable to lay down, in adequate detail, the manner in which the amount of any subsidy is to be determined;

Whereas it seems appropriate to set out certain factors which may be relevant for the determination of injury;

Whereas it is necessary to lay down the procedures for anyone acting on behalf of a Community industry which considers itself injured or theatened by dumped or subsidized

(1) OJ No L 201, 30. 7. 1984, p. 1.
(2) OJ No L 167, 26. 6. 1987, p. 9.

imports to lodge a complaint; whereas it seems appropriate to make it clear that in the case of withdrawal of a complaint, proceedings may, but need not necessarily, be terminated;

Whereas there should be cooperation between the Member States and the Commission, both as regards information about the existence of dumping or subsidization and injury resulting therefrom, and as regards the subsequent examination of the matter at Community level; whereas, to this end, consultations should take place within an advisory committee;

Whereas it is appropriate to lay down clearly the rules of procedure to be followed during the investigation, in particular the rights and obligations of the Community authorities and the parties involved, and the conditions under which interested parties may have access to information and may ask to be informed of the essential facts and considerations on the basis of which it is intended to recommend definitive measures;

Whereas it is desirable to state explicitly that the investigation of dumping or subsidization should normally cover a period of not less than six months immediately prior to the initiation of the proceeding and that final determinations must be based on the facts established in respect of the investigation period;

Whereas to avoid confusion, the use of the terms 'investigation' and 'proceeding' in this Regulation should be clarified;

Whereas it is necessary to require that when information is to be considered as being confidential, a request to this effect must be made by the supplier, and to make clear that confidential information which could be summarized but of which no non-confidential summary has been submitted may be disregarded;

Whereas, in order to avoid undue delays and for administrative convenience, it is advisable to introduce time limits within which undertakings may be offered;

Whereas it is necessary to lay down more explicit rules concerning the procedure to be followed after withdrawal or violation of undertakings;

Whereas it is necessary that the Community's decision-making process permit rapid and efficient action, in particular through measures taken by the Commission, as for instance the imposition of provisional duties;

Whereas, in order to discourage dumping, it is appropriate to provide, in cases where the facts as finally established show that there is dumping and injury, for the possibility of definitive collection of provisional duties even if the imposition of a definitive anti-dumping duty is not decided on, on particular grounds;

Whereas it is essential, in order to ensure that anti-dumping and countervailing duties are levied in a correct and uniform manner, that common rules for the application of such duties be laid down; whereas, by reason of the nature of the said duties, such rules may differ from the rules for the levying of normal import duties;

Whereas experience gained from the implementation of Regulation (EEC) No 2176/84 has shown that assembly in the Community of products whose importation in a finished state is subject to anti-dumping duty may give rise to certain difficulties;

Whereas in particular:

— where assembly or production is carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to an anti-dumping duty, and

— where the value of the parts or materials used in the assembly or production operation and originating in the country of origin of the product subject to an anti-dumping duty exceeds the value of all other parts or materials used,

such assembly or production is considered likely to lead to circumvention of the anti-dumping duty;

Whereas, in order to prevent circumvention, it is necessary to provide for the collection of an anti-dumping duty on products thus assembled or produced;

Whereas it is necessary to lay down the procedures and conditions for the collection of duty in such circumstances;

Whereas the amount of anti-dumping duty collected should be limited to that necessary to prevent circumvention;

Whereas provision should be made for the review of regulations and decisions to be carried out, where appropriate, in part only;

Whereas, in order to avoid abuse of Community procedures and resources, it is appropriate to lay down a minimum period which must elapse after the conclusion of a proceeding before such a review may be conducted, and to ensure that there is evidence of a change in circumstances sufficient to justify a review;

Whereas it is necessary to provide that, after a certain period of time, anti-dumping and countervailing measures will lapse unless the need for their continued existence can be shown;

Whereas appropriate procedures should be established for examining applications for refunds of anti-dumping duties; whereas there is a need to ensure that refund procedures apply only in respect of definitive duties or amounts of any provisional duty which have been definitively collected, and to streamline the existing procedures for refunds;

Whereas this Regulation should not prevent the adoption of special measures where this does not run counter to the Community's obligations under the GATT;

Whereas agricultural products and products derived therefrom might also be dumped or subsidized; whereas it is, therefore, necessary to supplement the import rules generally applicable to these products by making provision for protective measures against such practices;

Whereas, in addition to the above considerations, which, in essence, led to the adoption of Regulation (EEC) No 2176/84, experience has shown that it is necessary to define more precisely certain of the rules to be applied and the procedures to be followed in the context of anti-dumping proceedings;

Whereas, for the determination of normal value, it is appropriate to ensure that when this is based on domestic prices, the price should be that actually paid or payable in the ordinary course of trade in the exporting country or country of origin and, therefore, the treatment of discounts and rebates should be clarified, in particular, with regard to deferred discounts which may be recognized if evidence is produced that they were not introduced to distort the normal value. It is also desirable to state more explicitly how normal value is established on the basis of constructed value, in particular, that the selling, general and administrative expenses and profit should be calculated, depending on the circumstances, by reference to the expenses incurred and the profit realized on profitable sales made by the exporter concerned or by other producers or exporters or on any reasonable basis. In addition, it is appropriate to state that, where the exporter neither produces nor sells the like product in the country or origin, the normal value shall normally be established by reference to the prices or costs of the exporter's supplier. Finally, it is considered necessary to define more precisely the conditions under which sales at a loss may be considered as not having been made in the ordinary course of trade;

Whereas, for the determination of export prices, it is advisable to ensure that this is based on the price actually paid or payable and, therefore, the treatment of discounts and rebates should be clarified. In cases where the export price has to be reconstructed, it is necessary to state that the costs to be used in this reconstruction include those normally borne by an importer but paid by any party which appears to be associated with the importer or exporter;

Whereas, for the comparison of normal value and export prices, it is necessary to ensure that this is not distorted by claims for adjustments relating to factors which are not directly related to the sales under consideration or by claims for factors already taken into account. It is therefore appropriate to define precisely the differences which affect price comparability and to lay down more explicit rules on how any adjustment should be made, in particular, for differences in physical characteristics, transport, packing, credit, warranties and other selling expenses. With regard to such selling expenses, it is appropriate, for reasons of clarity, to specify that no allowance should be made for general selling expenses since such expenses are not directly related to the sales under consideration with the exception of salesmen's salaries which should not be treated differently to commissions paid. For reasons of administrative convenience, it is also appropriate to specify that claims for individual adjustments which are insignificant should be disregarded;

Whereas, it is expedient to clarify Community practice with regard to the use of averaging and sampling techniques;

Whereas, in order to avoid undue disruption to proceedings, it is advisable to clarify that the supply of false or misleading information may lead to such information being disregarded and any claims to which it refers being disallowed;

Whereas, experience has shown that, it is necessary to prevent the effectiveness of anti-dumping duties being eroded by the duty being borne by exporters. It is appropriate to confirm that, in such circumstances, additional anti-dumping duties may be imposed, where necessary retroactively;

Whereas, experience has also shown that the rules relating to the expiry of anti-dumping and countervailing measures should be clarified. For this purpose and in order to facilitate the administration of these rules, provision should be made for the publication of a notice of intention to carry out a review;

Whereas, it is appropriate to state more explicitly the methods to be used in the calculation of the amount to any refund, thus confirming the consistent practice of the Commission, as regards refunds and the relevant principles countained in the notice which the Commission has published concerning the reimbursement of anti-dumping duties [1];

Whereas, it is appropriate to take advantage of this opportunity to proceed to a consolidation of the provisions in question,

HAS ADOPTED THIS REGULATION:

Article 1

Applicability

This Regulation lays down provisions for protection against dumped or subsidized imports from countries not members of the European Economic Community.

[1] OJ No C 266, 22. 10. 1986, p. 2.

Article 2

Dumping

A. PRINCIPLE

1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

2. A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.

B. NORMAL VALUE

3. For the purposes of this Regulation, the normal value shall be:

(a) the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin. This price shall be net of all discounts and rebates directly linked to the sales under consideration provided that the exporter claims and supplies sufficient evidence that any such reduction from the gross price has actually been granted. Deferred discounts may be recognized if they are directly linked to the sales under consideration and if evidence is produced to show that these discounts were based on consistent practice in prior periods or on an undertaking to comply with the conditions required to qualify for the deferred discount.

(b) when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison:

(i) the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price; or

(ii) the constructed value, determined by adding cost of production and a reasonable margin of profit. The cost of production shall be computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses. The amount for selling, general and administrative expenses and profit shall be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of like products on the domestic market. If such data is unavailable or unreliable or is not suitable for use they shall be calculated by reference to the expenses incurred and profit realized by other producers or exporters in the country of origin or export on profitable sales of the like product. If neither of these two methods can be applied the expenses incurred and the profit realized shall be calculated by reference to the sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export or on any other reasonable basis.

(c) Where the exporter in the country of origin neither produces nor sells the like product in the country of origin, the normal value shall be established on the basis of prices or costs of other sellers or producers in the country of origin in the same manner as mentioned in subparagraphs (a) and (b). Normally the prices or costs of the exporter's supplier shall be used for this purpose.

4. Whenever there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for consumption in the country of origin is less than the cost of production as defined in paragraph 3 (b) (ii), sales at such prices may be considered as not having been made in the ordinary course of trade if they:

(a) have been made in substantial quantities during the investigation period as defined in Article 7 (1) (c); and

(b) are not at prices which permit recovery, in the normal course of trade and within the period referred to in paragraph (a), of all costs reasonably allocated.

In such circumstances, the normal value may be determined on the basis of the remaining sales on the domestic market made at a price which is not less than the cost of production or on the basis of export sales to third countries or on the basis of the constructed value or by adjusting the sub-production-cost price referred to above in order to eliminate loss and provide for a reasonable profit. Such normal value calculations shall be based on available information.

5. In the case of imports from non-market economy countries and, in particular, those to which Regulations (EEC) No 1765/82 (1) and (EEC) No 1766/82 (2) apply, normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(a) the price at which the like product of a market economy third country is actually sold:

(i) for consumption on the domestic market of that country; or

(ii) to other countries, including the Community;

or

(1) OJ No L 195, 5. 7. 1982, p. 1.
(2) OJ No L 195, 5. 7. 1982, p. 21.

(b) the constructed value of the like product in a market economy third country;

(c) if neither price nor constructed value as established under (a) or (b) provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin.

6. Where a product is not imported directly from the country of origin but is exported to the Community from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the domestic market of either the country of export or the country of origin. The latter basis might be appropriate *inter alia*, where the product is merely transhipped through the country of export, where such products are not produced in the country of export or where no comparable price for it exists in the country of export.

7. For the purpose of determining normal value transactions between parties which appear to be associated or to have a compensatory arrangement with each other may be considered as not being in the ordinary course of trade unless the Community authorities are satisfied that the prices and costs involved are comparable to those involved in transactions between parties which have no such link.

C. EXPORT PRICE

8. (a) The export price shall be the price actually paid or payable for the product sold for export to the Community net of all taxes, discounts and rebates actually granted and directly related to the sales under consideration. Deferred discounts shall also be taken into consideration if they are actually granted and directly related to the sales under consideration.

(b) In cases where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party, or that for other reasons the price actually paid or payable for the product sold for export to the Community is unreliable, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer, or if the product is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis. In such cases, allowance shall be made for all costs incurred between importation and resale and for a reasonable profit margin. These costs shall include those normally borne by an importer but paid by any party either in or outside the Community which appears to be associated or to have a compensatory arrangement with the importer or exporter.

Such allowances shall include, in particular, the following:

(i) usual transport, insurance, handling, loading and ancillary costs;

(ii) customs duties,any anti-dumping duties and other taxes payable in the importing country by reason of the importation or sale of the goods;

(iii) a reasonable margin for overheads and profit and/or any commission usually paid or agreed.

D. COMPARISON

9. (a) The normal value, as established under paragraphs 3 to 7, and the export price, as established under paragraph 8, shall be compared as nearly as possible at the same time. For the purpose of ensuring a fair comparison, due allowance in the form of adjustments shall be made in each case, on its merits, for the differences affecting price comparability, i. e. for differences in:

(i) physical characteristics;

(ii) import charges and indirect taxes;

(iii) selling expenses resulting from sales made:

— at different levels of trade, or

— in different quantities, or

— under different conditions and terms of sale.

(b) Where an interested party claims an adjustment it must prove that its claim is justified.

10. Any adjustments to take account of the differences affecting price comparability listed in paragraph 9 (a) shall, where warranted, be made pursuant to the rules specified below.

(a) *Physical characteristics:*

The normal value as established under paragraphs 3 to 7 shall be adjusted by an amount corresponding to a reasonable estimate of the value of the difference in the physical characteristics of the product concerned.

(b) *Import charges and indirect taxes:*

Normal value shall be reduced by an amount corresponding to any import charges or indirect taxes,

as defined in the notes to the Annex, borne by the like product and by materials physically incorporated therein, when destined for consumption in the country of origin or export and not collected or refunded in respect of the product exported to the Community.

(c) *Selling expenses* (i. e.):

(i) Transport, insurance, handling, loading and ancillary costs:

Normal value shall be reduced by the directly related costs incurred for conveying the product concerned from the premises of the exporter to the first independent buyer. The export price shall be reduced by any directly related costs incurred by the exporter for conveying the product concerned from its premises in the exporting country to its destination in the Community. In both cases these costs comprise transport, insurance, handling, loading and ancillary costs.

(ii) Packing:

Normal value and export price shall be reduced by the respective, directly related costs of the packing for the product concerned.

(iii) Credit:

Normal value and export price shall be reduced by the cost of any credit granted for the sales under consideration.

The amount of the reduction shall be calculated by reference to the normal commercial credit rate applicable in the country of origin or export in respect of the currency expressed on the invoice.

(iv) Warranties, guarantees, technical assistance and other after-sales services:

Normal value and export price shall be reduced by an amount corresponding to the direct costs of providing warranties, guarantees, technical assistance and services.

(v) Other selling expenses:

Normal value and export price shall be reduced by an amount corresponding to the commissions paid in respect of the sales under consideration. The salaries paid to salesmen, i. e. personnel wholly engaged in direct selling activities, shall also be deducted.

(d) *Amount of the adjustment*

The amount of any adjustment shall be calculated on the basis of relevant data for the investigation period or the data for the last available financial year.

(e) *Insignificant adjustments:*

Claims for adjustments which are insignificant in relation to the price or value of the affected transactions shall be disregarded. Ordinarily, individual adjustments having an *ad valorem* effect of less than 0,5 % of that price or value shall be considered insignificant.

E. ALLOCATION OF COSTS

11. In general, all cost calculations shall be based on available accounting data, normally allocated, where necessary, in proportion to the turnover for each product and market under consideration.

F. LIKE PRODUCT

12. For the purposes of this Regulation, 'like product' means a product which is identical, i. e., alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration.

G. AVERAGING AND SAMPLING TECHNIQUES

13. Where prices vary:

— normal value shall normally be established on a weighted average basis,

— export prices shall normally be compared with the normal value on a transaction-by-transaction basis except where the use of weighted averages would not materially affect the results of the investigation,

— sampling techniques, e. g. the use of the most frequently occurring or respresentative prices may be applied to establish normal value and export prices in cases in which a significant volume of transactions is involved.

H. DUMPING MARGIN

14. (a) 'Dumping margin' means the amount by which the normal value exceeds the export price.

(b) Where dumping margins vary, weighted averages may be established.

Article 3

Subsidies

1. A countervailing duty may be imposed for the purpose of offsetting any subsidy bestowed, directly or indirectly, in the country of origin or export, upon the manufacture, production, export or transport of any product whose release for free circulation in the Community causes injury.

2. Subsidies bestowed on exports include, but are not limited to, the practices listed in the Annex.

3. The exemption of a product from import charges or indirect taxes, as defined in the notes to the Annex, effectively borne by the like product and by materials physically incorporated therein, when destined for consumption in the country of origin or export, or the refund of such charges or taxes, shall not be considered as a subsidy for the purposes of this Regulation.

4. (a) The amount of the subsidy shall be determined per unit of the subsidized product exported to the Community.

(b) In establishing the amount of any subsidy the following elements shall be deducted from the total subsidy:

(i) any application fee, or other costs necessarily incurred in order to qualify for, or receive benefit of, the subsidy;

(ii) export taxes, duties or other charges levied on the export of the product to the Community specifically intended to offset the subsidy.

Where an interested party claims a deduction, it must prove that the claim is justified.

(c) Where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount shall be determined by allocating the value of the subsidy, as appropriate, over the level of production or exports of the products concerned during a suitable period. Normally this period shall be the accounting year of the beneficiary.

Where the subsidy is based upon the acquisition or future acquisition of fixed assets, the value of the subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned. Where the assets are non-depreciating, the subsidy shall be valued as an interest-free loan.

(d) In the case of imports from non-market economy countries and in particular those to which Regulations (EEC) No 1765/82 and (EEC) No 1766/82 apply, the amount of any subsidy may be determined in an appropriate and not unreasonable manner, by comparing the export price as calculated in accordance with Article 2 (8) with the normal value as determined in accordance with Article 2 (5). Article 2 (10) shall apply to such a comparison.

(e) Where the amount of subsidization varies, weighted averages may be established.

Article 4

Injury

1. A determination of injury shall be made only if the dumped or subsidized imports are, through the effects of dumping or subsidization, causing injury i.e., causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry. Injuries caused by other factors, such as volume and prices of imports which are not dumped or subsidized, or contraction in demand, which, individually or in combination, also adversely affect the Community industry must not be attributed to the dumped or subsidized imports.

2. An examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

(a) volume of dumped or subsidized imports, in particular whether there has been a significant increase, either in absolute terms or relative to production or consumption in the Community;

(b) the prices of dumped or subsidized imports, in particular whether there has been a significant price undercutting as compared with the price of a like product in the Community;

(c) the consequent impact on the industry concerned as indicated by actual or potential trends in the relevant economic factors such as:

— production,

— utilization of capacity,

— stocks,

— sales,

— market share,

— prices (i.e., depression of prices or prevention of price increases which otherwise would have occurred),

— profits,

— return on investment,

— cash flow,

— employment.

3. A determination of threat of injury may only be made where a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as:

(a) rate of increase of the dumped or subsidized exports to the Community;

(b) export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community;

(c) the nature of any subsidy and the trade effects likely to arise therefrom.

4. The effect of the dumped or subsidized imports shall be assessed in relation to the Community production of the like product when available data permit its separate identification. When the Community production of the like product has no separate identity, the effect of the dumped or subsidized imports shall be assessed in relation to the production of the narrowest group or range of production which includes the like product for which the necessary information can be found.

5. The term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like product or to those of them whose collective output of the products constitutes a major proportion of the total Community production of those products except that:

— when producers are related to the exporters or importers or are themselves importers of the allegedly dumped or subsidized product the term 'Community industry' may be interpreted as referring to the rest of the producers;

— in exceptional circumstances the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a Community industry if,

(a) the producers within such market sell all or almost all their production of the product in question in that market, and

(b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community.

In such circumstances injury may be found to exist even where a major proportion of the total Community industry is not injured, provided there is a concentration of dumped or subsidized imports into such an isolated market and provided further that the dumped or subsidized imports are causing injury to the producers of all or almost all of the production within such market.

Article 5

Complaint

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint.

2. The complaint shall contain sufficient evidence of the existence of dumping or subsidization and the injury resulting therefrom.

3. The complaint may be submitted to the Commission, or a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives.

4. The complaint may be withdrawn, in which case proceedings may be terminated unless such termination would not be in the interest of the Community.

5. Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.

6. Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of dumping or subsidization and of injury resulting therefrom for a Community industry, it shall immediately communicate such evidence to the Commission.

Article 6

Consultations

1. Any consultations provided for in this Regulation shall take place within an Advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately on request by a Member State or on the initiative of the Commission.

2. The Committee shall meet when convened by its chairman. He shall provide the Member States, as promptly as possible, with all relevant information.

3. Where necessary, consultation may be in writing only; in such case the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation.

4. Consultation shall in particular cover:

(a) the existence of dumping or of a subsidy and the methods of establishing the dumping margin or the amount of the subsidy;

(b) the existence and extent of injury;

(c) the causal link between the dumped or subsidized imports and injury;

(d) the measures which, in the circumstances, are appropriate to prevent or remedy the injury caused by dumping or the subsidy and the ways and means for putting such measures into effect.

Article 7

Initiation and subsequent investigation

1. Where, after consultation it is apparent that there is sufficient evidence to justify initiating a proceeding the Commission shall immediately:

(a) announce the initiation of a proceeding in the *Official Journal of the European Communities;* such announcements shall indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with paragraph 5;

(b) so advise the exporters and importers known to the Commission to be concerned as well as representatives of the exporting country and the complainants;

(c) commence the investigation at Community level, acting in cooperation with the Member States; such investigation shall cover both dumping or subsidization and injury resulting therefrom and shall be carried out in accordance with paragraphs 2 to 8; the investigation of dumping or subsidization shall normally cover a period of not less than six months immediately prior to the initiation of the proceeding.

2. (a) The Commission shall seek all information it deems to be necessary and, where it considers it appropriate, examine and verify the records of importers, exporters, traders, agents, producers, trade associations and organizations.

(b) Where necessary the Commission shall carry out investigations in third countries, provided that the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection. The Commission shall be assisted by officials of those Member States who so request.

3. (a) The Commission may request Member States:

— to supply information,

— to carry out all necessary checks and inspections, particularly amongst importers, traders and Community producers,

— to carry out investigations in third countries, provided the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection.

(b) Member States shall take whatever steps are necessary in order to give effect to requests from the Commission. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out.

(c) Where this information is of general interest or where its transmission has been requested by a Member State, the Commission shall forward it to the Member States, provided it is not confidential, in which case a non-confidential summary shall be forwarded.

(d) Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.

4. (a) The complainant and the importers and exporters known to be concerned, as well as the representatives of the exporting country, may inspect all information made available to the Commission by any party to an investigation as distinct from internal documents prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. To this end, they shall address a written request to the Commission indicating the information required.

(b) Exporters and importers of the product subject to investigation and, in the case of subsidization, the representatives of the country of origin, may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties or the definitive collection of amounts secured by way of a provisional duty.

(c) (i) requests for information pursuant to (b) shall:

(aa) be addressed to the Commission in writing,

(bb) specify the particular issues on which information is sought,

(cc) be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty;

(ii) the information may be given either orally or in writing as considered appropriate by the Commission. It shall not prejudice any subsequent decision which may be taken by the Commission or the Council. Confidential information shall be treated in accordance with Article 8;

(iii) information shall normally be given no later than 15 days prior to the submission by the

Commission of any proposal for final action pursuant to Article 12. Representations made after the information is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.

5. The Commission may hear the interested parties. It shall so hear them if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard orally.

6. Furthermore the Commission shall, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and any rebuttal argument put forward. In providing this opportunity the Commission shall take account of the need to preserve confidentiality and of the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

7. (a) This Article shall not preclude the Community authorities from reaching preliminary determinations or from applying provisional measures expeditiously.

(b) In cases in which any interested party or third country refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation, preliminary or final findings, affirmative or negative, may be made on the basis of the facts available. Where the Commission finds that any interested party or third country has supplied it with false or misleading information, it may disregard any such information and disallow any claim to which this refers.

8. Anti-dumping or countervailing proceedings shall not constitute a bar to customs clearance of the product concerned.

9. (a) An investigation shall be concluded either by its termination or by definitive action. Conclusion should normally take place within one year of the initiation of the proceeding.

(b) A proceeding shall be concluded either by the termination of the investigation without the imposition of duties and without the acceptance of undertakings or by the expiry or repeal of such duties or by the termination of undertakings in accordance with Articles 14 or 15.

Article 8

Confidentiality

1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.

2. (a) Neither the Council, nor the Commission, nor Member States, nor the officials of any of these, shall reveal any information received pursuant to this Regulation for which confidential treatment has been requested by its supplier, without specific permission from the supplier.

(b) Each request for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary.

3. Information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.

4. However, if it appears that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded.

The information may also be disregarded where such request is warranted and where the supplier is unwilling to submit a non-confidential summary, provided that the information is susceptible of such summary.

5. This Article shall not preclude the disclosure of general information by the Community authorities and in particular of the reasons on which decisions taken pursuant to this Regulation are based, or disclosure of the evidence relied on by the Community authorities in so far as necessary to explain those reasons in court proceedings. Such disclosure must take into account the legitimate interest of the parties concerned that their business secrets should not be divulged.

Article 9

Termination of proceedings where protective measures are unnecessary

1. If it becomes apparent after consultation that protective measures are unnecessary, then, where no objection is raised within the Advisory Committee referred to

in Article 6 (1), the proceeding shall be terminated. In all other cases the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the proceeding be terminated. The proceeding shall stand terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

2. The Commission shall inform any representatives of the country of origin or export and the parties known to be concerned and shall announce the termination in the *Official Journal of the European Communities*, setting forth its basic conclusions and a summary of the reasons therefor.

Article 10

Undertakings

1. Where, during the course of an investigation, undertakings are offered which the Commission, after consultation, considers acceptable, the investigation may be terminated without the imposition of provisional or definitive duties.

Save in exceptional circumstances, undertakings may not be offered later than the end of the period during which representations may be made under Article 7 (4) (c) (iii). The termination shall be decided in conformity with the procedure laid down in Article 9 (1) and information shall be given and notice published in accordance with Article 9 (2). Such termination does not preclude the definitive collection of amounts secured by way of provisional duties pursuant to Article 12 (2).

2. The undertakings referred to under paragraph 1 are those under which:

(a) the subsidy is eliminated or limited, or other measures concerning its injurious effects taken, by the government of the country of origin or export; or

(b) prices are revised or exports cease to the extent that the Commission is satisfied that either the dumping margin or the amount of the subsidy, or the injurious effects thereof, are eliminated. In case of subsidization the consent of the country of origin or export shall be obtained.

3. Undertakings may be suggested by the Commission, but the fact that such undertakings are not offered or an invitation to do so is not accepted, shall not prejudice consideration of the case. However, the continuation of dumped or subsidized imports may be taken as evidence that a threat of injury is more likely to be realized.

4. If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the Commission, after consultation, so decides or if request is made, in the case of dumping, by exporters representing a significant percentage of the trade involved or, in the case of subsidization, by the country of origin or export. In such a case, if the Commission, after consultation, makes a determination of no injury, the undertaking shall automatically lapse. However, where a determination of no threat of injury is due mainly to the existence of an undertaking, the Commission may require that the undertaking be maintained.

5. The Commission may require any party from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertaking.

6. Where an undertaking has been withdrawn or where the Commission has reason to believe that it has been violated and where Community interests call for such intervention, it may, after consultations and after having offered the exporter concerned an opportunity to comment, apply provisional anti-dumping or countervailing duties forthwith on the basis of the facts established before the acceptance of the undertaking.

Article 11

Provisional duties

1. Where preliminary examination shows that dumping or a subsidy exists and that there is sufficient evidence of injury caused thereby and the interests of the Community call for intervention to prevent injury being caused during the proceeding, the Commission, acting at the request of a Member State or on its own initiative, shall impose a provisional anti-dumping or countervailing duty. In such cases, release of the products concerned for free circulation in the Community shall be conditional upon the provision of security for the amount of the provisional duty, definitive collection of which shall be determined by the subsequent decision of the Council under Article 12 (2).

2. The Commission shall take such provisional action after consultation or, in cases of extreme urgency, after informing the Member States. In this latter case, consultations shall take place 10 days at the latest after notification to the Member States of the action taken by the Commission.

3. Where a Member State requests immediate intervention by the Commission, the Commission shall within a maximum of five working days of receipt of the request, decide whether a provisional anti-dumping or countervailing duty should be imposed.

4. The Commission shall forthwith inform the Council and the Member States of any decision taken under this Article. The Council, acting by a qualified majority, may decide differently. A decision by the Commission not to impose a provisional duty shall not preclude the imposition of such duty at a later date, either at the request of a Member State, if new factors arise, or on the initiative of the Commission.

5. Provisional duties shall have a maximum period of validity of four months. However, where exporters representing a significant percentage of the trade involved so request or, pursuant to a notice of intention from the Commission, do not object, provisional anti-dumping duties may be extended for a further period of two months.

6. Any proposal for definitive action, or for extension of provisional measures, shall be submitted to the Council by the Commission not later than one month before expiry of the period of validity of provisional duties. The Council shall act by a qualified majority.

7. After expiration of the period of validity of provisional duties, the security shall be released as promptly as possible to the extent that the Council has not decided to collect it definitively.

Article 12

Definitive action

1. Where the facts as 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, a definitive anti-dumping or countervailing duty shall be imposed by the Council, acting by qualified majority on a proposal submitted by the Commission after consultation.

2. (a) Where a provisional duty has been applied, the Council shall decide, irrespective of whether a definitive anti-dumping or countervailing duty is to be imposed, what proportion of the provisional duty is to be definitively collected. The Council shall act by a qualified majority on a proposal from the Commission.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there has been dumping or subsidization, and injury. For this purpose, 'injury' shall not include material retardation of the establishment of a Community industry, nor threat of material injury, except where it is found that this would, in the absence of provisional measures, have developed into material injury.

Article 13

General provisions on duties

1. Anti-dumping or countervailing duties, whether provisional or definitive, shall be imposed by Regulation.

2. Such Regulation shall indicate in particular the amount and type of duty imposed, the product covered, the country of origin or export, the name of the supplier, if practicable, and the reasons on which the Regulation is based.

3. The amount of such duties shall not exceed the dumping margin provisionally estimated or finally established or the amount of the subsidy provisionally estimated or finally established; it should be less if such lesser duty would be adequate to remove the injury.

4. (a) Anti-dumping and countervailing duties shall be neither imposed nor increased with retroactive effect. The obligation to pay the amount of these duties is incurred in accordance with Directive 79/623/EEC (1).

(b) However, where the Council determines:

(i) for dumped products:

— that there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and

— that the injury is caused by sporadic dumping i.e., massive dumped imports of a product in a relatively short period, to such an extent that, in order to preclude it recurring, it appears necessary to impose an anti-dumping duty retroactively on those imports;

or

(ii) for subsidized products:

— in critical circumstances that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from export subsidies paid or bestowed inconsistently with the provisions of the GATT and of the

(1) OJ No L 179, 17. 7. 1979, p. 31.

Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, and

— that it is necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on these imports;

or

(iii) for dumped or subsidized products:

— that an undertaking has been violated,

the definitive anti-dumping or countervailing duties may be imposed on products in relation to which the obligation to pay import duties under Directive 79/623/EEC has been or would have been incurred not more than 90 days prior to the date of application of provisional duties, except that in the case of violation of an undertaking such retroactive assessment shall not apply to imports which were released for free circulation in the Community before the violation.

5. Where a product is imported into the Community from more than one country, duty shall be levied at an appropriate amount on a non-discriminatory basis on all imports of such product found to be dumped or subsidized and causing injury, other than imports from those sources in respect of which undertakings have been accepted.

6. Where the Community industry has been interpreted as referring to the producers in a certain region; the Commission shall give exporters an opportunity to offer undertakings pursuant to Article 10 in respect of the region concerned. If an adequate undertaking is not given promptly or is not fulfilled, a provisional or definitive duty may be imposed in respect of the Community as a whole.

7. In the absence of any special provisions to the contrary adopted when a definitive or provisional anti-dumping or countervailing duty was imposed, the rules on the common definition of the concept of origin and the relevant common implementing provisions shall apply.

8. Anti-dumping or countervailing duties shall be collected by Member States in the form, at the rate and according to the other criteria laid down when the duties were imposed, and independently of the customs duties, taxes and other charges normally imposed on imports.

9. No product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from the granting of any subsidy.

10. (a) Definitive anti-dumping duties may be imposed, by way of derogation from the second sentence of paragraph 4 (a), on products that are introduced into the commerce of the Community after having been assembled or produced in the Community, provided that:

— assembly or production is carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to a definitive anti-dumping duty,

— the assembly or production operation was started or substantially increased after the opening of the anti-dumping investigation,

— the value of parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty exceeds the value of all other parts or materials used by at least 50%.

In applying this provision, account shall be taken of the circumstances of each case, and, *inter alia*, of the variable costs incurred in the assembly or production operation and of the research and development carried out and the technology applied within the Community.

In that event the Council shall, at the same time, decide that parts or materials suitable for use in the assembly or production of such products and originating in the country of exportation of the product subject to the anti-dumping duty can only be considered to be in free circulation in so far as they will not be used in an assembly or production operation as specified in the first subparagraph.

(b) Products thus assembled or produced shall be declared to the competent authorities before leaving the assembly or production plant for their introduction into the commerce of the Community. For the purposes of levying an anti-dumping duty, this declaration shall be considered to be equivalent to the declaration referred to in Article 2 of Directive 79/695/EEC (1).

(c) The rate of the anti-dumping duty shall be that applicable to the manufacturer in the country of origin of the like product subject to an anti-dumping duty to which the party in the Community carrying out the assembly or production is related or associated. The amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete product on the cif value of the parts or materials imported; it shall not exceed that required to prevent circumvention of the anti-dumping duty.

(d) The provisions of this Regulation concerning investigation, procedure, and undertakings apply to all questions arising under this paragraph.

(1) OJ No L 205, 13. 8. 1979, p. 19.

11. (a) Where the exporter bears the anti-dumping duty, an additional anti-dumping duty may be imposed to compensate for the amount borne by the exporter.

(b) When any party directly concerned submits sufficient evidence showing that the duty has been borne by the exporter, e.g. that the resale price to the first independent buyer of the product subject to the anti-dumping duty is not increased by an amount corresponding to the anti-dumping duty, the matter shall be investigated and the exporters and importers concerned shall be given an opportunity to comment.

Where it is found that the anti-dumping duty has been borne by the exporter, in whole or in part, either directly or indirectly and where Community interests call for intervention, an additional anti-dumping duty shall, after consultation, be imposed in accordance with the procedures laid down in Articles 11 and 12.

This duty may be applied retroactively. It may be imposed on products in relation to which the obligation to pay import duties under Directive 79/623/EEC has been incurred after the imposition of the definitive anti-dumping duty, except that such assessment shall not apply to imports which were released for free circulation in the Community before the exporter bore the anti-dumping duty.

(c) Insofar as the results of the investigation show that the absence of a price increase by an amount corresponding to the anti-dumping duty is not due to a reduction in the costs and/or profits of the importer for the product concerned then the absence of such price increase shall be considered as an indicator that the anti-dumping duty has been borne by the exporter.

(d) Article 7 (7) (b) applies within the context of investigations under this paragraph.

Article 14

Review

1. Regulations imposing anti-dumping or countervailing duties and decisions to accept undertakings shall be subject to review, in whole or in part, where warranted.

Such review may be held either at the request of a Member State or on the initiative of the Commission. A review shall also be held where an interested party so requests and submits evidence of changed circumstances sufficient to justify the need for such review, provided that at least one year has elapsed since the conclusion of the investigation. Such requests shall be addressed to the Commission which shall inform the Member States.

2. Where, after consultation, it becomes apparent that review is warranted, the investigation shall be re-opened in accordance with Article 7, where the circumstances so require. Such re-opening shall not *per se* affect the measures in operation.

3. Where warranted by the review, carried out either with or without re-opening of the investigation, the measures shall be amended, repealed or annulled by the Community institution competent for their introduction. However, where measures have been taken under the transitional provisions of an Act of Accession the Commission shall itself amend, repeal or annul them and shall report this to the Council; the latter may, acting by a qualified majority, decide that different action be taken.

Article 15

1. Subject to the provisions of paragraphs 3, 4 and 5, anti-dumping or countervailing duties and undertakings shall lapse after five years from the date on which they entered into force or were last modified or confirmed.

2. The Commission shall normally, after consultation and within six months prior to the end of the five year period, publish in the *Official Journal of the European Communities* a notice of the impending expiry of the measure in question and inform the Community industry known to be concerned. This notice shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with Article 7 (5).

3. Where an interested party shows that the expiry of the measure would lead again to injury or threat of injury, the Commission shall, after consultation, publish in the *Official Journal of the European Communities* a notice of its intention to carry out a review of the measure. Such notice shall be published prior to the end of the relevant five year period. The measure shall remain in force pending the outcome of this review.

However, where the initiation of the review has not been published within six months after the end of the relevant five year period the measure shall lapse at the end of that six month period.

4. Where a review of a measure under Article 14 is in progress at the end of the relevant five year period, the measure shall remain in force pending the outcome of such review. A notice to this effect shall be published in the *Official Journal of the European Communities* before the end of the relevant five year period.

5. Where anti-dumping or countervailing duties and undertakings lapse under this Article the Commission shall publish a notice to that effect in the *Official Journal of the European Communities*. Such notice shall state the date of expiry of the measure.

Article 16

Refund

1. Where an importer can show that the duty collected exceeds the actual dumping margin or the amount of the subsidy, consideration being given to any application of weighted averages, the excess amount shall be reimbursed. This amount shall be calculated in relation to the changes which have occurred in the dumping margin or the amount of the subsidy which were established in the original investigation for the shipments to the Community of the importer's supplier. All refund calculations shall be made in accordance with the provisions of Articles 2 or 3 and shall be based, as far as possible, on the same method applied in the original investigation, in particular, with regard to any application of averaging or sampling techniques.

2. In order to request the reimbursement referred to in paragraph 1, the importer shall submit an application to the Commission. The application shall be submitted via the Member State in the territory of which the products were released for free circulation and within three months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty.

The Member State shall forward the application to the Commission as soon as possible, either with or without an opinion as to its merits.

The Commission shall inform the other Member States forthwith and give its opinion on the matter. If the Member States agree with the opinion given by the Commission or do not object to it within one month of being informed, the Commission may decide in accordance with the said opinion.

In all other cases, the Commission shall, after consultation, decide whether and to what extent the application should be granted.

Article 17

Final provisions

This Regulation shall not preclude the application of:

1. any special rules laid down in agreements concluded between the Community and third countries;

2. the Community Regulations in the agricultural sector and of Regulation (EEC) No 1059/69 (1), (EEC) No 2730/75 (2); and (EEC) No 2783/75 (3); this Regulation shall operate by way of complement to those Regulations and in derogation from any provisions thereof which preclude the application of anti-dumping or countervailing duties;

3. special measures, provided that such action does not run counter to obligations under the GATT.

Article 18

Repeal of existing legislation

Regulation (EEC) No 2176/84 is hereby repealed.

References to the repealed Regulation shall be construed as references to this Regulation.

Article 19

Entry into force

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

It shall apply to proceedings already initiated.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 July 1988.

For the Council
The President
P. ROUMELIOTIS

(1) OJ No L 141, 12. 6. 1969, p. 1.
(2) OJ No L 281, 1. 11. 1975, p. 20.
(3) OJ No L 282, 1. 11. 1975, p. 104.

ANNEX

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises. Notwithstanding the foregoing, deferral of taxes and charges referred to above need not amount to an export subsidy where, for example, appropriate interest charges are collected.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption. The problem of the excessive remission of value added tax is exclusively covered by this paragraph.

(h) The exemption, remission or deferral or prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral or like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product. This paragraph does not apply to value added tax systems and border tax adjustments related thereto.

(i) The remission or drawback of import charges in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported good as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years. This paragraph does not apply to value added tax systems and border tax adjustments related thereto.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated at the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if the country of origin or export is a party to an international undertaking on official export credits to which at least 12 original signatories to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice the country of origin or export applies the interest rate provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the GATT.

Notes:

For the purposes of this Annex the following definitions apply:

1. The term 'direct taxes' shall mean taxes on wages, profits, interest, rents, royalties, and all other forms of income, and taxes on the ownership of real property.

2. The term 'import charges' shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in these notes that are levied on imports.

3. The term 'indirect taxes' shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges.

4. 'Prior stage' indirect taxes are those levied on goods or services used directly or indirectly in making the product.

5. 'Cumulative' indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production.

6. 'Remission' of taxes includes the refund or rebate of taxes.

Appendix 2

The following list shows all undertakings concluded between 1985 and 1987, in order of appearance in the Official Journal:

1985

1. Copper Sulphate Case (Poland), EEC Comm'n Decision 85/104 (O.J. 1985, L41/13).
2. Plasterboard Case (Spain), EEC Comm'n Decision 85/209 (O.J. 1985, L89/69).
3. Corner Fittings Case (Austria), EEC Comm'n Decision 85/443 (O.J. 1985, L256/44).
4. Bicycle Chains Case (USSR), EEC Comm'n Decision 85/542 (O.J. 1985, L339/63).

1986

1. Wooden Clogs Case (Sweden), EEC Comm'n Decision 86/21 (O.J. 1986, L32/28).
2. Bicycle Chains Case (PR China), EEC Comm'n Decision 86/33 (O.J. 1986, L40/27).
3. Fibre Board Case (Finland, Sweden), EEC Comm'n Decision 86/35 (O.J. 1986, L46/23).
4. Glass Case (Turkey, E. Europe), EEC Comm'n Decision 86/36 (O.J. 1986, L51/73).
5. Hardboard Case (Argentina), EEC Comm'n Decision 86/232 (O.J. 1986, L157/61).
6. Deep Freezers Case (E. Europe), EEC Comm'n Decision 2800/86 (O.J. 1986, L259/14).
7. Corundum Case (E. Europe), EEC Comm'n Decision 86/464 (O.J. 1986, L271/26).
8. Acrylic Fibres Case (Israel), EEC Comm'n Decision 86/468 (O.J. 1986, L272/29).
9. Electric Typewriters Case (Japan), EEC Comm'n Decision 86/490 (O.J. 1986, L283/25).
10. Silicon Carbide Case (PR China), EEC Comm'n Decision 86/497 (O.J. 1986, L287/25).
11. Potassium Permanganate Case (Czechoslovakia), EEC Comm'n Decision 86/589 (O.J. 1986, L371/84).

1987

1. Paint Brushes Case (PR China), EEC Comm'n Decision 87/104 (O.J. 1987, L48/45).
2. Photocopiers Case (Japan), EEC Comm'n Decision 87/135 (O.J. 1987, L54/86).
3. Outboard Motors Case (Japan), EEC Comm'n Decision 87/210 (O.J. 1987, L82/86).
4. Electric Motors Case (Rumania), EEC Comm'n Decision 87/215 (O.J. 1987, L88/53).
5. Cooper Sulphate Case (Poland, USSR), EEC Comm'n Decision 87/443 (O.J. 1987, L235/22).
6. Urea Case (Czechoslovakia), EEC Comm'n Decision 87/3339 (O.J. 1987, L317/1).