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The Rights of Private Parties: Procedure and Review Under the Antidumping Legislation of the European Economic Community and the United States

by Nerys A. Jefford*

I. INTRODUCTION

The treaty establishing the European Economic Community (EEC, Community) envisioned a community encompassing a customs union, and the free movement of labor, goods, and capital. It also established a number of common policies, including the common commercial policy governing the Member States' external trade relations. A general aim of the union, declared in Article 110 of the EEC Treaty, is to contribute to free international trade.¹ Article 113 states more specifically:

After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the case of dumping or subsidies.²

In the area of dumping and subsidization, the Community has had a coherent policy since 1968, when the Council³ adopted Regulation (EEC) 459/68,⁴ drafted to accord with the Agreement on the Implementation of Article VI of the

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¹ Treaty Establishing the European Economic Community, *done at Rome*, March 25, 1957, 298 U.N.T.S. 3, art. 110 [hereinafter Treaty of Rome or EEC Treaty].

² *Id.* at art. 113.

³ The institutions of the Community are the Council, the Commission, the Court of Justice and the Assembly or European Parliament. *Id.* at art. 4. A common procedure is for the Council to adopt legislative acts, acting on a recommendation from the Commission.

⁴ O.J. EUR. COMM. Special Edition (No. L 93) 1 (1968).

General Agreement on Tariffs and Trade (GATT)⁵ reached at the Kennedy Round of GATT negotiations (1964–67). Following the Tokyo Round (1973–79), the Commission signed the final package of Agreements on behalf of the Communities on December 17, 1979, and on December 20, 1979, the Council amended the rules on antidumping to take account of these new international commitments.⁶ Regulation (EEC) 3017/79 was subsequently amended⁷ and the current controlling legislation is Council Regulation No. 2176/84.⁸

Although low price imports can cause substantial and irreparable damage to domestic industries, Article VI of the GATT does not contemplate a prohibition of such competitive, free trade practices. Rather it condemns certain *unfair* trade practices.⁹ Thus, the EEC permits an antidumping duty to be applied “to any dumped product whose release for free circulation in the Community causes injury.”¹⁰ Any 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.”¹¹

Commentators maintain that the availability of these duties should not encourage the Community to blame all of its ills on low-priced imports and to penalize exporters indiscriminately and illegitimately. Mr. Haferkamp, a Vice President of the Commission, has said that dumping provisions are subject to legal rules: “We have observed these and shall continue to observe them and we cannot stick the dumping label on everything we find inconvenient. We cannot fish the dumping label out of the drawer whenever competition gets awkward.”¹² In contrast, however, Mr. Ivo van Bael, a Belgian practitioner in the area, has commented that where the common commercial policy is concerned, he “would only change the word ‘policy’ into ‘politics.’”¹³

What is clear is that in an area that is so politically volatile and so full of potential abuse, there is a strong need for a fair and reasonable procedure controlling the imposition of duties, with ready opportunities for review, both

⁵ GATT Doc. MTN/NTM/W/232, *reprinted in*, H.R. Doc. No. 153, 311, 96th Cong., 1st Sess. 257 (1979).

⁶ 22 O.J. EUR. COMM. (No. L 339) 1 (1979).

⁷ Regulation No. 1580/82, 25 O.J. EUR. COMM. (No. L 178) 9 (1982).

⁸ 27 O.J. EUR. COMM. (No. L 201) 1 (1984) [hereinafter Antidumping Regulation]; *See also* 17 EUR. COMM. BULL. (No. 5) 74, pt. 2.2.7 (1984) for legislative history of this regulation.

⁹ The General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, EEC, art. VI, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 180.

¹⁰ Antidumping Regulation, *supra* note 8, at art. 2(A)(1). In compliance with article VI of the GATT, “causing injury” is defined in article 4 of the regulation as “causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry.” *Id.* at art. 4(1).

¹¹ *Id.* at art. 2(A)(2).

¹² *Remarks of Vice President Haferkamp*, 21 O.J. EUR. COMM. (No. 229) 46 (1978)(Debates of European Parliament).

¹³ Oldekop & van Bael, *European Antidumping Law and Procedure*, 1 MICH. Y.B. INT’L LEGAL STUDIES 237 (Jackson ed. 1979).

at the administrative and at the judicial level. This is acknowledged in the preamble to the Antidumping Regulation which includes the following recitations:

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 appropriate to provide for open and fair procedures for the review of measures taken, and for the investigation to be reopened when the circumstances so require.¹⁴

This Article is concerned specifically with the procedural aspects of the Community's antidumping regime. The author addresses only the European Economic Community, and not the European Coal and Steel Community; the article is written for an audience with a minimal understanding of the structure and legal nature of the Community. Consequently, to highlight the points made, comparisons will be drawn with the U.S. position on the same issues.

This Article examines the complaint and investigative process and the provisions for review by the institutions of the Community, open to exporters, importers, Community producers, and other affected groups within the Community.

The Author's approach is a practical one, pointing out the stages of antidumping proceedings when review might be desirable and examining potential grounds for review. The Article also addresses the particularly thorny problems of admissibility. While the subject matter is of considerable importance to the trade groups involved, until recently little was written on this particular aspect of the EEC's antidumping provisions. This may be explained by the fact that judicial review involves the application of general principles to a specific piece of legislation. This Article suggests, however, that the European Court of Justice is beginning to recognize some of the distinctive features of antidumping proceedings and to modify its approach accordingly. This Article shows why such tendencies are wholly supportable and is, therefore, a speculative treatment of the area. Antidumping procedure and review is still a developing field for the Community and for the Court; indeed, the ramifications of recent cases remain largely undetermined.

¹⁴ Antidumping Regulation, *supra* note 8.

II. ANTIDUMPING PROCEEDINGS

The relevant procedure for seeking action against dumping and subsequent courses of action available to the Community are set forth in Articles 5 to 13 of the 1984 Regulation.¹⁵ Investigation of a complaint is undertaken by the Commission, which then makes recommendations to the Council. The Council formally decides on the final course of action, but always follows the Commission's recommendations.

A complaint may be lodged, in writing, with the Commission or a Member State by "[a]ny 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 . . . imports."¹⁶ Community industry generally means the producers, as a whole, of the product which is like that being dumped,¹⁷ or those producers whose output constitutes a major percentage of the total Community production. Exceptions are provided when there is a special relationship between the exporter and the Community producer and where market conditions are such that the effect on producers in a discrete regional area should be considered.¹⁸

The complaint must contain sufficient evidence both of dumping and of injury before the Commission is obligated to undertake an investigation. In practice, the Commission uses a questionnaire to help complainants provide the appropriate information.¹⁹ The meaning of sufficient evidence, however, is unclear. It would not appear to be a standard of proof beyond all reasonable doubt; it may not even mean proof on the balance of probabilities, but simply that there must be *some* reasonable evidence to support the complaint.

Upon receipt of the complaint, the Commission will undertake a preliminary investigation and at this stage is required²⁰ to hold consultations on relevant issues such as the existence of dumping, or injury and of the causal connection between the two.²¹ Once the Commission has reached a conclusion as to whether

¹⁵ *Id.* at arts. 5-13.

¹⁶ *Id.* at art. 5.

¹⁷ *Id.* at art. 2(F)(12).

¹⁸ *Id.* at art. 4(5).

¹⁹ CUNNANE & STANBROOK, *DUMPING AND SUBSIDIES: THE LAW AND PROCEDURE GOVERNING THE IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES IN THE EUROPEAN COMMUNITY* 78 (1983). See also Vermulst, *Dumping in the United States and the European Community: A Comparative Analysis*, *LEGAL ISSUES IN EUR. INTEGRATION* 103, 119-23 (1984).

²⁰ This is not clear from the Regulation. Rather it appears that the Commission is not actually required to do anything, however, before it can decide whether or not there is sufficient evidence, it must consult within an Advisory Committee. Antidumping Regulation, *supra* note 8, at arts. 5(5) and 7(1). See *e.g.*, *id.* at art. 5(5) which provides: "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" (emphasis added). *Id.* at art. 5(5).

²¹ The Advisory Committee consists of representatives of Member States. Antidumping Regulation, *supra* note 8, at art. 6(1).

there is sufficient evidence of injurious dumping, the Regulation requires the Commission either to initiate a proceeding or to inform the complainant that there is insufficient evidence.²² This mandatory action is, however, conditioned on whether the Commission finds the evidence sufficient. The important issue is, therefore, the scope of the Commission's discretion in this determination. Since there are relatively precise definitions of dumping and injury, it would seem that there are limits analogous to those in the administrative law context.

Whether it is possible for either side to challenge the Commission's determination will be considered in Part IV of this Article. One of the problems with such a review is simply the lack of a requirement that the Commission provide any form of explanation for its decision. Without any such explanation, the parties cannot know on what grounds the Commission reached its decision. It is then impossible for the parties to argue that the Commission reached its decision improperly.

The term "decision" is used here loosely. It, like "regulation," has a precise legal meaning, with legal implications under Article 189 of the Treaty of Rome.²³ Again, in Part IV of this Article the relevance of these distinctions to the admissibility of an action by a private party will be examined closely.

The European Parliament also commented on the lack of information about the Commission's decisions in its Resolution on the Community's antidumping activities in 1981.²⁴ Upon the request of the Parliament, the Commission published its first annual report on the Community's antidumping activities in 1983.²⁵ The Commission reported:

In order to achieve as great a degree of transparency as possible in its procedures, it is the Commission's practice to publish full details of the allegations of dumping, or subsidisation and injury contained in the complaint. These are given in the notices of *initiation* which are published in the Official Journal. Similarly, the Decisions [and] Regulations . . . which terminated the investigations set out all the issues of fact and law which were considered to be material in the investigation and give full reasons for the action taken. These instruments are also published in the Official Journal (emphasis added).²⁶

This practice is of no use to the complainant who wishes to challenge the decision not to proceed. There is still no obligation on the Commission to give

²² *Id.* at art. 7(1).

²³ EEC Treaty, *supra* note 1, at arts. 189 and 190.

²⁴ 24 O.J. EUR. COMM. (No. C 11) 39 (1981).

²⁵ *First Annual Report of the Commission of the European Communities to the European Communities on the Community's Anti-dumping and Anti-subsidy Activities, 1982-1983* EUR. PARL. DOC. (COM No. 519) 2 (1983) [hereinafter *First Annual Report*].

²⁶ *Id.* at 1.

reasons for a decision not to investigate a complaint. The Commission need only state that there is insufficient evidence.²⁷

The Commission must announce any proceeding it initiates in the Official Journal of the European Communities and must state the period within which interested parties may make known their views in writing and apply to be heard.²⁸ The Commission should also advise exporters, importers, representatives of the exporting country and the complainants of the proceeding.²⁹ It shall then "seek all information it deems to be necessary," which may include information from investigations in Member States and third countries.³⁰ Exporters, importers and complainants have broad access to information made available to the Commission by a party to an investigation, but there is an equally broad exception for "internal documents prepared by the authorities of the Community or its Member States."³¹ These internal documents contain the very information to which all the parties will most want access, for these documents will indicate how and on what grounds the Commission intends to act and will best enable the parties to defend their interests.

Disclosure may also be denied on the grounds of confidentiality.³² Article 8 encourages the supplier to provide a nonconfidential summary but provides generally that "information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier . . ."³³ In *Timex Corp. v. The Council and Commission (Timex)*,³⁴ however, the Court made clear that confidentiality must be balanced against the interest of manufacturers and traders in presenting their case.³⁵ The Commission shall, if necessary, decide on an appropriate means of providing information sufficient to enable the applicant to defend his interests.³⁶

Exporters and importers "may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the

²⁷ *But see* text accompanying notes 94-95.

²⁸ Antidumping Regulation, *supra* note 8, at art. 7(1)(a).

²⁹ *Id.* at art. 7(1)(b).

³⁰ *Id.* at arts. 7(2) and 7(3).

³¹ *Id.* at art. 7(4)(a). This provision has been held to include not only parties subject to investigation but also parties whose information has been used as part of the investigation. *See Timex Corp. v. E.C. Council and Commission*, 44 Common Mkt. L.R. 550, 557-61 (1985), where information from other foreign undertakings had been used to calculate normal value.

³² Antidumping Regulation, *supra* note 8, at art. 8.

³³ *Id.* at art 8(3).

³⁴ *Timex*, *supra* note 31.

³⁵ Compare the emphasis of the Court under protection of business secrets in a recent competition case, *ECS/Akzo Chemic*, 28 O.J. EUR. COMM. (No. L 374) 1, 47 Common Mkt. L.R. 273 (1985), where the Court stated that: "[h]aving regard to the extremely serious damage which could result from improper communication of documents to a competitor, the Commission must, before implementing its decision, give the undertaking an opportunity to bring an action before the Court."

³⁶ *Timex*, *supra* note 31, at 570.

imposition of definitive duties or the definitive collection of amounts secured by way of a provisional duty.³⁷ This section implies, however, that even these parties are not entitled to be informed of the Commission's reasoning until after the decision has been made. The Commission can, moreover, set a time limit of not less than 10 days within which exporters' and importers' representations may then be received.³⁸ Thus, one Commentator explains that: "the Commission has had the advantage of a period of about one year for the preparation of its file . . . while the accused parties have to verify the Commission's calculations and answer to the accusations within ten days."³⁹

Precisely the same critical lack of information on the Community's position arises in the context of hearings⁴⁰ and the meeting which the Commission shall, on request, arrange for the parties *directly concerned* "so that opposing views may be presented and any rebuttal argument put forward."⁴¹

The meeting provided for parties directly concerned in the controversy leads to a further problem rooted in the variation in terminology in Article 7. The Article also refers to "interested parties,"⁴² and "any party to an investigation."⁴³ The parties directly concerned are presumably those specifically mentioned elsewhere in the Article: exporters, importers, complainants and, perhaps, representatives of the exporting nation. The two former terms, by contrast, seem broad enough to include other parties potentially affected by the result of the proceedings. Examples include trade unions and regional political organizations, from both the exporting and importing nations, and Community consumer and upstream manufacturers groups. Not only are such groups excluded from the confrontational meeting, they are given no right of access to general information.⁴⁴ Furthermore, these groups have no right to be informed of the Commission's reasons for the decision it makes. The exclusion of these groups may be criticized on grounds of procedural fairness. The exclusion is also inconsistent with the Commission's obligation to consider the interests of the Community, in addition to considering the existence of dumping and injury caused thereby, in deciding whether to apply a provisional or definitive anti-dumping duty.⁴⁵

³⁷ Antidumping Regulation, *supra* note 8, at art. 7(4)(b).

³⁸ *Id.* at art. 7(4)(c)(iii).

³⁹ Didier, *EEC Antidumping Rules and Practices*, 17 COMMON MKT. L. REV. 349, 364 (1980).

⁴⁰ Antidumping Regulation, *supra* note 8, at art. 7(5).

⁴¹ *Id.* at art. 7(6).

⁴² *Id.* at arts. 7(1)(a) and 7(5).

⁴³ *Id.* at art. 7(4)(a).

⁴⁴ *Id.*

⁴⁵ *Id.* at arts. 11 and 12. The extent to which "community interests" are considered in practice is almost impossible to judge. In the *Ferrochrome* case involving imports from Sweden and South Africa, there was apparently convincing evidence of both dumping and injury, but the Commission's reaction was limited by the interests of the Community steel industry, as a consumer of ferrochromium. 21

Imposing a definitive antidumping duty is one of three options open to the Commission at the conclusion of an investigation.⁴⁶ First, if protective measures are unnecessary, the Commission may, subject to certain controls, simply terminate the proceeding.⁴⁷ If it does so, Article 9(2) provides that: "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."⁴⁸

A second option, under Article 10, is for the Commission to accept a promise, known as an undertaking, by the exporter to revise prices or regulate exports so that either the dumping margin or the injury is eliminated. Undertakings have to be *offered* no later than the end of the period during which representations can be made under Article 7(4)(c)(iii). It is the Commission's practice to *accept* undertakings only after a final determination has been made as to the existence of injurious dumping.⁴⁹ The acceptance of undertakings has proved to be the primary method of settling antidumping proceedings because "it is often found that undertakings prove to be more flexible than duties as a means of eliminating the injury caused by dumping . . ."⁵⁰ If preliminary examination indicates that dumping and injury exist and it is in the interests of the Community to intervene to prevent injury during the proceeding, the Commission shall impose a provisional antidumping duty.⁵¹ If the Commission establishes that there is dumping and consequent injury and the interests of the Community call for intervention, "a definitive antidumping . . . duty shall be imposed by the Council, acting . . . on a proposal submitted by the Commission after consultation."⁵² The Council may decide to collect the provisional duty regardless of whether a definitive duty is imposed. A provisional duty may be collected where dumping and injury have occurred but the interests of the Community weigh

O.J. EUR. COMM. (No. C 90) 3 (1978); 21 O.J. EUR. COMM. (No. L 165) 20 (1978); 21 O.J. EUR. COMM. (No. C 232) 3 (1978). See CUNNANE & STANBROOK *supra* note 19, at 73-74.

On the other hand, in replying to a question in the European Parliament, the Commission said: "nor is it the practice to refuse to impose anti-dumping duties where the facts as finally established show that dumping and material injury have occurred." 20 O.J. EUR. COMM. (No. C 214) 5 (1977).

⁴⁶ Antidumping Regulation, *supra* note 8, at art. 7(9)(b).

⁴⁷ *Id.* at art. 9.

⁴⁸ *Id.* at art. 9(2).

⁴⁹ *Second Annual Report of the Commission of the European Communities to the European Communities on the Community's Anti-dumping and Anti-subsidy Activities, 1984-1985* EUR. PARL. DOC. (COM No. 721) 5 (1984) [hereinafter *Second Annual Report*].

⁵⁰ *First Annual Report, supra* note 25, at 4. In 1980, 46 investigations were concluded by the acceptance of price undertakings, compared to eight concluded by the imposition of a definitive duty. For 1981, the figures were seven and 10 respectively; for 1982, 35 and seven and for 1983, 27 and 20. *Id.* at 7. See also, *Second Annual Report, supra* note 49.

⁵¹ Antidumping Regulation, *supra* note 8, at art. 11(1).

⁵² *Id.* at art. 12(1). Antidumping duties, whether provisional or definitive, shall be imposed by Regulation. *Id.* at art. 13(4).

against introducing a definitive duty.⁵³ For this purpose, injury is more narrowly defined than elsewhere in the Regulation, creating a situation where the Commission can impose a provisional duty which the Council is never empowered to collect.⁵⁴

At this stage of the proceedings, all parties may find review desirable. Both importers and complainants may wish to challenge the acceptance of undertakings. Exporters and importers may wish to challenge the imposition or level of a definitive duty, and complainants may also wish to challenge its level.⁵⁵

III. ADMINISTRATIVE REVIEW

The 1984 Antidumping Regulation, like the 1979 Regulation, contains provisions for review of both regulations imposing duties and decisions to accept undertakings. Article 14 declares:

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* (emphasis added).⁵⁶

The required evidence of altered circumstances and the one year waiting period are substantial changes from the 1979 Regulation, which simply required that a party submit "positive evidence substantiating the need for review"⁵⁷ and prescribed no time period.⁵⁸ Both of these changes are aimed at avoiding abuse of Community procedures and resources.⁵⁹

⁵³ *Id.* at art. 12(2)(b). See e.g., *Ferrochrome*, *supra* note 45.

⁵⁴ See generally CUNNANE & STANBROOK, *supra* note 19, at 86–89. See also, Antidumping Regulation, *supra* note 8, at art. 12(2)(b).

⁵⁵ A definitive dumping duty may not exceed the dumping margin. Antidumping Regulation, *supra* note 8, at art. 13(3).

⁵⁶ *Id.* at art. 14(1).

⁵⁷ 22 O.J. EUR. COMM. (No. L 339) 1 (1979), art. 14.

⁵⁸ This was first added in 1982 by Regulation No. 1580/82, 25 O.J. EUR. COMM. (No. L 178) 9 (1982). Note that there is also a change in that the request for review can now only be submitted to the Commission and not also to the Member States.

⁵⁹ In its *Second Annual Report*, the Commission found a noticeable reduction in the number of reviews opened in 1983. In 1983 only 10 reviews were opened. In 1982, 24 were opened and 17 were opened in 1981. *Second Annual Report*, *supra* note 49. The Commission commented that:

The reduction in 1983 was contrary to expectations in view of the increase in the number of anti-dumping . . . measures in force in recent years and it remains to be seen whether or not this only reflects a temporary fall in the number of reviews requested by interested parties. *Id.*

While the Report does not provide statistics on the number of reviews *requested*, this comment implies that it is close to the number opened. The congruence may, however, disappear with the stricter prerequisites for review in the 1984 Regulation.

After a review has been conducted, the measures adopted may be amended, repealed or annulled. The *First Annual Report* surveyed the outcome of reviews between 1980 and 1982. *First Annual Report*, *supra* note 25, at Annexes L–N. During review proceedings provisional duties were imposed in fourteen

The review process seems to have favored complainants but examples of successful importers can also be found. For instance, the Commission amended a regulation which introduced a provisional antidumping duty on certain kinds of polyester yarn imported from the United States, in order to exempt imports of some types of sewing thread, after importers pointed out that these caused no injury but simply came under the same tariff code as the other dumped imports.⁶⁰ In 1984, an Italian importer succeeded in getting the Commission to commence a review of the definitive duty on certain acrylic fibers from the United States in so far as it applied to a particular high-priced fiber. This had not been found to cause injury during the original investigation but was nonetheless not excluded from the application of the duty.⁶¹ This case points to one technical problem with the new 1984 Regulation. The Commission could find that there was sufficient evidence to support the request for a review, however, it is not obvious that there was any "change of circumstances." It would have been absurd to force the importer to pursue a judicial remedy because of apparently illegitimate behavior by the Commission.

Recently, exporters have also been successful in obtaining review of measures. For example, the Spanish steel producers association obtained a reduction in countervailing duties to reflect an increased tax burden on them.⁶²

In another case, American Cyanamid obtained review and amendment of the regulation imposing a duty on certain acrylic fibers from the United States.⁶³ The Commission agreed to accept a price undertaking from the company. This case is difficult because the preamble recites a finding of no dumping and the undertakings seem to have been accepted with a view to averting dumping in the future.

The same course seems to have been taken regarding p-xylene originating in Puerto Rico, the United States, and the U.S. Virgin Islands.⁶⁴ The Commission accepted undertakings, *inter alia*, from three companies which had not exported

cases but only one case was terminated by the imposition of a definitive duty. Of these fourteen cases, the review was finally terminated by the amendment of the price undertakings. In the sixth case a definitive duty was imposed. The case concerned electric multi-phase motors from the U.S.S.R. The Council cited as the reasons for its action, the scale of dumping and of injury caused. Regulation No. 2075/82, 25 O.J. EUR. COMM. (No. L 220) 36 (1982). Another eight cases were concluded with the amendment of the price undertakings, all *against* the exporters. 25 O.J. EUR. COMM. (No. L 85) 9 (1982); 25 O.J. EUR. COMM. (No. L 181) 19 (1982). Only three reviews were terminated without a change in the measures in force. 24 O.J. EUR. COMM. (No. L 337) 51 (1981); 25 O.J. EUR. COMM. (No. L 254) 15 (1982).

⁶⁰ 23 O.J. EUR. COMM. (No. L 294) 5 (1980). *See also*, 13 EUR. COMM. BULL. (No. 10) 62, pt. 2.2.7 (1980).

⁶¹ 27 O.J. EUR. COMM. (No. C 65) 2 (1984).

⁶² 26 O.J. EUR. COMM. (No. L 116) 7 (1983).

⁶³ 26 O.J. EUR. COMM. (No. L 55) 1 (1983).

⁶⁴ 26 O.J. EUR. COMM. (No. L 101) 1 (1983).

during the original investigation and had not dumped in the Community during the period covered by the review.

This case is also interesting for the Commission's consideration of the Community's interest in deciding whether to continue definitive duties. An assessment of the Community's interest is not required by Article 14 and appears to have been adopted from Articles 10-12.

There may be no administrative review of a decision to take no action. This is apparent from the specific reference in Article 14 to regulations imposing duties and decisions accepting undertakings. While a new complaint can be lodged at any time,⁶⁵ such a procedure is inconsistent with the desire to prevent wastefulness and abuse in the review procedure. An administrative review should also be provided in these circumstances, with a limit on the time at which action can be requested.

The importer may get a refund⁶⁶ if he can show that the duty definitively collected⁶⁷ exceeds the actual dumping margin.⁶⁸ Application for reimbursement must be made within three months of the date on which the amount to be definitively collected was determined and must be directed to the Commission. In another change from the 1979 Regulation, it is the Commission, and not the Member State, that makes the final decision on whether to grant the application.⁶⁹ The importer can only challenge the decision of the Commission directly before the Court of Justice.

IV. JUDICIAL REVIEW

In describing the complaint and review procedure provided in Regulation 2176/84 on protection against dumped imports, three stages have been identified at which the private parties involved may wish to approach the European Court of Justice:

1. When the Commission decides that there is either insufficient evidence to commence an investigation or sufficient evidence to initiate a proceeding.
2. When, during an investigation, the Commission imposes a provisional antidumping duty and when, following an investigation, the Commission decides on its final course of action.
3. When the Commission decides whether to undertake a review of duties or undertakings, or to grant a refund of duties.

⁶⁵ CUNNANE & STANBROOK, *supra* note 19, at 98.

⁶⁶ See D. LASOK & W. CAIRNS, *THE CUSTOMS LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 252 (1983). The authors are incorrect in stating this to be a remedy of the exporter.

⁶⁷ The 1984 Regulation was purposely varied to limit refunds to amounts definitively collected.

⁶⁸ Antidumping Regulation, *supra* note 8, at art. 16(1).

⁶⁹ *Id.* at art. 16(2).

At each of these stages, two questions arise: (1) the nature of the act sought to be challenged which determines the admissibility of the action, and (2) the substantive grounds on which the challenge may be made. With the increase in the number of antidumping actions, "the trend in the Community is towards an increase in litigation and the issue common to all cases on which judgment has been made, or is awaited, is admissibility."⁷⁰

A. *General Principles*

Reference has already been made to the technical differences in the types of acts available to the institutions of the Community. Article 189 explains that: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force."⁷¹ These distinctions determine the availability of judicial review under Article 173, which is the focus of discussion in this section. Article 173 provides:

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.⁷²

Under this provision, Member States, the Council and Commission are "privileged" applicants to the Court. A private party, however, has to fulfill the specific criteria of the second paragraph. He has to show either (1) that there is a decision addressed to him, or (2) a decision addressed to another that is nonetheless of a direct and individual concern to him, or (3) a measure that is in form a regulation but is in substance a decision and one that is of direct and individual concern to him.

⁷⁰ *First Annual Report*, *supra* note 25, at 10. See also 16 EUR. COMM. BULL. (No. 9) 69, pt. 2.2.2 (1983).

⁷¹ EEC Treaty, *supra* note 1, at art. 189. The other form of act, the directive, is not relevant in this context.

⁷² *Id.* at art. 173.

The direct challenge of regulations as such is totally excluded. This accords with the legislative nature of regulations. The underlying policy is "that measures of general effect . . . which are basic implementations of social or economic policy, ought not to be interfered with by individuals until such persons are actually and directly affected by these measures."⁷³ It is generally accepted, however, that the Court's attitude towards private suits has been particularly restrictive.⁷⁴

Where an action is admitted because a regulation is in substance a decision which directly and individually concerns the applicant, the orthodox analysis, recently reaffirmed in *Greek Cannery Ass'n v. The Commission*⁷⁵ is that there must be distinct showings of a substantive decision, individual concern and direct concern. Direct concern requires that the decision's effect on the individual's interests must not depend on the exercise of discretion by another.⁷⁶ The problem that arises in this area is that the tests for a decision and for individual concern tend to become confused. In practice, this rarely makes much difference. One commentator explains:

It can be seen that very generally the concept of individual concern functions to identify a special interest in a Community measure which is clearly distinct from the general interest in that act, and the presence of this special interest *at the same time* reflects the juridical character of the measure (emphasis added).⁷⁷

The Court has used the test of individual concern to determine whether an act is a regulation. In each case where the Court has held a regulation to be a decision, it has also found the applicants to have had an individual concern.⁷⁸ However, in *Calpak SpA v. Commission*⁷⁹ Advocate-General Warner pointed to the possibility of a situation where a single provision is of direct and individual

⁷³ Harding, *The Private Interest in Challenging Community Action*, 5 EUR. L. REV. 354, 358 (1980).

⁷⁴ See Rasmussen, *Why is Article 173 Interpreted Against Private Plaintiffs?*, 5 EUR. L. REV. 112 (1980).

Judicial review of Community legislation and administrative acts is one important procedural way of ensuring that individual rights are safeguarded. For years, however, the European Court, for most practical purposes, has been barring individuals from judicial review under Article 173 paragraph (2) of the EEC Treaty.

Id.

This article contains a thorough discussion of various theories for the Court's behavior. It also challenges the much cited article, Stein & Vining, *Citizens' Access to Judicial Review of Administrative Action in a Transnational and Federal Context*, 70 AM. J. INT'L L. 219 (1976) (comparing the EEC with more developed federal systems).

⁷⁵ *Greek Cannery Ass'n v. E.C. Commission*, 37 Common Mkt. L.R. 32 (1983).

⁷⁶ *S.A. Alcan Aluminium Raeren et al. v. E.C. Commission*, 1970 E.Comm. Ct. J. Rep. 385, 9 Common Mkt. L.R. 337 (1970).

⁷⁷ Harding, *The Review of EEC Regulations and Decisions*, 19 COMMON MKT. L. REV. 311, 319 (1982).

⁷⁸ *Id.* at 319-20.

⁷⁹ *Calpak SpA v. E.C. Commission*, 30 Common Mkt. L.R. 26 (1981).

concern and appears to be a decision, but the Court is unable to separate the provision from the rest of the regulation.⁸⁰

The Court's test for a decision is that found in *Confédération Nationale des Producteurs de Fruits et Légumes v. Council*.⁸¹ The test characterizes a decision as applying to a limited number of persons, defined or identifiable: a regulation is of general application and affects categories of persons viewed abstractly and in their entirety.⁸² In *International Fruit Co. v. Commission*,⁸³ the test was that the class of persons must be "fixed and ascertainable" so that the ostensible regulation can be construed as a bundle of decisions. Any possibility, however theoretical and improbable, that the group might change undermines its character as a decision.⁸⁴ The Court stated that the analogous test for individual concern was in *Plaumann & Co. v. Commission*;⁸⁵ "Persons . . . may only claim to be individually concerned if [the] decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually"⁸⁶

The first success with this formulation, for an applicant, was in *Toepfer v. Commission*.⁸⁷ Those affected were of a fixed and ascertainable class and the Court found that the factual situation differentiated them from all other persons. The Court also stressed that the defendant Commission was in a position to know that its action affected the interests and position of this class alone.⁸⁸

B. Application of Principles in Antidumping Cases

1. Initiation

As we have seen, the first stage at which review may seem desirable is when the Commission decides whether there is sufficient evidence to require an investigation.

⁸⁰ *Id.*

⁸¹ *Confédération Nationale des Producteurs de Fruits et Légumes v. Council of the EEC*, 1962 E. Comm. Ct. J. Rep. 471, 478-79, 2 Common Mkt. L.R. 160 (1963).

⁸² *Id.*

⁸³ *International Fruit Co. v. E.C. Commission (No. 1)*, 1971 E. Comm. Ct. J. Rep. 411, 16 Common Mkt. L.R. 515 (1975).

⁸⁴ *Koninklijke Scholten Honig v. E.C. Council and Commission*, 1977 E. Comm. Ct. J. Rep. 797, 28 Common Mkt. L.R. 669 (1980).

⁸⁵ *Plaumann & Co. v. EEC Commission*, 1963 E. Comm. Ct. J. Rep. 95, 3 Common Mkt. L.R. 29 (1963).

⁸⁶ *International Fruit (No. 1)*, *supra* note 83, at 523 (quoting *Plaumann*, 3 Common Mkt. L.R. at 47).

⁸⁷ *Alfred Toepfer KG and Getreide-Import Gesellschaft GmbH v. EEC Commission*, 5 Common Mkt. L.R. 111 (1966).

⁸⁸ For a general discussion and fuller analysis of the interpretative problems, see T. HARTLEY, *FOUNDATIONS OF EUROPEAN COMMUNITY LAW* ch. 12 (1981). See also *Harding*, *supra* note 77.

The stringency of the standing requirements under Article 173 is enough to exclude interested groups, other than importers, exporters and complainants, from further discussion.

The announcement in the Official Journal of the commencement of proceedings and the advice to exporters and importers "known to the Commission to be concerned"⁸⁹ appears to be a determination which is too general to be challenged. It seems easier, however, to challenge the notice to the complainant that its complaint does not provide sufficient evidence, as a decision. One scholar, Kuypers, points out that the Commission's communication is of a provisional nature, since its intention not to open the investigation will not be definitive.⁹⁰ Since the notice neither binds the Commission nor bars the complainant from a further application, Kuypers argues that it does not have legal effects, therefore it cannot be an act reviewable under Article 173.⁹¹

This issue recently came before the Court of Justice in *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL) v. E.C. Commission (Fediol)*⁹² in which the Commission followed this reasoning. Fediol requested the Commission to initiate an antisubsidy proceeding regarding exports of soya bean oil cake from Brazil. The Commission investigated the disputed practices, negotiated with the Brazilian government and kept Fediol informed of these discussions. Fediol, however, also served notice on the Commission under Article 175(2) of the EEC Treaty. Article 175 provides for an action before the Court should the Council or Commission, in infringement of the Treaty, fail to act. Natural and legal persons are given standing as in Article 173. Kuypers also considered the possibility of an action under Article 175 and concluded that the Commission's discretion made it highly improbable that the complainant had any right to the opening of an antidumping proceeding. He noted, moreover, that the Antidumping Regulation provides a procedure directed against third persons that does not constitute an act with legal effects aimed at the complainant. Eventually, the Commission informed Fediol that it would not initiate an antisubsidy proceeding. Fediol then brought an action under Article 173(2).

The Commission's arguments linked the concepts of the actions under Articles 173 and 175. They contended that there was merely a transmission of information and no decision. The Commission reasoned that the notice had no legal effects since the complainant had no right to compel the initiation of a proceeding.

⁸⁹ Antidumping Regulation, *supra* note 8, at art. 7(1)(b). As Cunnane and Stanbrook also note, in the frequently similar area of competition law, the Court held that the initiation of a proceeding does not constitute an act within the meaning of Article 173 but is merely a preparatory step. CUNNANE & STANBROOK, *supra* note 19. See *IBM v. E.C. Commission*, 1981 E. Comm. Ct. J. Rep. 2639, 32 Common Mkt. L.R. 635 (1981).

⁹⁰ Kuypers, *Some Reflections on the Legal Position of the Private Complainant*, LEGAL ISSUES IN EUR. INTEGRATION 115 (1983).

⁹¹ *Id.*

⁹² 1983 E. Comm. Ct. J. Rep. 2913, 41 Common Mkt. L.R. 244 (1984). The case actually concerned an antisubsidy proceeding and application for a countervailing duty, but the issues are the same as in an antidumping proceeding.

Advocate General Rozès rejected this reasoning. She made particular reference to the *IBM* case:

... the Court went on to state that in principle an act is open to review only if it is a measure *definitively* laying down the position of the Commission or the Council on the conclusion of that procedure and not a provisional measure intended to pave the way for a final decision. It added that *it would be otherwise if the measures adopted in the course of the preparatory proceedings were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case* (emphasis added).⁹³

Rozès felt that this was clearly the case in *Fediol* since the Commission unequivocally expressed its intention not to initiate an investigation.⁹⁴ In the scheme of the Regulation the announcement after consultation that there was insufficient evidence to start a proceeding presupposed that the preliminary proceeding had been terminated. There was, moreover, an actual change in the complainant's legal position, since the action dealt with the decision not to commence a proceeding and not with a refusal to adopt protective measures.

In *Fediol*, the Court emphasized the applicant's rights within the context of the antidumping scheme, the legitimate interest of Community producers in the adoption of antisubsidy measures, and the specific procedural rights granted in the 1979 Regulation. As noted previously, if the Commission's action did constitute a decision, it would be obligated to state reasons for it under Article 190 of the EEC Treaty. In *Fediol*, the Court, by analogy to another part of the Regulation, simply asserted that the right to be informed under Article 5(5) of the Regulation meant the right to receive "a statement of the Commission's basic conclusions and a summary of the reasons therefor as is required by Article 9"⁹⁵

The Court concluded:

[C]omplainants may not be refused the right to put before the Court any matters which would facilitate a review as to whether the Commission has observed the procedural guarantees granted to complainants by Regulation 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters of such a nature as to give rise to a belief in the existence of subsidisation or has based the

⁹³ *Fediol*, *supra* text accompanying note 92, at 2941.

⁹⁴ Advocate General Rozès dismissed as irrelevant the argument that the notice was not definitive because the Commission could subsequently initiate a proceeding of its own motion. Instead, she emphasized that the *initiative of the applicant* was brought to an end. *Id.* at 2942.

⁹⁵ *Id.* at 2934.

reasons for its decision on considerations amounting to a misuse of powers.⁹⁶

The substantive grounds for review under Article 173 which the Court was prepared to use, thus included, misuse of powers, infringement of an essential procedural requirement, infringement of provisions of the Regulation, and, perhaps, of any rule of law relating to its application. Such rules of law might include a general doctrine of *ultra vires*, requiring the Commission's decision, to be reasonable, or at least that its decision must not be so unreasonable that it exceeds the bounds of its discretion.⁹⁷

The impact of the *Fediol* decision may, however, be even more considerable because the Court declared:

Furthermore it must be acknowledged that, in the spirit of the principles which lie behind Articles 164 and 173 of the Treaty, complainants have the right to avail themselves, with regard both to the assessment of the facts *and to the adoption of the protective measures provided for by the regulation*, of a review by the Court appropriate to the nature of the powers reserved to the Community institutions on the subject (emphasis added).⁹⁸

This comment could radically change the position of the complainant at the conclusion of the proceedings.⁹⁹ The following section addresses that issue.

2. Termination

This section is concerned with challenges to regulations imposing duties, decisions accepting undertakings, and the refusal of the Commission to take any such protective measures.

a. The Complainant

There are two situations in which the complainant may want review at this stage: either the Commission has refused to take protective measures or the complainant considers the protection obtained to be inadequate.

⁹⁶ *Id.* at 2935.

⁹⁷ See Advocate General Warner, *NTN Toyo Bearing Co. v. E.C. Council*; *Import Standard Office v. E.C. Council*; *Nippon Seiko K.K. v. E.C. Council and E.C. Commission*; *Koyo Seiko Co. v. E.C. Council and E.C. Commission*; *Nachi Fujikoshi Corp. v. E.C. Council (Japanese Ballbearings)*, 1979 E. Comm. Ct. J. Rep. 1185, 1246, 25 Common Mkt. L.R. 257, 265 (1979).

⁹⁸ *Fediol*, *supra* text accompanying note 92, at 2935.

⁹⁹ See Bellis, *Judicial Review of EEC Anti-dumping and Anti-subsidy Determinations After FEDIOL: the Emergence of a New Admissibility Test*, 21 COMMON MKT. L. REV. 539 (1984).

This case only concerned an interlocutory judgment on admissibility. The substantive question of whether the Commission was under an obligation to proceed was left until later. The case was then removed from the Register without decision on this point. 27 O.J. EUR. COMM. (No. C 201) 8 (1984).

If the Commission refuses to take protective measures, the proceedings are terminated under Article 9 of the Antidumping Regulation and the Commission will notify the complainant as one of the parties "known to be concerned." It seems improbable that the complainant can challenge the decision as addressed to him. By this stage, the complainant is only one of a number of parties involved in the Commission's investigation.

There is, moreover, a logical difficulty in treating the Commission's refusal as a decision addressed to him. The Court has allowed the review of negative decisions, that is, decisions not to act in a particular way, but for purposes of standing, the decision has been given the character of the act as if it had been performed. The reasoning for this is that review of a negative decision is, in effect, an action for failure to act. Therefore, the only appropriate remedy is the provision of the act previously refused.¹⁰⁰ Here the relevant action is the provision of a regulation or a decision not addressed to the complainant. Kuyper asserts that in consequence no action under Article 173 is available.¹⁰¹ Indeed, it would seem almost impossible to come within the Article 173 standing requirements. In *Fediol* the Advocate-General was aware of this issue,¹⁰² but the Court's broad holding seems to give the complainant standing.

Fediol has recently gained support in the *Timex* case,¹⁰³ which dealt with review to increase duties. In *Timex*, the Court stressed Timex's position as sole manufacturer in the Community, while at the same time approving *Fediol*.¹⁰⁴ If *Fediol* is given its broad interpretation allowing complainants generally to seek review of protective measures, the action would be admissible without such strictures.

b. The Importer

Article 13(8) of the 1984 Antidumping Regulation provides that "Anti-dumping and countervailing duties shall be collected by Member States . . ." ¹⁰⁵ Thus, it is the importer who actually pays the duty. If he wishes to challenge it under Article 173, he must also meet the standing requirements, and, as Advocate-General Warner pointed out in the *Japanese Ballbearings* case,¹⁰⁶ it is almost impossible for an importer to be individually concerned. The regulation will apply generally to all importers and the class of importers may vary. In *Japanese Ballbearings* the Court recognized an exception for affiliates or subsidiaries of the exporters. Independent importers were denied standing.

¹⁰⁰ See T. HARTLEY, *supra* note 88, at 389.

¹⁰¹ Kuyper, *supra* note 90, at 121.

¹⁰² See *supra* notes 93-94 and accompanying text.

¹⁰³ *Timex*, *supra* note 31.

¹⁰⁴ *Id.*

¹⁰⁵ Antidumping Regulation, *supra* note 8, at art. 13(8).

¹⁰⁶ *Japanese Ballbearings*, *supra* note 97.

This analysis was reaffirmed in the recent case of *Alusuisse Italia SpA v. E.C. Council and Commission*,¹⁰⁷ which concerned a challenge to a regulation imposing a definitive antidumping duty on imports of orthoxylene originating in the United States and Puerto Rico. The exporters were expressly named in the regulation; the importers were not. The Court found that the measures were of general application "because they apply to objectively determined situations and entail legal effects for categories of persons regarded generally and in the abstract."¹⁰⁸ The duties were imposed on persons importing by reference to the objective criterion that they were importers. The Court also rejected the argument that the importers' involvement in the antidumping procedure gave them any special position, "since the distinction between a regulation and a decision may be based only on the nature of the measure itself and the legal effects which it produces and not on the procedures for its adoption."¹⁰⁹

The Court's final point, however, was that the importers were not left without a remedy. They had the option of contesting the imposition of the duty before the national courts and this opened the possibility of a preliminary reference to the European Court of Justice under Article 177 of the EEC Treaty.¹¹⁰

c. The Exporter

The leading antidumping case for a considerable time was the *Japanese Ball-bearings* case,¹¹¹ which dealt, in part, with a challenge by exporters to the imposition of a definitive antidumping duty. The regulation imposed a definitive duty, but suspended its application, so long as certain price undertakings were observed by the major producers. The regulation then authorized the collection of amounts, secured by way of a provisional duty, from Koyo Seiko Company Ltd., Nachi Fuyikoshi Corporation, NTN Toyo Bearing Company Ltd., and Nippon Seiko KK.

¹⁰⁷ *Alusuisse Italia SpA v. E.C. Council and E.C. Commission*, 1982 E. Comm. Ct. J. Rep. 3463, 38 Common Mkt. L.R. 388 (1983).

¹⁰⁸ *Id.* at 3472. *But see* *Casteels Pvba v. E.C. Commission*, 46 Common Mkt. L.R. 475 (1986).

¹⁰⁹ *Alusuisse*, *supra* note 107, at 3473, *aff'd in Allied Corp. v. E.C. Commission* (No. 1), 44 Common Mkt. L.R. 572, 611 (1985). The situation is not altered by the fact that the company is an importing agent for an exporter with standing.

¹¹⁰ EEC Treaty, *supra* note 1, at art. 177:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community . . .

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Id. See also *Casteels*, 46 Common Mkt. L.R. at 475.

¹¹¹ See Dashwood, 17 COMMON MKT. L. REV. 119 (1980); Vance, *Judicial Review of Antidumping Orders in the United States and the European Economic Community*, 26 N.Y.L. SCH. L. REV. 577 (1981).

As discussed previously, to challenge the definitive antidumping duty under Article 173, the exporters have to show that there was in fact a decision which directly and individually concerned them. In this case, these requirements were relatively unproblematical. Advocate-General Warner concluded that the links in the provisions and the naming of the producers meant that the regulation had "all the characteristics of a decision affecting particular persons on the basis of their own conduct." The Court found that the relevant article constituted a collective decision relating to named addressees. Under these criteria, the decision in the *Japanese Ballbearings* case seemed to follow the Court's usual restrictive interpretation of Article 173.

In most cases, however, the Court's strict interpretation of Article 173 is mitigated by the possibility of a preliminary reference to the Court under Article 177 of the EEC Treaty. Most acts affecting an individual will require some form of implementation by the Member States. Even a "purely technical act of application could be challenged before a Member State court, which could then ask for a preliminary ruling concerning the interpretation and validity of the Community measure which is really at issue."¹¹² This route is not, however, open to the foreign exporter as the duty is collected from the importer by the importing state. The foreign exporter's only means of involvement in a preliminary reference would be through the importer. Not only is this circuitous but it would also require the exporter to release information, explaining its operations to the importer, which may be adverse to its best interest.

The need for some symmetry in the system requires easier access to the Court for the exporter, particularly after the liberalization of the standing requirements for the complainant. The Court relaxed the access standard in *Allied Corp. v. Commission*.¹¹³ The Court held actions by the exporters admissible where they had been concerned by the preparatory investigation.

This is an extremely broad standard which is curious in two respects. First, it adopts as its test of standing the criterion considered irrelevant by the *Alusuisse* Court,¹¹⁴ (*i.e.*, participation in the investigation). Second, although the *Allied Corp.* test can probably be restricted to the particular circumstances of an antidumping proceeding, it is more liberal than the tests under Article 173, discussed earlier.

Both these technical criticisms can be refuted by a policy argument: if there is to be procedural equality in the review process, a favorable stance must be taken towards exporters, since they do not have the backup of an Article 177 reference.

¹¹² Harding, *supra* note 77, at 322.

¹¹³ *Allied Corp. (No. 1)*, *supra* note 109, at 613.

¹¹⁴ See *supra* note 109 and accompanying text.

3. Administrative Review

The final stage of the process is the administrative review proceeding. If a party seeks review and is refused, the issue becomes whether he has recourse to the Court. Lasok and Cairns state that, "Since this is an individual decision, it would seem that any refusal by the Commission to review a case could be challenged before the ECJ."¹¹⁵ Substantively, the problem is that a review is to be undertaken where warranted, a phrase which leaves a large margin of discretion to the Commission.

If the Commission undertakes a review but refuses to take the action requested by the party concerned, it appears that the party cannot challenge this as an individual decision. The Commission's action is in effect a decision not to amend either a regulation or a decision not addressed to the party. Thus the party would first have to meet the standing requirements under Article 173.

At this stage, as at earlier ones, the issue of the admissibility of a private party's action is complex. Once a party succeeds in bringing a case before the Court, the next question is the substantive grounds on which to challenge a Community act.

V. SUBSTANTIVE GROUNDS FOR REVIEW

The applicant may challenge the act in question as contrary to the enabling regulation. Common grounds for such a challenge would be infringement of procedural requirements or incorrect application of tests in the regulation. An exporter, for example, may contend that findings of dumping and injury are, as a matter of law, excluded by the criteria laid down in the regulation. Prior to initiation, a complainant may argue that the existence of injury and dumping is so obvious that the Commission could not have rejected its proceeding request without, for instance, basing its decisions on irrelevant considerations.

In addition, the applicant may challenge the act as contrary to a higher rule of law. This approach could be used at the termination and review stages. First, references were made to the inadequacy of information and of opportunities to make representations in antidumping proceedings. These show that the procedure fails to protect an applicant's due process rights.

The Court has used Articles 173¹¹⁶ and 164¹¹⁷ to develop a doctrine of fundamental rights that are a form of unwritten Community law, though based

¹¹⁵ D. LASOK & W. CAIRNS, *supra* note 66, at 252.

¹¹⁶ EEC Treaty, *supra* note 1, at art. 173 refers to "any rule of law relating to [this Treaty's] application"

¹¹⁷ *Id.* at art. 164 states: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."

on the traditions of the Member States.¹¹⁸ In the *Nold*¹¹⁹ case, for example, the Court held that:

fundamental rights form an integral part of the general principles of law which it enforces. In assuring the protection of such rights, this Court is required to base itself on the constitutional traditions common to the member-States and therefore could not allow measures which are incompatible with the fundamental rights recognised and guaranteed by the constitutions of such States.¹²⁰

Although the Court has concentrated on human rights, the principle may also extend to procedural rights. Examples of the types of argument that may be advanced are found in the second *Allied Corp.* case.¹²¹ The grounds on which review was sought included infringement of general principles and rules of law, especially the defendant's rights to be heard and to know the case against him. In *Allied Corp.*, during the investigation the applicants were not informed of the facts and considerations which would be the basis for the Commission's recommendation of definitive duties. In addition, the statement as to the method adopted for determining "normal value" was insufficient. Other general principles put forward by the applicant were equality, objectivity, distributive justice, and that all administrative measures should be based on legally valid grounds.¹²² In each complaint, infringement of provisions of the EEC Treaty and the Antidumping Regulation was also pleaded.¹²³

An applicant may also try to invoke the rules of the GATT as an additional source of higher law.¹²⁴ An applicant may argue that the imposition of a duty is unjustified under the criteria in Article VI of the GATT¹²⁵ and thereby indirectly challenge the enabling regulation. Such an approach depends on the status of the GATT rules in Community law.

¹¹⁸ See Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 2 LEGAL ISSUES IN EUR. INTEGRATION 1 (1979).

¹¹⁹ *Firma J. Nold v. E.C. Commission*, 14 Common Mkt. L.R. 338, 354 (1974).

¹²⁰ *Id.*

¹²¹ 26 O.J. EUR. COMM. (No. C 112) 4 (1983).

¹²² *Id.* at 5.

¹²³ The corporation argued that the EEC authorities erred in using criteria contained in undertakings that had been withdrawn. The Court held that a duty may not exceed the dumping margin and should be less if adequate to eliminate injury. In this case, there was nothing to demonstrate that the Council had considered this point. The regulation imposing a definitive duty was, therefore, held void. The ground for so finding was, thus, the standard administrative law one of failure to take into account relevant considerations and/or consideration of irrelevant factors. *Allied Corp. v. E.C. Council* (No. 2), 47 Common Mkt. L.R. 605 (1986).

¹²⁴ See *supra* note 9.

¹²⁵ *Id.*

In *Hauptzollamt Mainz v. Kupferberg & Cie*,¹²⁶ the Court considered four factors as determining the direct effect of an international agreement in Community law: (1) the nature and structure of the agreement; (2) the intention of the parties; (3) whether the agreement itself allowed for direct effects or whether other means of application had to be considered; and (4) whether the provision was sufficiently precise to be directly effective.¹²⁷ Applying these criteria, it would seem unlikely that Article VI could have an effect in Community law. Dispute over the status of the GATT has continued.¹²⁸ In the recent decision, *Amministrazione Delle Finanze v. SPI*,¹²⁹ the Court found that the jurisdiction conferred upon it in order to ensure the uniform interpretation of Community law must include a determination of the scope and effect of the rules of the GATT within the Community. However, applying criteria from *International Fruit (No. 3)*¹³⁰ and considering the general scheme of the GATT, the Court found that Article VI was not directly applicable.¹³¹

VI. U.S. ANTIDUMPING LEGISLATION: A COMPARISON

A. Introduction

The U.S. method of determining whether to impose an antidumping duty provides a number of instructive procedural contrasts. The process will first be outlined briefly and the availability of administrative and judicial review will then be considered in more detail.

The relevant legislation in the United States is Subtitle IV of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984.¹³²

B. Antidumping Proceedings

In the United States the authority to administer the antidumping law rests with the Secretary of Commerce,¹³³ while the administering agency is the International Trade Administration (ITA). This body is responsible for making

¹²⁶ *Hauptzollamt Mainz v. Kupferberg & Cie*, 1982 E. Comm. Ct. J. Rep. 3641, 36 Common Mkt. L.R. 1 (1983).

¹²⁷ *Id.* at 3653-55.

¹²⁸ See Bebr, *Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg*, 20 COMMON MKT. L. REV. 35 (1983).

¹²⁹ *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI) (SAMI)*, 1983 E. Comm. Ct. J. Rep. 801, 39 Common Mkt. L.R. 354 (1984).

¹³⁰ *International Fruit Co. v. Produktschap voor Groenten en Fruit (No. 3)*, 1972 E. Comm. Ct. J. Rep. 1219, 16 Common Mkt. L.R. 1 (1975).

¹³¹ *SAMI*, *supra* note 129, at 830.

¹³² 19 U.S.C.A. § § 1671-1677h (West 1980 & Supp. 1986).

¹³³ See Exec. Order No. 12188, *reprinted in* 19 U.S.C.A. § 2171, 155-58 (West 1980 & Supp. 1986).

determinations as to the existence of dumping.¹³⁴ However, injury determinations¹³⁵ are made by an independent body, the International Trade Commission (ITC).

This division of responsibilities provides an immediate contrast with the EEC where all the significant factual determinations are made by the Commission. Commentators have noted that because the final decision in the EEC rests with the overtly political Council, the EEC decision model "is structured to allow policy considerations to play an important role in dumping determinations."¹³⁶ This analysis raises two issues. First, as previously noted, the Council tends to accept the Commission's recommendations unaltered. Second, the weight that the Commission gives to the interests of the Community varies considerably.¹³⁷ Thus, while the rationale behind the U.S. division might be cloudy, it is also probably of little importance.

In the United States, proceedings may be commenced on the Secretary's initiative or by a petition filed by an interested party on behalf of a domestic industry.¹³⁸ The term "interested party"¹³⁹ includes a manufacturer, producer, or wholesaler of a like product¹⁴⁰ in the United States, a union or other group of workers, representative of such an industry and a trade or business association whose members manufacture, produce or wholesale a like product. This definition provides for broader and more general access than the EEC Regulation.

The petition must allege "the elements necessary for the imposition of the [antidumping] duty."¹⁴¹ The standard of proof required to compel initiation of a proceeding is fairly low. In *Roses Inc. v. United States*,¹⁴² Judge Rao stated: "It is thus clear that Congress intended to alleviate the burden of petitioners in initiating antidumping proceedings, and to limit the information considered by the administering authority to that included in the petition and supporting data submitted by the petitioner and facts 'within the public domain.'"¹⁴³

¹³⁴ Essentially, dumping occurs if sales in the U.S. are at less than fair value, i.e., at a lower price than in the manufacturer's home market, and these sales cause or threaten to cause material injury to a U.S. industry or to retard its establishment.

¹³⁵ Material injury is defined as "harm which is not inconsequential, immaterial or unimportant" and numerous relevant factors are specified, 19 U.S.C.A. § 1677 (West 1980 & Supp. 1986).

¹³⁶ Bryan and Boursereau, *Antidumping Law in the European Communities and the United States: A Comparative Analysis*, 18 GEO. WASH. J. INT'L L. & ECON. 631, 679 (1985).

¹³⁷ See *supra* notes 44-48 and accompanying text.

¹³⁸ 19 U.S.C.A. § 1673a (West 1980 & Supp. 1986).

¹³⁹ 19 U.S.C.A. § 1677(9)(C) (West 1980 & Supp. 1986).

¹⁴⁰ The term "like product" means a product which is like, or in the absence of like, most similar in characteristics and uses to the article subject to investigation, 19 U.S.C.A. § 1677(10) (West 1980 & Supp. 1986).

¹⁴¹ 19 U.S.C.A. § 1673a(b)(1) (West 1980 & Supp. 1986).

¹⁴² 3 Ct. Int'l Trade 110, 538 F. Supp. 418 (1982), *aff'd in part and rev'd in part* 1 CA FC 39, 706 F.2d 1563 (1983).

¹⁴³ *Id.* at 421.

Another contrast between the EEC and U.S. regulations is the specific time limits the U.S. law prescribes for the completion of various stages of the proceedings. While the U.S. proceedings are noticeably more structured, there is still room for flexibility in given circumstances.¹⁴⁴

In the EEC proceedings and review, the parties' right to be heard is limited. In the U.S. proceedings the Secretary is required to provide opportunities for consultation with all parties to the investigation, regarding the ITA's findings and information, prior to making its preliminary determination.¹⁴⁵ The hearing is not, however, adversarial. In this respect, the procedure is as inadequate as that of the EEC.

In contrast, however, there is a more equitable provision for access to information under the U.S. procedure. First, it is a fundamental feature that all decisions, both preliminary and final, must be published in the Federal Register with a statement of the facts and law on which the determination is based.¹⁴⁶ Further, any judicial review will be based on the proceeding record. The ITA and ITC are required to keep detailed records of meetings with interested parties or other persons who provide factual information.¹⁴⁷

Clearly, some information may be confidential and protected. In this area the U.S. law is similar to Article 8 of the EEC Regulation. Parties who wish to preserve the confidentiality of their information must follow specified procedures.¹⁴⁸ The ITA or ITC may, like the EEC authorities, decide that a claim

¹⁴⁴ The initial determination as to the sufficiency of the petition must be made within 20 days. 19 U.S.C.A. § 1673a(c) (West 1980 & Supp. 1986). If the proceeding goes ahead, the ITC must make a preliminary determination on the issue of injury within 45 days of the filing of the petition or notification by the Secretary, while the ITA's determination on dumping must normally be made within 160 days of filing of the petition or commencement of the investigation. 19 U.S.C.A. § § 1673b(a); 1673b(b)(1) (West 1980 & Supp. 1986).

If the preliminary determination is affirmative, the Secretary suspends liquidation of all entries, which effectively means that the fixing of the final duty payable is suspended. 19 U.S.C.A. § 1673b(d) (West 1980 & Supp. 1986). Liquidation may be suspended retroactively if the Secretary finds "critical circumstances," i.e., that there have been massive imports of the product over a short period and either there is a history of dumping or the importer knew or should have known that the product was being dumped. 19 U.S.C.A. § 1673b(e) (West 1980 & Supp. 1986). A determination of negative critical circumstances is not reviewable on its own. *See Haarman & Reimer Corp. v. United States*, 1 Ct. Int'l Trade 148, 509 F. Supp. 1276 (1981).

The ITA's final determination should normally be within 75 days of the preliminary determination. This determination may be postponed in limited circumstances. *See* 19 U.S.C.A. § 1673d(a) (West 1980 & Supp. 1986). The ITC's final determination should be made before the later of either the 120th day after the ITA's preliminary determination or the 45th day after the final determination. Following a negative preliminary determination but positive final determination by the Secretary, the ITC's determination is required within 75 days of the final determination. 19 U.S.C.A. § 1673(b)(3)(d) (West 1980 & Supp. 1986).

¹⁴⁵ 19 U.S.C.A. § 1677c(a)(1) (West 1980 & Supp. 1986).

¹⁴⁶ 19 U.S.C.A. § § 1673a(c) and 1673d(d) (West 1980 & Supp. 1986).

¹⁴⁷ 19 U.S.C.A. § 1677f(a)(3) (West 1980 & Supp. 1986).

¹⁴⁸ 19 U.S.C.A. § 1677f(b) (West 1980 & Supp. 1986).

for confidentiality is unwarranted. Under the U.S. law, however, further provision for the release of confidential information exists. The ITA or ITC may release information under a "protective order."¹⁴⁹

If a request for confidential information is denied, the party may apply to the Court of International Trade which may release the information under a protective order.¹⁵⁰ This is a more direct form of relief than that available to a party to an EEC proceeding. To compel release of information, in an EEC proceeding one would have to seek review of the Commission decision not to release the information. This is a circuitous and complicated route.

U.S. law further provides that in any proceedings for judicial review, the confidentiality of any documents shall be preserved, but the court may examine the material and disclose it under appropriate terms and conditions.¹⁵¹ In reaching such decisions, the court applies a balancing test, weighing the need of the litigant for access to information against the public interest in preserving confidential business information from competitors and the need of the government to obtain information in future proceedings.¹⁵² Under Article 8 of the EEC Regulation, information will be deemed confidential if its disclosure "is likely to have a significantly adverse effect upon the supplier or the source of the information."¹⁵³ The supplier should provide a nonconfidential summary, but, apart from this, *on its terms*, the Article, gives no weight to the applicant's need for information.

Finally, the Secretary may terminate a proceeding at any time by withdrawing the initiating petition.¹⁵⁴ Alternatively, an investigation may be suspended on the acceptance, by the Secretary, of either an agreement to eliminate completely sales at less than fair value or to cease exports or an agreement which eliminates the injurious effect.¹⁵⁵ Before suspension, the Secretary must consult the petitioner, notify all the parties and the ITC, provide the petitioner with a copy of

¹⁴⁹ 19 U.S.C.A. § 1677f(c)(1)(B) (West 1980 & Supp. 1986).

¹⁵⁰ 19 U.S.C.A. § 1677f(c)(2) (West 1980 & Supp. 1986).

¹⁵¹ 19 U.S.C.A. § 1516a(b)(2)(B) (West 1980 & Supp. 1986).

¹⁵² *American Spring Wire Corp. v. United States*, 5 Ct. Int'l Trade 256, 566 F. Supp. 1538 (1983); *Frères v. United States*, 4 Ct. Int'l Trade 239, 554 F. Supp. 1246, 1248 (1982). The court is not entitled, however, to release information submitted by non-parties.

¹⁵³ Antidumping Regulation, *supra* note 8, at art. 8(3). This article also provides that in disclosing general information and in giving the reasons authorities should "take into account the legitimate interest of the parties concerned that their business secrets should not be divulged." *Id.* at 8(5). This provision is unusual, because it places the onus on the Community authorities themselves. It is also the only indication of the factors to be considered in determining the confidentiality of documents.

¹⁵⁴ If the withdrawal is based on an agreement to restrict the volume of imports, the Secretary must also determine that the termination is in the public interest.

¹⁵⁵ 19 U.S.C.A. § 1673c (West 1980 & Supp. 1986). The latter type of agreement is limited to cases involving "extraordinary circumstances," meaning that the suspension of the investigation will be more beneficial to the domestic industry than its continuation, and cases which are "complex." In all cases, the Secretary must also be satisfied that the suspension is in the public interest.

the agreement and permit all parties to submit opinions and information.¹⁵⁶ The U.S. procedure is analogous to the Community method of accepting undertakings but has greater procedural safeguards.¹⁵⁷

C. *Administrative Review*

Under U.S. law, administrative review exists in a number of specified circumstances. The Secretary shall, if so requested, annually review the dumping margin and compliance with any agreement which resulted in the suspension of an investigation.¹⁵⁸

The ITC and ITA may review a final *affirmative* determination or an accepted agreement, on receiving information or a request for review, which shows a sufficient change in circumstances.¹⁵⁹ Following such a review, the Secretary may revoke an antidumping order in whole or in part.¹⁶⁰ This type of review parallels the only review available within the EEC.¹⁶¹ In contrast with the minimal procedural provisions in Article 14 of the EEC Regulation, the U.S. law specifically provides that the authority conducting the review must, on request, hold a hearing on the record for an interested party.¹⁶²

Agreements to eliminate injurious effects may be reviewed once an interested domestic party files a petition with the ITC.¹⁶³

Both domestic parties and exporters that account for a significant proportion of exports to the United States may also request continuation of the investigation within 20 days of suspension.¹⁶⁴ The investigation must then be continued. If its conclusion is affirmative, the agreement remains intact; if its conclusion is negative, the agreement has no effect at all.

D. *Judicial Review*

As previously discussed, the U.S. procedure roughly parallels the EEC's. The parties involved may wish to obtain review of official decisions at four broadly

¹⁵⁶ 19 U.S.C.A. § 1673c(e) (West 1980 & Supp. 1986).

¹⁵⁷ Notice of suspension is to be published in the Federal Register, with a simultaneous affirmative preliminary determination.

¹⁵⁸ 19 U.S.C.A. § 1675 (West 1980 & Supp. 1986).

¹⁵⁹ 19 U.S.C.A. § 1675(b)(1) (West 1980 & Supp. 1986).

¹⁶⁰ 19 U.S.C.A. § 1675(c) (West 1980 & Supp. 1986).

¹⁶¹ See *supra* notes 56-59 and accompanying text.

¹⁶² 19 U.S.C.A. § 1675(d) (West 1980 & Supp. 1986). The ITC's refusal to review a determination for changed circumstances is expressly susceptible to judicial review under 19 U.S.C.A. § 1516a(a)(1)(A) (West 1980 & Supp. 1986). While any such ITA decisions and any decision not to review a suspensory agreement is reviewable under the residuary provision of § 1516a(a)(2)(B)(iii) (West 1980 & Supp. 1986). No explanation for the disparity appears from the legislative history.

¹⁶³ 19 U.S.C.A. § 1673 (West 1980 & Supp. 1986).

¹⁶⁴ 19 U.S.C.A. § 1673c(h) (West 1980 & Supp. 1986).

similar stages: the initiation of the proceedings, the preliminary determinations, the final determinations, and determinations on administrative review.

Judicial review is addressed in U.S.C.A. § 1516(a), which divides determinations into two categories, namely certain determinations and reviewable determinations.¹⁶⁵ These categories differ according to the scope of review and the method of commencing proceedings. Review of certain determinations must begin within 30 days of publication in the Federal Register, by filing concurrently a summons and a complaint, setting out the factual findings and legal conclusions contested. Review of reviewable determinations may be commenced by filing a summons within 30 days of publication and the complaint within another 30 days.¹⁶⁶

In marked contrast to the EEC procedure where the admissibility of action is strictly limited by Article 173, review can be sought by any interested party, which includes the U.S. importers, business associations, and the full spectrum of foreign parties.¹⁶⁷ In addition to these powers, the Court of International Trade possesses a residual jurisdiction over tariff and trade matters.¹⁶⁸ Such actions may be commenced by any person adversely affected or aggrieved by governmental action.¹⁶⁹ This provision has been used, for example, to give jurisdiction in an action for an order of mandamus that the ITA reduce the level of a countervailing duty, as this is not otherwise a determination specifically subject to review.¹⁷⁰ Although this section does not allow review in all feasible situations, it provides a vital element of flexibility.

A determination not to initiate an investigation is reviewable as a certain determination.¹⁷¹ On the other hand, there is no provision for the review of a positive decision to initiate an investigation, and it has been held that this is not available under the residual provision.¹⁷²

A preliminary negative determination as to injury by the ITC is reviewable.¹⁷³ There is no provision for the review of an affirmative determination, and review of ITA fair value determinations is limited to final determinations.¹⁷⁴ Other preliminary determinations, for example, as to critical circumstances or extraordinary circumstances, may not be reviewed.

¹⁶⁵ 19 U.S.C.A. § 1516a(a)(1) and (2) (West 1980 & Supp. 1986).

¹⁶⁶ 19 U.S.C.A. § 1516a(a)(2)(A) (West 1980 & Supp. 1986).

¹⁶⁷ 19 U.S.C.A. § 1677(9) (West 1980 & Supp. 1986).

¹⁶⁸ 28 U.S.C.A. § 1581(i) (West 1980 & Supp. 1986).

¹⁶⁹ 5 U.S.C.A. § 702 (West 1980 & Supp. 1986).

¹⁷⁰ *Ceramica Regiomontana v. United States*, 5 Ct. Int'l Trade 23, 557 F. Supp. 596 (1983).

¹⁷¹ 19 U.S.C.A. § 1516a(a)(1)(A) (West 1980 & Supp. 1986).

¹⁷² *National Latex Products Co. v. United States*, 4 Ct. Int'l Trade 110 (1982).

¹⁷³ 19 U.S.C.A. § 1516a(a)(1)(B) (West 1980 & Supp. 1986).

¹⁷⁴ 19 U.S.C.A. § 1516a(a)(2)(B) (West 1980 & Supp. 1986).

The U.S. law states that reviewable determinations include:

(i) Final affirmative determinations by the administering authority and by the Commission . . . including any negative part of such a determination [other than a part referred to in clause (ii)].

(ii) A final negative determination by the administering authority or the Commission . . . including, at the option of the appellant, any part of a final affirmative determination which specifically excludes any company or product.¹⁷⁵

Thus, all final determinations are reviewable and affirmative and negative parts of such determinations are separable.¹⁷⁶ Moreover, if the ITA's affirmative determination is followed by a negative ITC determination as to injury, so that no antidumping order is ever issued, an exporter may still challenge the affirmative determination.¹⁷⁷

As already discussed, a proceeding may also be brought to an end by the acceptance of agreements. Such a decision to suspend an investigation is also subject to judicial review.¹⁷⁸

Refusals to initiate administrative review are, in general, subject to judicial review. The only decision that is not subject to such review is a refusal to review an agreement to eliminate injurious effects. There is no valid reason for this, it may just be a gap in judicial coverage. Such an agreement should itself be susceptible to judicial review, as there is a specific provision for review of the Commission's determinations on injurious effects.¹⁷⁹

E. *Substantive Grounds for Review*

The statutory standards for review in the United States encapsulate many of the ideas mooted in the discussion of this aspect of the EEC procedure. Certain determinations will be unlawful if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"¹⁸⁰ while a reviewable determination will be unlawful if "unsupported by substantial evidence on the

¹⁷⁵ 19 U.S.C.A. § 1516a(a)(2)(B)(i) & (iii) (West 1980 & Supp. 1986).

¹⁷⁶ This clarifies the issue that arose in *Bethlehem Steel Corp. v. United States*, 6 Ct. Int'l Trade 164, 571 F. Supp. 1265, *rev'd* 2 CA FC 112, 742 F.2d 1405 (1984).

¹⁷⁷ See *Huffy Corp. v. United States*, 604 F. Supp. 1250.

¹⁷⁸ 19 U.S.C.A. § 1516a(a)(2)(B)(iv) (West 1980 & Supp. 1986). This appears to cover agreements to eliminate injurious effects because paragraph (v) makes provision for the relevant Commission determinations for injurious effects under § 1671(c) and § 1673c(h).

¹⁷⁹ *Id.*

¹⁸⁰ 19 U.S.C.A. § 1516a(b)(1)(A) (West 1980 & Supp. 1986).

record, or otherwise not in accordance with law."¹⁸¹ This latter test is potentially narrower as a document is inadmissible if it does not form part of the record, even if it should have been considered.¹⁸² It would seem to follow that this failure will not render the decision otherwise contrary to law, but such a failure could be an abuse of discretion or result in an arbitrary decision within the first test. In general, however, the petitioner is limited to making his challenge on the basis of the information available to the authority at the time and cannot raise new issues at trial.¹⁸³ Equally, the record should not contain extraneous materials such as data from other investigations.¹⁸⁴

Under both tests, it is not the Court's function to weigh the evidence or substitute its own judgment, but rather to decide whether the authority had substantial evidence on which it could have based its decision.¹⁸⁵

VII. CONCLUSION

The Community's antidumping legislation presents a difficult and complex area, especially regarding procedure and review. In addition, recent cases have raised new uncertainties in the field.

The damages available to a party involved in an antidumping review in the Court of Justice are outside the scope of this discussion. While theoretically available, damages have never been awarded in an antidumping case. This Article illustrates the difficult journey to and through the Court of Justice for any party ever to reach this stage.

U.S. procedure is equally complex. However, to some extent, the pitfalls for potential applicants are alleviated by more precise provisions, broader and fairer standards of admissibility, and better access to relevant information.

As European Communities law continues to develop, the following considerations need to be taken into account. On the one hand, antidumping proceedings involve social and economic issues in an international setting, such that

¹⁸¹ 19 U.S.C.A. § 1516a(b)(1)(B) (West 1980 & Supp. 1986). For these purposes, the record consists of:

(i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of *ex parte* meetings required to be kept . . . ; and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C.A. § § 1516a(b)(2)(A)(i) and (ii) (West 1980 & Supp. 1986).

¹⁸² PPG Industries Inc. v. United States, 5 Ct. Int'l Trade 282 (1983).

¹⁸³ Border Brokerage Co. v. United States, 484 F. Supp. 901 (1979), *aff'd* 68 C.C.P.A. 32, CAD 1262, 646 F.2d 539 (1981)

¹⁸⁴ Bethlehem Steel Corp. v. United States, 5 Ct. Int'l Trade 236, 566 F. Supp. 346 (1983).

¹⁸⁵ SCM Corp. v. United States, 4 Ct. Int'l Trade 7, 544 F. Supp. 194, 202 (1982); Alberta Gas Chemicals v. United States, 1 Ct. Int'l Trade 312, 515 F. Supp. 780 (1981); Armstrong Bros. Tool Co. v. United States, 84 Cust. Ct. 102, 489 F. Supp. 269 (1980).

interference by private parties is undesirable. On the other hand, parties who are assessed a duty deserve satisfactory procedural safeguards. From this perspective, the complainant has the least compelling claim to access to the Court, while the exporters and importers deserve the most protection. The present law attempts to meet both of these policies. It provides a fertile source of litigation which is likely to have wider ramifications for Community law. The development of antidumping law will be watched with interest and speculation.