Shortcomings of EU Antidumping Law and Policy

Arturas Mickus*

Introduction

The overall goal of worldwide trade policy is to stimulate free trade and keep open markets in all regions of the world, regardless of size, location and level of development. However, free and unrestricted trade is a myth, due to the intense trade distortions taking place within most of the liberalizing world economies. It was in 1947 in the first GATT agreement when such unfair trading practices as dumping were identified as a threat to open markets on an international level.[1] In 1968, the EC adopted its own antidumping legislation.[2] More recently, major improvements have been made with detailed provisions on antidumping measures being agreed upon during multilateral trade negotiations, especially those at the Uruguay Round resulting in the World Trade Organization (WTO) Antidumping Agreement 1994.[3] The EC amended its legislation accordingly by adopting Basic Regulation 384/96 in the light of this Agreement.[4]

A major increase in antidumping investigations in recent years highlights the importance of the antidumping rules in EC Commercial Trade Policy. Between 1987 and 1997 some 355 antidumping proceedings were initiated, which represented 16 per cent of the total number of investigations opened during that period.[5] In 1998, only 29 investigations were opened but there was a significant increase in 1999, mainly due to

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* Concordia International University in Estonia, Kaluri tee 3, Tallinn, 2002.

1 Art. VI of General Agreement on Tariffs and Trade (GATT 1947).

2 Nineteenth Annual Report from the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities, COM (2001) 571 Final, Brussels, 12 October 2001, at 15.

3 Agreement on Implementation of Art. VI of GATT 1994, OJ 1994 L336/103.

4 Council Regulation (EC) No 384/96 of 22 December 1995 on Protection Against Dumped Imports from not Members of the European Community, OJ 1995 L/1, as last amended by Council Regulation (EC) No 2238/2000 (OJ 2000 L257/2). A very last amendment was made after the date of completion of this paper: Council Regulation (EC) No 1972/2002 (OJ 2002 L305/1).

5 J. Miranda, R.A. Torres, M. Ruiz, 'The International Use of Antidumping: 1987–1997' in (1998) 32(5) *Journal of World Trade* 5 at 7.

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the economic crisis in Asia resulting in 86 proceedings, with some 31 investigations being initiated in 2000.[6] At the end of 2000, the EC had 175 antidumping measures in force covering 67 products and 38 countries and of those measures 34 related to China, 11 to Russia, nine to Ukraine, three to Belarus and ten to CEECs.[7] The main sectors under investigation were concerned with iron, steel, chemical, textile, and high technology products, resulting in approximately 0.5 per cent of total imports into the EC being affected by antidumping measures in the year 2000.[8]

As is evident from the above, exports from any non-EU country can be subject to antidumping investigations if exported to the EU at 'dumped prices', that is, selling goods cheaper in the EU market than at home, or selling products in the EU at a price lower than the production costs.[9] Besides 'price dumping' and 'cost dumping', 'predatory dumping' has also been identified, whereby the exporter sells goods at very low prices in order to drive competitors out of business and later charge his own high prices.[10] However, the presence of the latter type of dumping has so far not been found to exist.[11]

EC antidumping law targets 'unfair' pricing practices as 'antidumping measures should be seen as corrective instruments to combat injurious dumping and restore equal competition in the markets'.[12] However, it is argued that antidumping laws impede competition rather than promote it, as local producers are protected from foreign imports at the expense of consumers having to pay higher prices for lower quality products and having no choice.[13] It will be suggested that a median line should be drawn between those two opinions expressed above as it is clear that incorrect use of antidumping measures encourages protectionism, denying equal competition and damaging not only producers, both foreign and domestic, but consumers too.

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6 Eighteenth Annual Report from the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities, COM (2000) 440 Final, Brussels, 11 July 2000, p. 17, and *supra* note 2 at p. 14. Thirty-three new investigations were initiated in 2001 (according to the Twentieth Annual Report) of which 27 were directly involved with antidumping proceedings.

7 Nineteenth Annual Report, *supra* note 2 at p. 24. The number of antidumping measures in force for the year 2001 remained the same amounting to 175; however, they covered 68 products and 36 countries (reported in the Twentieth Annual Report).

8 Ibid., at pp.24–26. The percentage remained the same throughout 2001 (according to the Twentieth Annual Report).

9 Art. 1(2), Basic Regulation 384/96.

10 F. Engering, H. De Brabander, & E. Vermulst, 'EC Antidumping Policy in a Globalizing World – A Dutch Perspective' (1998) 32(6) *Journal of World Trade* 115 at 117.

11 R.W. McGee, 'Antidumping Law: A Bright Future for a Bad Idea' (1996) at p. 3, available online at <http://papers.ssrn.com/sol3/delivery.cfu/98040605.pdf?abstract_id=7399>, viewed on 1 February 2002.

12 F. Engering, H. De Brabander, and E. Vermulst, *supra* note 10 at 115.

13 R.W. McGee, 'Antidumping Laws as Protectionist Trade Barriers: The Case for Repeal' (1996) at p. 2 available online at <http://papers.ssrn.com/sol3/delivery.cfu/98040704.pdf?abstractid=91268>, viewed on 1 February 2002.

In order to open an antidumping investigation, the Commission, which is the main administering authority in such cases, must determine whether dumping is taking place, if it is causing injury to EC producers and if it is in the Community interest to impose the measures.[14] In the absence of any of those elements no antidumping duties should be applied. There are rules and procedures to be applied in determining each step of the above requirements. However, the Basic Regulation has certain defects as it does not clearly define the powers and duties of the administering authority, thus the Commission constantly infringes the rights of legal certainty for foreign producers and actually discriminates against exporters from non-market economies (NMEs). There are also many shortcomings in the methods of calculations of dumping and injury margins as they usually end up being calculated arbitrarily. This not only violates general accounting principles, but also gives rise to inflated dumping margins being adopted against foreign exporters. The purpose of this paper is to address the weaknesses of the Basic Regulation at each stage of investigation. By making a comparative analysis with other antidumping laws, especially with the WTO Antidumping Agreement, and by looking at the most relevant scholarly works, suggestions for possible changes will be offered to reform the currently abusive antidumping legislation.

In Section 1, the analysis will begin by providing a clarification of the specific antidumping rules applicable for initiating investigation proceedings and the issues involved. It will identify who can lodge the antidumping complaints and on which basis and the results of not co-operating during the investigations. It will address the weaknesses of 'like-product' determinations since the Commission does not include market factors, producing odd results of comparing 'apples to oranges'. Furthermore, it will prove that the way normal value and export prices are calculated for dumping margin determinations simply allows no fair comparison to be made between the two. There have been many shortcomings present when the proper adjustments for both groups of products have had to be made. However, the results are even worse when the Commission is dealing with the imports from non-market economies. Not only has it disregarded home prices and constructed normal values on the basis of other analogue market economy country's data, but it has constantly failed to issue market economy treatment or individual treatment for the majority of Chinese and Russian exporters. Finally, it will identify further the problems within injury margin calculations. It will prove that the Commission acts arbitrarily by not providing sufficient evidence of the computational methods used whereas it should not be justified in withholding essential information under the confidentiality policy argument.

In Section 2 of this work, the necessity for changes and further improvements in the current antidumping laws will be considered in relation to the realities of the new globalizing world. Some possible solutions aiming to overcome the procedural and technical problems encountered in antidumping law and policy will be pointed out.

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[14] Art. 1(1) and (2), and Art. 21, Basic Regulation 384/96.

Furthermore, potential substitutes for the existing antidumping laws will be discussed, such as the inclusion of antidumping laws under competition rules, and the use of other safeguard measures instead of pursuing antidumping measures. The possibilities of repealing EC antidumping laws will be considered or at least the chances of combating the abusive nature of the investigation proceedings due to the arbitrary use of the Commission's powers.

In conclusion it will be shown that, no matter what trade protection instruments are applied, there is always a great risk of abuse involved unless there are very detailed explicit mandatory norms laid down covering both procedures and technicalities.

1. Misuse of the EC Basic Regulation 384/96

1.1. Administration of Rules

The Commission, besides the Advisory Committee and the Council, is the central body in the administration of antidumping rules. The Commission, within Directorate-General I (DG I), has the authority to accept complaints and initiate proceedings, commence investigations, impose provisional antidumping duties and accept undertakings, as well as to carry out reviews of existing antidumping measures.[15] In addition, the Commission may terminate either the investigation or the proceedings and submit a proposal to the Council, following consultation with the Advisory Committee, recommending the imposition of definitive antidumping duties.[16] The Basic Regulation seems to contain clear guidance for the roles of each of the administering institutions involved. Furthermore, the Commission claims that it guarantees transparent, fair and objective proceedings and in all cases follows the same procedural rules.[17] However, this is far from being true as the Commission in many cases is acting arbitrarily and the procedures are most often applied differently on a case-by-case basis, thus lacking transparency, as will be shown below.

1.2. Investigation Proceedings

First, it is important to distinguish between the initiation of proceedings and the investigation provided for under the Basic Regulation as only after initiating proceedings may the Commission start the investigation to determine dumping and injury.[18] The proceedings normally begin with the submission of a written complaint containing evidence of dumping, injury and causality from an EC industry producing

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[15] Arts. 5–8 and 11, Basic Regulation 384/96.
[16] Art. 9 (2) and (4), Basic Regulation 384/96.
[17] Nineteenth Annual Report, *supra* note 2 at p. 17.
[18] Art. 5(10), Basic Regulation 384/96.

more than 50 per cent, but not less than 25 per cent, of the total production of same or similar products to those referred to in the complaint.[19] The Commission starts the investigation when it finds 'sufficient evidence' of the substance of the complaint submitted by any natural or legal person, or any association not having legal personality, on behalf of the EC industry.[20] The Commission may also initiate the investigation 'in special circumstances' of its own initiative or when sufficient evidence of dumping, injury and causation is provided by any Member State.[21] The evidence of dumping and injury is considered in parallel. Proceedings must not be initiated against countries whose imports have a market share of below one per cent of EC consumption unless such countries collectively account for three per cent or more (under the *de minimis* rule).[22] The complaint should not be publicized before initiation, but the exporter's government must be notified.[23]

1.2.1. Time Limits

Once 'sufficient evidence' is determined to justify the initiation, the Commission must initiate a proceeding within 45 days of the lodging of the complaint and publish a notice of initiation in the Official Journal.[24] It must include the rights of interested parties and must inform the exporters, importers and representatives of the exporting county and the complainant about the initiation. The full text of the complaint, subject to the protection of confidential information, must be provided to the exporters and the exporting country, and other interested parties may also request copies.[25]

The investigation periods for dumping and injury differ, they are both investigated simultaneously but by two independent teams of investigators. In the case of dumping, a period of at least six months must be selected immediately prior to the initiation of the proceedings.[26] The Commission enjoys broad discretion in selecting both dumping and injury periods due to the complexity of the economic factors at issue.[27] Usually the Commission sets a twelve-month period for dumping investigation, and for injury investigation, normally a period of three or four years is judged necessary to determine the effect of the dumped imports.[28]

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[19] Art. 5(2) and (4) Basic Regulation 384/96.
[20] Art. 5(1) and (3), Basic Regulation 384/96.
[21] Art. 5(1) and (6), Basic Regulation 384/96.
[22] Art. 5(7), Basic Regulation 384/96.
[23] Art. 5(5), Basic Regulation 384/96.
[24] Art. 5(9), Basic Regulation 384/96.
[25] Art. 5(11), Basic Regulation 384/96.
[26] Art. 6(1), Basic Regulation 384/96.
[27] Joined Cases T-33/98 and T-34/98, *Petrotub and Republica v. Council*, [1999] ECR II-3837, recitals 126 and 161; and *see* also Case C-121/86, *Epichiriseon Metalleftikon v. Council*, [1990] ECR I–3919, recital 30; Case C-69/89, *Nakajima All Precision v. Council*, [1991] ECR I–2069, recital 86.
[28] Synthetic Staple Fibres of Polyester originating in Australia, Indonesia and Thailand (definitive), OJ 2000 L175/10, recital 87.

The Commission sends questionnaires to exporters and importers requesting large amounts of detailed information regarding all domestic sales and sales to the EC of products concerned, and asks for data on the production costs during the investigation period.[29] There is a period of at least 30 days to respond and 'in particular circumstances' the Commission may grant an extension of that period.[30] Officials of the Commission may later visit the premises of the companies in order to verify the data provided in the questionnaires.

With regard to the time limits of the dumping investigation itself must be concluded within one year, but in any case within 15 months of initiation.[31] However, it appears that the Commission is not bound by those explicit time limits and the Court of Justice has observed that the period should not be 'unreasonably' long.[32] On average, it takes the Commission more than 18 months to conclude investigations, which is exceeding the maximum time limit noted above.[33] However, the Court of First Instance has recently stated that this 15-month maximum time limit foreseen in the Basic Regulation is set to prevent overly lengthy antidumping procedures; therefore, the Commission is bound to complete the investigation within that time limit.[34]

1.2.2. Rights of Interested Parties

Although 'interested parties' are quite often mentioned in the EC Basic Regulation, there is no direct definition of the term. The WTO Antidumping Agreement specifies that it includes exporters, foreign producers, importers, trade or business associations, governments of the exporting Member, and producers, traders and business associations producing like products in the importing Member country.[35] Associations representing consumers should not be excluded as they might have useful information concerning antidumping proceedings.[36] There is a potential list of interested parties in the Basic Regulation including complainants, importers, exporters and their representative associations, users and consumer organizations which have made themselves known as well as representatives of the exporting countries.[37]

Such interested parties have a right to hearing and may inspect and respond to the

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[29] Art. 6(2), Basic Regulation 384/96.
[30] Ibid., *see* e.g., Welded Tubes Originating in Yougoslavia and Romania (provisional), OJ 1989 L294/10, recital 3.
[31] Art. 6(9), Basic Regulation 384/96.
[32] *See*, however, Case 246/87, *Continentale Producten-Gesellschaft v. Hauptzollamt München-West*, [1989] ECR 1151, recital 8 (32 months was deemed reasonable).
[33] J. Miranda et al., *supra* note 5 at 29.
[34] Case T-213/97, *Eurocoton v. Council*, [2000] ECR II-3727
[35] Art. 6(11), WTO Antidumping Agreement 1994.
[36] Case T-256/97, *BEUC v. Commission*, [2000] ECR II-101, recital 75.
[37] Art. 6(7), Basic Regulation 384/96.

relevant non-confidential information provided by parties upon written request addressed to the Commission.[38] There is also a possibility of confrontation meetings provided for the parties to be able to present their adverse views, but it is rarely used in practice due to the non-disclosure of confidential information and there being no obligation to attend such meetings.[39]

It is important to note that non co-operating foreign exporters have least advantageous treatment under the norms of the Basic Regulation. It is considered that, by choosing not to co-operate, the exporter may be presumed to have accepted the allegations made in the complaint.[40] Therefore, provided that there is a high level of co-operation among foreign exporters during the antidumping proceedings, the Commission will assign to those exporters who have not co-operated the highest dumping or injury margin determined for exports from their home country or calculating the highest possible duty based on different methods for exports concerned.[41]

1.2.2.1. DISCLOSURE OF DOCUMENTS

The Commission can only give access to non-confidential documents if the parties applying have a legitimate interest in the matter.[42] The duration of access to non-confidential information only lasts during the course of the proceedings. Once the investigation is completed the right of access to non-confidential information most likely disappears as well.[43] The Commission's refusal to disclose any document which is in the form of a preparatory act cannot be challenged under Article 230 EC Treaty during the antidumping proceedings.[44] Moreover, once the Commission fails to provide documents which it has taken into account during the proceedings, they may result in being excluded as evidence, but this would not lead to an annulment.[45] Interested parties may request the Commission to provide disclosures of the essential facts and considerations based on which the provisional measures were adopted and on which basis it recommends the imposition of definitive duties.[46]

Failure to disclose measures as far as is compatible with confidentiality obligations, when adopting such measures, will lead to their annulment.[47] But the Commission's obligation to disclose information depends on economic factors.

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[38] Art. 6(5) and (7), Basic Regulation 384/96.
[39] Art. 6(6), Basic Regulation 384/96.
[40] Video Cassette Recorders originating in Japan and Korea (definitive), OJ 1989 L57/55, recital 32.
[41] Art. 18, Basic Regulation 384/96. *See* also Footwear with Uppers of Leather or Plastic originating in China, Indonesia and Thailand (definitive), OJ 1998 L60/1, recitals 40 and 41.
[42] Arts 19 and 20, Basic Regulation 384/96. *See* also *supra* note 35, recital 44.
[43] Case T-171/97, *Swedish Match Philippines Inc. v. Council*, [1999] ECR II–3241, recital 46.
[44] T. Tridimas, *The General Principles of EC Law* (Oxford Oxford University Press 1999) at p. 259.
[45] Case T-30/91, *Solvay v. Commission*, [1995] ECR II–1775, recital 30.
[46] Arts. 6(5), 20(1), and 20(2), Basic Regulation 384/96.
[47] Case 264/82, *Timex v. Council and Commission*, [1985] ECR 849–871, recital 30.

When parties, who are subject to an investigation, are major players in the field and the disclosure would lead them to an informational advantage of the market and working out confidential information regarding the complainant, the Commission may choose not to disclose.[48] This again leaves the Commission with very broad discretion. The result is quite interesting, as failure to disclose the basis for the adoption of provisional measures does not make the regulation for imposing definitive duties invalid.[49] This is because the rules for adopting the regulation might differ from the ones used for the adoption of provisional measures.

1.2.2.2. RIGHT TO A FAIR HEARING

Under the EC Basic Regulation the right to a hearing is interpreted as a fundamental right of a general application.[50] Parties concerned must be given an opportunity to express their opinion on the truth and relevance of the facts and circumstances alleged, and must have access to information.[51] The Commission and the Council must inform the parties concerned of the facts and other considerations upon which they have adopted antidumping measures.[52] It is important to note that the right is respected regardless of the fact that antidumping measures are imposed by a regulation, rather than an individual decision, as it affects the parties concerned both directly and individually.[53] However, the failure of the Commission or the Council to present information and considerations that are only of a confirmatory nature does not constitute a breach of a right to a hearing.[54]

Therefore, in the written request, which must be made within the time limits specified in the notice of initiation, parties concerned must show that they are interested parties and are likely to be affected by the outcome of the proceedings, and that there are particular reasons why they should be heard.[55] It suggests that there are more parties allowed to use the right to be heard than those that are entitled to see the non-confidential information. Most often the Commission listens to parties who do not have access to the non-confidential documents because of the fact that it benefits from the amount of information received from them.[56] However, the investigated parties are distinguished from other interested parties as they do not

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[48] Joined Cases T-159/94, *Ajinomoto Co. Inc. v. Council*, and T-160/94, *The Nutra Sweet Company v. Council*, [1997] ECR II-2461, recital 86.
[49] Tridimas, *supra* note 44 at p. 269.
[50] Case C-49/88, *Al Jubail Fertiliser v. Council*, [1991] ECR I–3187, recital 15.
[51] Case C-69/89, *Nakajima All Precision v. Council*, [1991] ECR I–2069, recital 108.
[52] Tridimas, *supra* note 44 at p. 268.
[53] Ibid.
[54] Case T-121/95, *EFMA v. Council*, [1997] ECR II-2391, recital 84.
[55] Art. 6(5), Basic Regulation 384/96.
[56] T. Giannakopoulos, 'The Right to be Orally Heard by the Commission in Antitrust, Merger, Antidumping/Anti-subsidies and State Aid Community Procedures' in (2001) 24(4) *World Competition* (the Netherlands Kluwer International 2001) 541 at 558.

have to provide the reasons for their request since they are likely to be affected by the outcome of the proceedings.[57] There is also a permanent Hearing Officer appointed, taking a chairman's and adviser's role during the hearing.[58] Strangely enough, hearings are not public and the Commission provides only for the possibility of examination of economic factors and usually provides no possibility for pleading on other facts and law.[59] Meetings are held in an informal atmosphere, no witnesses are allowed if they are not interested parties and have not filed the questionnaire, and no official records are kept, except those that may result in the form of internal reports.[60]

1.2.3. Need for Transparency

There is no doubt that the Commission has broad discretion in antidumping proceedings and, for this reason, it remains essential to increase transparency at each stage of the investigation. There is also a necessity to find some better ways to publish more detailed and timely information through various channels, not only on complaints lodged but on the progress of investigations initiated as well. The Commission should consider ways in which to produce more disclosure summaries on working documents, subject to confidentiality provisions under the EC Basic Regulation. For example, in the United States and Canada, lawyers of interested parties can gain access to the confidential information of other parties under an administrative protective order, but cannot provide it to their clients.[61] It is necessary to have the same system within the EC since then legal representatives would be able to check the accuracy of the information directly, not having to rely on a disclosure system which is poorly administered by the Commission. Also, more technical details are necessary to be included in the working documents in order to be able to check the calculation methods of dumping and injury margins by the Commission resulting from the investigation.[62]

Using two independent teams of investigators for dumping and injury determinations for ensuring transparency is not efficient since competencies, skills and data involved are similar.[63] It is clear that the practice used in the past where the investigation was handled by a single team was more appropriate and less protectionist.

Moreover the antidumping measures must be applied in a restrictive manner,

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[57] Ibid., at 565.
[58] Ibid., at 560.
[59] Ibid., at 559.
[60] Ibid.
[61] E. Vermulst, 'Adopting and Implementing Antidumping Laws: Some Suggestions for Developing Countries' in (1997) 31(2) *Journal of World Trade* 5 at 14.
[62] Engering et al., *supra* note 10 at 123–124.
[63] Vermulst, *supra* note 61 at 8. *See* also A.H. Qureshi, 'Drafting Antidumping Legislation: Issues and Tips' (2000) 34(6) *Journal of World Trade* 19 at 27.

following strictly the time limits and standing requirements for lodging the complaint.

There are no guidelines in the EC Basic Regulation as to what kind of evidence is 'sufficient' enough for the Commission to start the investigation. The object of the 'sufficient evidence' requirement is to prevent exporters from being subjected to investigations not justified on objective grounds since 'antidumping proceedings relate in principle to all imports of a certain category of products from a third country and not to imports of products manufactured by a specific undertaking'.[64] However, there should be a stricter requirement of evidence calling for 'serious' rather than 'sufficient' evidence. Otherwise, it leaves the Commission in a position of having to justify most of the proceedings since it is not in its interests to deem evidence 'insufficient' while representing EC producers who are expecting it to act on their behalf. Some special considerations should be given to developing countries as they should be provided with the possibility to remedy the situation of dumping before proceedings are initiated.[65] This could be done by holding meaningful consultations to discuss the facts, seriousness of evidence and then to reach a mutually agreed solution and so agree on the implementation period for the elimination of dumping.[66]

Finally, it is necessary to improve the quality of the right to a fair hearing of the parties concerned. The Commission is discriminating against foreign exporters by not allowing the participation of witnesses in their hearings, which is not 'fair' as they ultimately lack proper rights of defence. Furthermore, the fact that the hearings are held in an informal atmosphere does not give much value to them. The resulting product of the hearing is an internal report which cannot be accessed by other interested parties and is deemed to be an internal document of the Commission which might have some confidential information in it. Simultaneous translation is not even provided and most of the hearings take place when it suits the Commission, since it sets the date.[67] As regards the Hearing Officer, it is not an effective instrument used since, as he is not independent from the proceedings, he is one of the Commission's officials and does not have any tangible powers during hearings.[68]

Therefore, the hearing procedure must be changed from an informal to an official atmosphere with an official report being drafted at the conclusion that can be accessed by interested parties. The hearings should be held not when it suits the Commission but before it has adopted its final position in the proceedings. The parties concerned must have a chance to submit their comments on the facts and

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[64] Case C-216/91, *Rima v. Council*, [1993] ECR I–6303, recital 17.
[65] K. Adamantopoulos & D. De Notaris, *Future of the WTO and the Reform of the Antidumping Agreement: A Legal Perspective* (Brussels Hammond Suddards Edge 2000) at p. 25.
[66] Ibid., at p. 26.
[67] Giannakopoulos, *supra* note 56 at 566.
[68] Ibid., at p. 567.

circumstances on which the Commission is planning to base its final position. The Hearing Officer should be an expert in the field selected on a case-by-case basis.

1.3. Like Product

The correct determination of 'like product' is one of the most important and most difficult factors of the antidumping proceedings since the Commission enjoys very wide discretion that sometimes leads to absurd results comparing 'apples to oranges'.

The term 'like product' could be identified as a product that is identical, meaning that it is 'alike in all respects', or in the absence of the latter, a similar product, which has 'characteristics closely resembling those of the product under consideration'.[69] The definition is applied when determining those products with which the price comparison is to be made for determining dumping and injury margins, and to determine the EC industry which is claiming to be injured. The Commission, at the beginning of the proceedings, makes an analysis of whether the products involved are to be investigated as a single product.[70] Separate investigations are to be held for each group of like products when there is variety of products involved.[71] The Commission might even decide during the proceedings that there are separate products involved which could lead to having the measure redefined retrospectively.[72] The aim of the Commission should be to determine same products that are manufactured and sold by the foreign company into the EC market with those produced by the EC industry. However, in the absence of an identical product, the definition of like product becomes controversial. Therefore, the Commission is faced with a complex task of determining a similar product which should be physically as close as possible to the product in question. The determinations in this case usually result in products being defined either too broadly or too narrowly, depending on the complaining EC industry's interests. Therefore, a larger group of products is investigated during the proceeding where 'like product' is interpreted broadly. However, it makes it quite difficult then for the complaining EC industry to meet the standing criteria and to prove injury.[73] Thus, the larger the group of products involved the more difficult it gets to reach the standing thresholds of the majority of producers for each group of products involved. The same applies to injury as different EC producers might be having difficulties with different groups of products, thus making it hard to prove injury. By contrast with a broad definition, a narrow interpretation of like product is less problematic; however, if it is too

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[69] Art. 1(4), Basic Regulation 384/96.

[70] W. Muller, N. Khan & H-A. Neumann, *EC Antidumping Law–A Commentary on Regulation 384/96* (Chichester John Wiley & Sons Ltd Chichester 1998) at p. 43.

[71] Espadrilles originating in China (definitive), OJ 1991 L166/1 recital 10.

[72] Ferro-Chrome with a Carbon Content by Weight of Maximum 0.5% originating in Kazakhstan, Russia and Ukraine, OJ 1999 L245/1, recital 10.

[73] M. Bronckers & N. McNelis, 'Rethinking the "Like Product" Definition in WTO Antidumping Law' (1999) 33(3) *Journal of World Trade* 73 at 78.

narrowly interpreted, there is a danger of circumvention of imported products from one group to another to avoid antidumping measures.

When determining the products, it is important to note their physical and technical characteristics, and to take the consumers' perceptions into account.[74] With all of today's technical developments and changes in consumer appreciation this may lead to changes in like-product determinations.[75] It is unclear whether the Commission will declare products alike where they are physically identical but have been made in different ways. This is the case where it is solely dependent on the Commission's interpretation, falling under its broad discretion. It is settled that if one product has to go through the successive stages of processing and another does not then they have to be distinguished from each other if the process has added a significant value.[76] But the Commission in some cases has considered as like products goods that had the same technical characteristics, but were different in design and went through different technical processes.[77] So if there is only simple processing involved then there is no need to distinguish between the two.[78] The same remains true if there is a slight addition made to one product which the other does not have.[79] However, if the technical characteristics of the products differ, for example if one is more technically advanced than the other, the Commission may exclude it from the scope of like-product determinations.[80] The same principal is followed when one product is a 'finished' product and another one is a 'semi-finished' product.[81]

Let us now look at examples of how the Commission determines the 'likeness' of products for some specific groups of products.

In a proceeding involving minerals, the Commission must determine 'same essential physical, technical and chemical characteristics'.[82] In order to determine the likeness of raw materials, the preferences of the users of the produced products is

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74 Case T-2/95, *IPS v. Council*, [1998] ECR II–3939, recital 207.

75 Colour Television Receivers originating in Malaysia, China, Korea, Singapore, Thailand (provisional), OJ 1994 L255/50, recital 15.

76 Outer Rings of Tapered Roller Bearings Originating in Japan (definitive), OJ 1993 L9/7, recital 6 (finished and unfinished bearing cups: not like).

77 Electronic Microcircuits Known as DRAMs originating in Japan (definitive), OJ 1990 L193/1, recital 7; Electronic Microcircuits Known as EPROMs originating in Japan (definitive), OJ 1991 L65/1, recital 26.

78 Unwrought Pure Magnesium originating in Russia and Ukraine (definitive), OJ 1996 L174/1, recital 15 (ingots and granules ground from ingots: considered to be like).

79 Gas Fuelled Non-Refillable Pocket Flint Lighters and Disposable Refillable Pocket Flint Lighters originating in China (definitive), OJ 1999 L 22/1, recital 10.

80 Magnetic ('3.5') Microdisks originating in Japan, Taiwan, China, Hong Kong, Korea, Malaysia, Mexico, USA, Indonesia, OJ 1999 L307/1, recital 28.

81 Audio Tapes in Cassettes originating in Japan, Korea and Hong Kong (provisional), OJ 1990 L313/5, recital 10.

82 Hematite Pig-Iron originating in Brazil, Poland, Russia and Ukraine (definitive), OJ 1994 L 182/37, recital 6.

important, which means that there must be a similar use, 'essentially the same end use' or there should be no significant differences in the uses of those products.[83] When high technologies are involved, the Commission looks at physical and technical characteristics, application and use, and also specificities of the market and consumer appreciation.[84] However, this is an ideal interpretation as it is quite rarely applied in practice.

1.3.1. Lack of Market-Based Factors

The Commission in some cases has also applied some other criteria for like-product determinations. It has considered the 'substitutability' of the products, which must be at least to a great extent, and products must be directly competing with each other.[85] Furthermore, the Commission has also looked at different uses, technical differences and technical performances, differences in technical specifications, and compared the purchase price of the products concerned.[86] However, the above principles are still vaguely applied in practice as in a number of cases the Commission, even after considering 'interchangeability' and competition criteria, has still failed to apply them in practice when comparing the products, producing unreasonable results, which will be illustrated below.

For example, in a Footwear case, the Commission defined products being like including all different sorts of indoor and outdoor slippers and shoes with different soles and textile uppers.[87] It is difficult to understand the logic behind this decision as there is no way that slippers could substitute for trainers or other shoes intended for outdoor use. Therefore, it was correct to have this approach changed when adopting final measures as slippers were simply withdrawn from the proceedings.[88]

However, in another case of Ring Binder Mechanisms, the Commission included in the like category products of 'several hundred different types of RBM' differing in 'size, shape and number of rings, the size of the base plate and the system to open the rings'.[89] The logic behind that was that 'all RBM have the same basic physical characteristic and

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[83] Peroxodisulphates originating in P.R. China (provisional), OJ 1995 L169/15, recital 9; Certain Magnetic Disks originating in Japan, Taiwan and China (provisional), OJ 1993 L95/5, recital 9; Polyester Textured Filament Yarn From Indonesia and Thailand (provisional), OJ 1996 L128/3, recital 9.

[84] Serial Impact Dot Matrix Printers originating in Japan, OJ 1998 L130/12, recital 11.

[85] Certain Photo Albums originating in China (provisional), OJ 1993 L228/16, recital 8; Certain Magnetic Disks from Japan, Taiwan and China (provisional), OJ 1993 L95/5, recital 9; Gas Fuelled, Non-refillable Pocket Flint Lighters originating in China (provisional), OJ 1995 L101/38, recital 13.

[86] Television Camera Systems originating in Japan (provisional), OJ 1993 L271/1, recital 8; PPCs originating in Japan (provisional), OJ 1986 L239/5, recital 11.

[87] Certain Footwear originating in China and Indonesia (provisional), OJ 1997 L29/3, recital 16.

[88] Certain Footwear originating in China and Indonesia (definitive), OJ 1997 L298/1, recital 8.

[89] Certain Ring Binder Mechanisms originating in Malaysia and China (provisional), OJ 1996 L187/47, recitals 12 and 13.

that the types of RBM can, within a certain range, replace each other'.[90] It is difficult to understand on what grounds the Commission excluded the lever-arch mechanisms as they are almost identical physically and in their end use to RBM.[91] The main reason for excluding the latter product could be that complainants had asked the Commission not to include that product in their complaint.[92] Therefore, it proves that the administering authorities can be influenced to a great extent, leaving foreign producers with subjective rather than objective proceedings.

In a case concerning bicycles, the Commission had grouped all different types of bicycles into one single like-product category, as it considered that 'there is a great degree of interchangeability and, consequently, of competition between models classified in different categories'.[93] In this case at least five groups of bicycles could have been distinguished, namely mountain, sports, touring, children's and other bicycles.[94] However, it is interesting to note that the Court of First Instance has approved the Commission's broad discretion in this case, effectively allowing it to compare Rolls Royces with Ladas.[95]

Another discretionary methodology used was in a Colour Television Receivers case, where the Commission has considered the products alike, regardless of their broadcasting and reception systems, voltage or design.[96] Therefore, there was no distinction made between small screen and large screen television sets, leading to the conclusion that private jets and luxury Boeings could be deemed 'alike' despite their 'minor' differences.

There are a lot more cases like the ones mentioned above where the Commission has proved that it has unlimited discretion when determining like products.[97] In conclusion, a broad interpretation of like products, excluding market-based factors, leads to a situation where antidumping measures are applied to products that were not even dumped or dumped at significantly lower levels.

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[90] Ibid.

[91] Certain Ring Binder Mechanisms originating in Malaysia and China (definitive), OJ 1997 L22/1, recital 14.

[92] Bronckers & McNelis, *supra* note 73 at 83.

[93] Bicycles originating in China (definitive). OJ 1993 L228/1, recital 7.

[94] Bicycles originating in China (provisional), OJ 1993 L58/12, recital 10; The same principle was applied in Bicycles originating in Indonesia, Malaysia and Thailand (provisional), OJ 1995 L248/12, recitals 11–14.

[95] Case T-170/94, *Shanghai Bicycle Corporation v. Council*, [1997] ECR II–1383, recital 70.

[96] CTVs originating in Malaysia, China, Korea, Singapore and Thailand (provisional), OJ 1994 L255/50, recital 13.

[97] DRAMs originating in Korea (provisional), OJ 1992 L272/13; Synthetic Fibres of Polyester originating in India and Korea (definitive), OJ 1993 L9/2; Certain Photo Albums originating in China (provisional), OJ 1993 L228/16; Japanese Television Camera Systems (provisional), OJ 1993 L271/1; Unwrought Magnesium originating in Russia and Ukraine (provisional), OJ 1995 L312/37.

1.3.2. Call for Changes

Due to the lack of proper clarification concerning determinations of like product within the Basic Regulation, the Commission enjoys wide discretion when interpreting the product scope of antidumping proceedings. The like-product interpretation used by the Commission is usually not related to the requirement of direct competition and substitutability of the products concerned, as it is usually focusing only on physical and technical characteristics. This, of course, leads to a broad 'like-product' definition, which would otherwise be less likely if a market-based approach was used. It is necessary to stress that market-based factors should not only prevail when determining like product, but also in the injury assessment. It is very important that only directly competing products are compared with each other, otherwise it leads to arbitrary protection of the EC industry, thus discriminating against foreign imports and offering no legal certainty to foreign operators.[98]

On the WTO level, in Liquor Taxes cases and the Indonesia Automobile case, the Panels and the Appellate Body repeatedly stressed the importance of a market-based approach in the like-product determinations.[99] It is therefore high time for EC antidumping policy to catch up, as the Commission has great potential within its wide discretion to increase the quality of the proceedings by applying a fair and foreseeable like-product test.

In order to achieve the above goal it is necessary for the Commission to apply market-based factors as an essential element among other criteria used. For comparing like with like, an examination of physical characteristics, end uses, and consumer perceptions by using a 'two-way' interchangeability test must be carried out. In carrying out this test, the Commission would check whether one product can be substituted for another and vice versa.[100] However, the substitution must be assessed carefully as some products have different standards and it might be technically possible that higher standard products substitute lower standard ones, but it would not be fair to call such groups 'alike' if there is a great difference in prices involved.[101]

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[98] Adamantopoulos & De Notaris, *supra* note 65 at p. 21.

[99] Japan – Taxes on Alcoholic Beverages (Japanese Liquor Taxes II), Panel Report of 11 July 1996 (WT/DS8/R, WT/DS10/R, WT/DS11/R) and Appellate Body Report of 4 October 1996 (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R); Korea – Taxes on Alcoholic Beverages (the Korean Liquor Taxes), Panel Report of 17 September 1998 (WT/DS75/R, WT/DS84/R) and Appellate Body Report of 18 January 1999 (WT/DS75/AB/R, WT/DS84/AB/R) 'like product' was analysed in the context of art. III.2 of the GATT (discriminatory tax provision); Indonesia – Certain Measures Affecting The Automobile Industry (Indonesia Automobile Case), Panel Report of 2 July 1998 (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R) 'like product' was analyzed in the context of the Agreement on Subsidies and Countervailing Measures ('ASCM').

[100] Adamantopoulos & De Notaris, *supra* note 65 at p. 18.

[101] Synthetic Staple Fibres of Polyester originating in Belarus (definitive), OJ 1999 L204/3, all spinning and non-woven PSFs were considered 'alike'.

Therefore, the Basic Regulation needs a precise like-product provision calling for direct competition between products in order for them to be considered alike. This would be the best way to limit the wide margin of discretion that the Commission enjoys in all antidumping proceedings and would allow comparison of like with like product. This would also strengthen legal certainty, with products not falling under the scope of like product being investigated separately or through concurrent investigations.[102]

1.4. Determination of Dumping

Dumping must be examined before any antidumping measures can be imposed on like imports subject to the proceedings. There are few forms of dumping that could be distinguished under the Basic Regulation. The most obvious two are price discrimination and sales below cost dumping, but non-market economy dumping can also be distinguished due to the specificities for establishing the latter involved.[103] However, it is the price discrimination that forms the essence of dumping because a product is generally considered to be dumped if its export price to the EC is less than its price on the domestic market of the exporter. Thus, in order to determine dumping, the Commission must identify the domestic market price of the product, called the 'normal value', establish the export price of the product, and compare the normal value and export price of the like product for calculating the 'dumping margin'.[104]

However, due to the wide discretion enjoyed by the Commission in dumping calculation procedures, there are cases in which dumping margins are being constantly inflated or antidumping measures are being imposed on imports which were not even dumped, as will be shown below.

1.4.1. Normal Value

A dumping determination starts with the establishment of 'normal value' on the basis of one of the three tests laid down under the Basic Regulation. There is a distinction made between normal value calculations for market economy and those for non-market economy countries, which will be explained below. Calculating normal value for the market economy countries should normally be based on 'the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'.[105] When the producer is not producing or has no sales in the domestic market, the normal value shall be based on the prices of 'other sellers or producers'.[106] Otherwise, another very common method used by the Commis-

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[102] Bronckers & McNelis, *supra* note 73 at 91.
[103] Art. 1(2), 2(4), and 2(7), Basic Regulation 384/96.
[104] Art. 2, Basic Regulation 384/96.
[105] Art. 2(1), Basic Regulation 384/96.
[106] Ibid.

sion would be the establishment of 'constructed value', where normal value is based on the cost of production, adding SGA costs and a reasonable profit.[107] A second alternative would be to determine normal value based on the prices in an 'appropriate' third-country export market, 'provided that those prices are representative'.[108] But in practice the latter method is disregarded by the Commission as it considers constructed value as being 'more accurate and precise'.[109] This choice of alternative methods directly contradicts the norms laid down under the WTO Antidumping Agreement as the 'constructed value' was agreed to be the last option in normal value determinations.[110]

Therefore, under the Basic Regulation, the Commission must establish the 'normal value' based on the actual sales prices in the exporting country, unless they are not made in sufficient quantities in the 'ordinary course of trade', or the sales do not permit 'proper comparison' due to 'particular market situations'.[111]

In this respect the measure of 'sufficient sales' are those 'intended for domestic consumption' when sales in the exporting country make at least five per cent of the exports to the EC.[112] Sales are not intended for domestic consumption if they are sold to other domestic customers to be exported.[113] Furthermore, the 'exporting country' is normally the country of origin of like products; however it could be an intermediate country under certain conditions as well.[114]

To be in the 'ordinary course of trade', domestic sales 'must reflect the normal behaviour on the part of purchasers and result from normal patterns of price formation'.[115] However, only sales to unrelated customers are made in the ordinary course of trade, unless it is determined that they are not affected by the exporter's relationship with the 'associated' party or with whom it has a 'compensatory arrangement'.[116] The Commission treats parties as being related if there is at least five per cent shareholding involved.[117]

Sales made between related parties, or made at a loss, or made within non-market

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[107] Art. 2(3), Basic Regulation 384/96.
[108] Ibid.
[109] Colour Television Receivers originating in Malaysia, China, Korea, Singapore and Thailand (definitive), OJ 1995 L73/3, recital 11.
[110] Art. 2(2), WTO Antidumping Agreement 1994.
[111] Art. 2(3), Basic Regulation 384/96.
[112] Art. 2(2), Basic Regulation 384/96. *See* also Pierre Didier, 'The WTO Antidumping Code and EC Practice: Issues for Review in Trade Negotiations' (2001) 35(1) *Journal of World Trade* 33 at 35.
[113] Polyester Yarn originating in the US (definitive), OJ 1985 L246/57, recital 9.
[114] Art. 1(3), Basic Regulation 384/96; Aspartame originating in Japan and the US (definitive), OJ 1991 L134/1, recital 14.
[115] Case C-105/90, *Goldstar v. Council*, [1992] ECR I–677, recital 15; Joined Cases C-76/98 and C-77/98, *Ajinomoto and Nutrasweet v. Council*, [2001] ECR I-3223, recital 39.
[116] Art. 2(1), Basic Regulation 384/96.
[117] E. Vermulst & P. Waer, *EC Antidumping Law and Practice* (London Sweet and Maxwell 1996) at p. 182.

economy countries are considered as those 'particular market situations' where domestic sales 'do not permit a proper comparison'.[118]

A key element in normal-value determinations is the five per cent sales sufficiency test since, based on the outcome of its application, the Commission knows which method it is going to use. This latter test is applied twice. First, the Commission applies the 'representativeness test' to determine whether the total sales of each exporter on the domestic market reaches five per cent of its total export volume to the EC.[119] If satisfied at this level, the Commission applies the same test to each like-product type separately, which is called the 'type specific representativeness test'.[120] By doing so, the Commission determines whether the like-product types sold in the home-country market allow the making of comparisons with the specific types sold in the EC.

However, the Commission might disregard the fact that the total export volume of sales is lower than five per cent when there is a specific market concerned, thus the prices charged are considered to be also representative in this case.[121]

Furthermore, the domestic sales below the cost of production are not considered by the Commission and are excluded from the above five per cent tests.[122] Therefore, the Commission applies the 'sales below cost test' on a specific like-product type basis.[123] If profitable sales represent more than 80 per cent of total sales, the sales prices of all sales are used to calculate the normal value. If profitable sales represent between 20 and 80 per cent of total sales, the normal value is based only on the profitable sales. If profitable sales are lower than 20 per cent of total sales, the Commission chooses to construct normal value.[124]

Therefore, if the five per cent tests are not met for some or all like-product types or when the sales below cost test ends up below 20 per cent, the Commission most often if not always chooses to construct normal value. Of course, this is again a clear indicator of the Commission's wide discretion as it simply refuses to use other methods like sales prices to the other sellers and producers because it finds it difficult to find like products in the product lines of other sellers.[125] A similar methodology is behind the dismissal of sales to third countries, which was mentioned briefly above, since the Commission is concerned that these export prices could also be dumped or

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[118] Art. 2(1), (4), and (7), Basic Regulation 384/96.
[119] Certain Unbleached Cotton Fabrics originating in China, Egypt, India, Indonesia, Pakistan and Turkey (provisional), OJ 1996 L295/3, recital 29.
[120] Cotton-Type Bed Linen originating in Egypt, India and Pakistan (provisional), OJ L 156/11, recital 24.
[121] Art. 2(2), Basic Regulation 384/96.
[122] Disodium Carbonate originating in the US (provisional), OJ 1995 L/8, recital 12.
[123] Art. 2(4), Basic Regulation 384/96.
[124] Microwave ovens originating in China, Korea, Malaysia and Thailand (provisional), OJ 1995 L156/5, recital 21.
[125] Stainless Steel Fasteners originating in China, India, Malaysia, Korea, Taiwan and Thailand (provisional), OJ 1997 L243/17, recital 15.

that there are technical differences between the products.[126] However, as shown above in section 1.3.1 the Commission has no difficulties comparing apples with oranges when imposing antidumping measures on like foreign imports.

1.4.1.1. CONSTRUCTED VALUE

Therefore, the 'constructed' normal value is commonly used in order to determine the sales prices of the like product as it would otherwise be if that product was sold in its domestic market.[127] It is constructed on the basis of the cost of production which is calculated on the basis of all costs, both fixed and variable, in the country of origin, of costs of resources and production involved plus SGA costs and adding a reasonable profit.[128] Therefore, this method allows a great margin of discretion for the Commission in determining normal value. Thus, there is a problem that dumping findings quite often result not from the exporter's actual behaviour but from the Commission's discriminatory assumptions when determining constructed value.[129]

The Commission calculates all costs on the basis of the records kept by the parties concerned that must be in accordance with the 'generally accepted accounting principles of the country concerned' and the data provided must reasonably reflect the costs incurred.[130] As to the allocation of costs, the evidence will be considered only if the proper allocation of costs has been historically used (period of four years), otherwise allocation on the basis of turnover will be used.[131] Turnover is also used when the exporter does not allocate costs to the like products for internal reporting purposes.[132] Moreover, the costs are to be adjusted for those 'non-recurring' items of cost, which have been incurred and written off in one year that might benefit future or current production, such as research and development costs, and so on.[133] Adjustments are also foreseen in 'start-up operations', when the creation of new production facilities involves additional costs having an effect on the prices of like products.[134]

The amount allocated for SGA costs is to be based on the actual data reflecting the 'production and sales of the like product' by the parties concerned in the

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[126] Urea originating in Libya and Saudi Arabia (definitive), OJ 1987 L317/1, recital 8; Colour Television Receivers originating in Malaysia, China, Korea, Singapore and Thailand (provisional), OJ 1994 L255/50, recital 45.
[127] Joined Cases 277/85 and 300/85, *Canon v. Council*, [1988] ECR 5731, recital 26.
[128] Art. 2(3), Basic Regulation 384/96.
[129] I. Van Bael & J-F. Bellis, *Antidumping and Other Trade Protection Laws of the EC* (Oxfordshire CCH Editions Limited 1996) at p. 77.
[130] Art. 2(5), Basic Regulation 384/96.
[131] Art. 2(5), Basic Regulation 384/96.
[132] Bicycles originating in Indonesia, Malaysia and Thailand (definitive), OJ 1996 L91/1, recitals 16.
[133] Art. 2(5), Basic Regulation 384/96; *see* also *supra* note 67 at p. 88.
[134] Ibid.

ordinary course of trade.[135] However, if total domestic sales of like products are not representative, less than five per cent of its export sales to the EC, the Commission establishes SGA costs on various other bases. One method is the 'weighed average of the actual amounts' for other exporters and producers concerned in the home market.[136] This method is not applicable when there is only one other exporter or producer in the home country or the other producers fail the representativeness test of five per cent.[137] Therefore, another way would be to base SGA costs on the 'actual amounts applicable to the same general category of products' for the parties concerned or 'any other reasonable method'.[138]

With regard to the profit margin, the Commission enjoys wide discretion when calculating the amount of profit to be added to the cost of production together with the SGA costs for the like product.[139] The rules for calculating profit margin closely relate to those applicable to SGA costs explained above. The Commission normally disregards the non-profitable sales for determining profit margins.[140] Therefore, the actual profit is not based on all domestic sales, but on profitable sales only, which clearly leads to inflation of the profit margins. The logic behind this is that the 'constructed value is a surrogate for domestic market price and should therefore approximate the result which would be obtained if sufficient profitable domestic sales had been made'.[141] Thus, the Commission is favouring the use of sometimes unusually high profit margins in order to inflate the constructed normal value.[142]

1.4.2. Export Price

The second step in a dumping determination is the establishment of the 'export price' which is that 'actually paid or payable for the product when sold from an exporting

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[135] Art. 2(6), Basic Regulation 384/96.

[136] Art. 2(6)(a), Basic Regulation. *See* also Disodium Carbnate originating in the US (provisional), OJ 1995 L83/8, recital 15.

[137] India-Antidumping on Cotton-Type Bed Linen, Appellate Body Report of 2001, WT/DS141/AB/R, recital 74; Stainless Steel Wires originating in Korea, OJ 1999 L79/1, recital 13.

[138] Art. 2(6)(b) and (c), Basic Regulation 384/96. *See* also Microwave Ovens originating in China, Korea, Thailand and Malaysia (provisional), OJ 1995 L156/5, recital 32; Magnetic Discs originating in Hong Kong and Korea (provisional), OJ 1994 L68/5, recital 13.

[139] Case C-69/89, *Nakajima All Precision v. Council*, [1991] ECR I–2069, recital 63.

[140] Video Cassette Recorders originating in Korea and Japan (provisional), OJ 1988 L240/5, recital 18.

[141] Van Bael & Bellis, *supra* note 129 at p. 91.

[142] 6% Ferro-Silicon originating in Poland and Egypt (provisional), OJ 1992 L183/8, recitals 11–12; 10% Magnetic Discs originating in Hong Kong and Korea (provisional), OJ 1994 L68/5, recital 13; 13.5% DRAMs originating in Korea (provisional), OJ 1992 L272/13, recital 23; 15% Magnetic Discs originating in Japan, Taiwan and China (provisional), OJ 1993 L95/5, recital 16; 32.39% Electronic Typewriters originating in Japan (definitive), OJ 1985 L163/1, recital 16.

country to the Community'.[143] However, the export price may be constructed or applied 'on any reasonable basis', where there is no actual export price or where it is found to be unreliable.[144]

The export price is most often determined on the basis of the actual price that the foreign producer charges to the independent importer for his direct sales to the EC.[145] The same remains true in the case of export sales made on an Original Equipment Manufacturer (OEM) basis, as the export price is determined on the actual prices paid by the OEM purchaser.[146]

However, it might be that a foreign producer sells a product to an intermediate company based in the exporting country, rather than to an independent buyer in the EC. Therefore, the price that the foreign producer charges to the unrelated trading house will be considered as the export price.[147] Furthermore, no separate dumping margins are calculated and no duties are imposed on trading houses which are not manufacturing the products in the home country.[148] In this case, the imports from the trading house are subject to an antidumping duty at the rate of the producer supplying the product concerned.[149] However, when trading houses are related to the foreign producer, the export price is determined on the basis of the prices charged by the trading house to the independent importer in the EC.[150]

The export price is the potentially dumped price, since the amount by which it differs from the normal value is considered to be the dumping amount. Therefore, it is extremely important that the Commission properly constructs an export price in the absence of a reliable export price. Unreliability exists where an 'association' or a 'compensatory arrangement' exists between the exporter and importer in the EC.[151] Therefore, the Commission constructs the export price based on the 'price at which the imported products are first resold to an independent buyer'.[152] In the absence of sales to the independent buyer, or where imported products are 'not resold in the condition in which they were imported,' the Commission constructs the export price 'on any reasonable basis'.[153] However, the Commission disregards the latter method as it has rarely been used to date.

The Basic Regulation does not require constructing the export price in each case

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[143] Art. 2(8), Basic Regulation 384/96.
[144] Art. 2(9), Basic Regulation 384/96.
[145] Vermulst & Waer, *supra* note 117 at p. 173.
[146] Photocopiers originating in Japan (provisional), OJ 1986 L239/5, recital 18.
[147] Urea Ammonium Nitrate Solution originating in Poland and Bulgaria (provisional), OJ 1994 L162/16, recital 15.
[148] Large Aluminium Electrolytic Capacitors originating in Korea and Taiwan (provisional), OJ 1994 L48/10, recital 13.
[149] Van Bael & Bellis, *supra* note 129 at p. 105.
[150] Microwave Ovens originating in China, Korea, Thailand and Malaysia (provisional), OJ 1995 L156/5, recital 15.
[151] Art. 2(9), Basic Regulation 384/96.
[152] Art. 2(9), Basic Regulation 384/96.
[153] Ibid.

when association or compensatory arrangements are involved. However, the Commission most often goes for constructing an export price for the prices charged by the foreign company to its subsidiary in the EC, even when the latter acts as an agent and does not keep any stock of its own.[154] In some cases the Commission has relied on the actual export prices charged to a related company, but this is more of an exception than a rule.[155]

Importers and exporters are considered to be 'associated' if there are links between them, such as shareholding of at least five per cent either directly or through third parties, or there are management, financial, marketing or any other links.[156] However, the mere existence of 'a contractual link', in the form of an exclusive distributorship contract between an exporter and an importer, does not necessarily call for the construction of an export price, unless there are compensatory arrangements involved.[157]

Furthermore, there are cases where the exporter does not sell directly to independent importers in the EC but rather sells through a company located in a third country. In this case, the Commission goes for constructing the export price on the basis of the prices charged by a third-country company to independent customers in the EC, and deducts a reasonable profit margin or direct costs incurred by that third country's company.[158]

Therefore, in order to establish a reliable export price, at the EC border level, adjustments must be made for 'all costs, including duties and taxes, incurred between exportation and resale, and for profits accruing'.[159] The purpose of it is to establish an export price as if the product has been sold to an independent importer.[160] Among the most significant and problematic items deducted are SGA costs as they must be allocated to the products under investigation based on 'available accounting data, normally allocated in proportion to the turnover for each product and market under consideration'.[161]

Such SGA items as advertising costs, interest income, exchange gain, bad debt, and so on, may be adjusted when constructing export price.[162]

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[154] Video Cassettes Recorders originating in Japan and Korea (provisional), OJ 1988 L240/5, recital 33.
[155] Standardised Multi-Phase Electric Motors originating in Bulgaria, Czechoslovakia, GDR, Hungary, Poland, Romania and the USSR (definitive), OJ 1987 L83/1, recital 9.
[156] Vermulst & Waer, *supra* note 117 at p. 172.
[157] Case 113/77, *NTN Toyo Bearing Co Ltd v. Council*, [1979] ECR 1185–1211, recital 9.
[158] Photo Albums originating in China (provisional), OJ 1993 L228/16, recital 23; Microwave Ovens originating in China, Korea, Malaysia and Thailand (definitive), OJ 1996 L2/1, recital 12; the Commission deducted only direct costs incurred by the Hong Kong sales companies, although it had chosen first to deduct 5% profit margin in the provisional determinations.
[159] Art. 2(9), Basic Regulation 384/96.
[160] Housed Bearing Units originating in Japan (definitive), OJ 1987 L35/32, recital 14.
[161] Van Bael & Bellis, *supra* note 129 at p. 109.
[162] Vermulst & Waer, *supra* note 117 at p. 175.

As regards profit margin, the Commission ignores the actual profits of the producer's related importer because of the relationship between the producer and its related importer.[163] Profit margins applied to related importers vary between three and 12.7 per cent, being on average five per cent.[164] Therefore, in every case, to determine a reasonable profit margin the Commission looks at profit levels among independent importers and might also use data from earlier investigations as well.[165]

The constructed export price often leads to higher dumping margins than the use of actual export price, due to the large scope of discretion enjoyed by the Commission when determining constructed export price. It is interesting to note that the producer selling to both related and independent importers usually finds that prices to related importers result in much higher dumping margins.

Finally, in special circumstances, such as where the interested parties oppose verification visits, or do not provide necessary information within a reasonable time, the Commission may determine the export price 'on the basis of the facts available', disregarding the use of the methods described above.[166] However, the result of this method usually leads to understatements of the actual export prices. The Commission generally uses the unreliable data provided in the EC (Eurostat) import statistics or the information laid down in the complaint, where complainants always allege low export prices.[167]

1.4.3. Fair Comparison

After establishing normal value and export price, a 'fair comparison' is to be made in order to determine subsequently the dumping margin. Therefore, the Commission makes this comparison 'at the same level of trade and in respect of sales made as nearly as possible at the same time and with due account taken of other differences which affect price comparability'.[168] However, certain adjustments are to be made where the normal value and the export price are not on a 'comparable basis'.[169] Allowances must be distinguished from those made in the construction of the export price mentioned above, due to the difference in purpose and conditions in which the

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[163] EPROMs originating in Japan (definitive), OJ 1991 L65/1, recital 61.

[164] 12.7% Video Cassette Recorders originating in Japan and Korea (definitive), OJ 1989 L57/55, recital 11; 8% Radio Broadcast Receivers of a Kind Used in Motor Vehicles originating in Korea (provisional), OJ 1992 L34/8, recital 24; 5% Ethanolamine originating in the US (provisional), OJ 1993 L195/5, recital 9; Polyester Textured Filament Yarn originating in Indonesia and Thailand (provisional), OJ 1996 L128/3, recital 30.

[165] Joined Cases 277/85 and 300/85, *Canon v. Council*, [1988] ECR 5731, recital 32, the Court of Justice approved the use of profit margins among independent importers. In Iron or Steel Ropes originating in the Check Republic, Russia, Thailand and Turkey (provisional), OJ 2001 L34/4, recital 27, the Commission used data on profit margins from earlier investigation.

[166] Art. 18(1), Basic Regulation 384/96.

[167] Vermulst & Waer, *supra* note 117 at p. 171.

[168] Art. 2(10), Basic Regulation 384/96.

[169] Ibid.

former are applied. Therefore, 'due allowances' are made for differences affecting price comparability, and there are a number of factors for which adjustments can be made, such as 'physical characteristics, import charges and indirect taxes, discounts, rebates and quantities, level of trade, transport, insurance, handling, loading and ancillary costs, packing, credit, post sales costs, commissions, and other factors'.[170] However, it must be noted again that the Commission enjoys wide discretion when comparing the normal value and export prices, thus the adjustments are not usually made to the full extent necessary in order to ensure fair comparison.[171]

Furthermore, the Commission should compare normal value with export prices at the ex-factory level, which means that it should deduct all expenses incurred after the product has left the factory including packing. From the analysis below, it will be evident to what extent it is followed in practice.

1.4.3.1. ADJUSTMENTS

The Commission regularly grants different forms of adjustments on a case-by-case basis. However, some forms of allowances are granted more often than others and some are not made at all. Therefore, it is important to analyze some of the weaknesses related to the application or misuse of certain adjustments made by the Commission.

First of all, differences in physical characteristics which affect market prices between the products exported to the EC and the products sold in the home market, qualify for an adjustment.[172] In most cases the adjustments involve quality differences. However it is quite often the case that the Commission disregards differences in design and technical specifications of the export and domestic products concerned.[173] Furthermore, in the absence of domestic pricing information, the Commission values the physical difference on the basis of the difference in cost of production, including SGA and adding profit, which is assumed to be the same as that realized on the sales of the product concerned in the home market.[174] Therefore, this form of adjustment is easily misused by the Commission as it depends solely on the Commission's discretion.

Furthermore, granting an adjustment for the differences in the level of trade is proven to be highly problematic. In order to obtain the latter, it must be shown that the 'export price, including a constructed export price, is at a different level of trade than normal value' and that difference must have affected price comparability which is shown by 'consistent and distinct differences in functions and prices of the seller

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[170] Art. 2(10)(a)–(k), Basic Regulation 384/96.
[171] Muller et al., *supra* note 70 at p. 114.
[172] Art. 2(10)(a), Basic Regulation 384/96.
[173] Magnetic Disks originating in Hong Kong and Korea (provisional), OJ 1994 L68/5, recital 18.
[174] Plain Paper Photocopiers originating in Japan (definitive), OJ 1987 L54/12, recital 19.

for the different levels of trade in the domestic market of the exporting country'.[175] The Commission has almost never granted a level of trade allowance, with the exception of OEM's adjustments, due to its wide discretion when finding 'significant' or 'consistent' differences in the prices charged for domestic sales to various categories of domestic customers, that is, distributors, wholesalers, retailers, end-users and dealers.[176]

Moreover, it is important to note that in the case of related importers, the Commission compares constructed export prices at ex-factory level with home sales prices to the first unrelated buyer without making any proper adjustments.[177] The Commission refuses to make the level of trade adjustment due to the presence of only one domestic sales channel. However the difference in levels of trade could be easily proven if the quantities of export sales were compared with those involved in the domestic market.[178] Moreover, a more appropriate level of trade adjustment should be based on the SGA and the profit margin of the domestic related subsidiaries, otherwise, this leads to inflated dumping margins.

However, as an alternative to the above adjustment, an exporter can still claim a special level of trade adjustment, when the Commission has failed to make one, on the strict criteria explained above. Thus, a 'special adjustment' may be granted, when the 'existing difference in level of trade cannot be quantified because of the absence of the relevant levels on the domestic market of the exporting countries'.[179] The Commission has granted such special adjustment for differences in advertising costs.[180] Therefore, a producer must show that its level of trade performance differs from the one used in the comparison and the adjustment is usually made on the normal value side. Furthermore, special adjustment is again subject to the wide discretion of the Commission and, in any case, it does not reflect the actual difference in functions and costs involved in the level of trade due to the underestimated gross profit margin of the seller on the domestic market.[181]

Another problematic adjustment is related to the conversion of currency. Export and domestic sales are priced in a wide variety of currencies, therefore converting

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[175] Art. 2(10)(d)(i), Basic Regulation 384/96.

[176] Potassium Permanganate originating in India (provisional), OJ 1998 L19/23, recital 22. However, in Stainless Steel Fasteners originating in China, India, Korea, Malaysia, Taiwan and Thailand (definitive), OJ 1998 L50/1, recital 38: level of trade adjustment was granted to Indian producers. Similarly, in Certain Ring Binder Mechanisms originating in Malaysia and China (provisional), OJ 1996 L187/47, recital 23.

[177] P. Didier, 'The WTO Antidumping Code and EC Practice: Issues for Review in Trade Negotiations' in (2001) 35(1) *Journal of World Trade* 33 at 42.

[178] Vermulst & Waer, *supra* note 117 at p. 225.

[179] Art. 2(10)(d)(ii), Basic Regulation 384/96.

[180] Personal Faxes originating in China, Japan, Korea, Malaysia, Singapore, Taiwan and Thailand (definitive), OJ 1998 L128/1, recital 39.

[181] R. Gottlieb, P. Vander Schueren, D. Pearson & K. Georgi, 'Antidumping Law and Practice in Canada, The European Community and United States: After the WTO Antidumping Agreement' in (1998) 5 *International Trade Journal* 160 at 169.

one set of prices into the currency of the other is an important step when making comparisons. It requires the conversion to be done with an appropriate exchange rate on the date of sale which is mainly based on the 'date of invoice'.[182] However the date of sale might also be based on the date of contract, purchase order or order confirmation.[183] The Commission usually takes the average monthly exchange rate as the official rate.[184] Therefore, it does not allow the proper 60 days as required under the Basic Regulation for exporters to adjust export prices to reflect continuous fluctuation in exchange rates.[185] Furthermore, the exporters have an unrealistic burden to bear as they must provide official and commercial daily exchange rates over the two previous years for all the 15 EU Member State currencies.[186] This has improved somewhat with the introduction of the Euro.

Finally, an adjustment for 'other factors' must be made if such factors also affect price comparison and there must be an evidentiary requirement that customers must 'consistently pay higher prices' due to the differences in other factors.[187] However, these are again almost impossible criteria to be proved by the exporters, thus resulting in the non-effective use of the above adjustment in practice.[188]

1.4.4. Dumping Margin

The final stage in the dumping determination involves the dumping margin, which is 'the amount by which the normal value exceeds the export price'.[189] The dumping amount is then transformed into a percentage of the Cost, Insurance and Freight (CFI) export price, as it is the basis on which '*ad valorem*' antidumping duties are imposed. Therefore, the dumping margin is calculated according to the following formula:[190]

$$\frac{\text{Normal Value less Export Price}}{\text{CIF Export Price (Duty Unpaid) EC Frontier}} \times 100\% = \text{Dumping Margin (\%)}$$

For example, if the normal value is 130, the export price is 100, and the CIF export price is 120, the dumping margin is: (130-100) 120 100% = 25 %.

Therefore, in this case an antidumping duty of 25 per cent could be imposed.

The Commission uses actual CIF prices, but it may construct CIF prices if it considers them unreliable.

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[182] Art. 2(10)(j), Basic Regulation 384/96.
[183] Ibid.
[184] J. Bum Kim, 'Currency Conversion in the Antidumping Agreement' in (2000) 34(4) *Journal of World Trade* 125 at 133.
[185] Art. 2(10)(j), Basic Regulation 384/96.
[186] Didier, *supra* note 177 at p. 43.
[187] Art. 2(10)(k), Basic Regulation 384/96.
[188] E. Vermulst & B. Driessen, 'New Battle Lines in the Antidumping War: Recent Movement on the European Front' in (1997) 31(3) *Journal of World Trade* 135 at 140.
[189] Art. 2(12), Basic Regulation 384/96.
[190] Van Bael & Bellis, *supra* note 129 at p. 338.

Furthermore, wherever dumping margins vary, 'a weighted average' dumping margin is established, resulting either in one weighted average margin for each exporter and for each like product or one weighted average margin for all model types for each producer.[191]

Therefore, the comparison of normal value and export price is normally made either on a weighted average basis or on a transaction-by-transaction basis.[192] The Commission may choose either of the two above methods although it has to date rarely used the latter method due to the complexities involved in determining individual normal values with each export transaction involved. However, there is an exceptional method of calculation used by the Commission, allowing it to compare weighted average normal value with individual export prices, in cases where export prices 'differ significantly among different purchasers, regions or time periods', and where a weighted average comparison is not appropriate, in order to cope with so-called 'targeted dumping'.[193] Therefore the use of the exception is approved, where exporters may target certain regional markets or major accounts with lower prices.[194]

Finally, an investigation must be immediately terminated if the margin of dumping is found to be less than two per cent ('*de minimis*' rule). However it is only the investigation that is terminated as the exporter remains subject to the proceedings.[195]

1.4.4.1. PRACTICE

In practice, the Commission determines dumping margins by using only two of the above methods, which is either the general rule on weighted average basis or going for the exception for weighted average normal value to be compared with the individual export prices. Therefore, the Commission uses the 'results-oriented approach' to reflect 'the full degree of dumping being practised'; thereby, always seeking the highest dumping margin possible.[196]

Thus, when the results show that the dumping margins are higher using individual export transactions, the Commission usually provides a reasoning, demonstrating a 'pattern of significant differences' among purchasers, region or time period.[197]

Furthermore, dumping margins differ significantly between the sales to unrelated customers and the ones made through subsidiaries. It must be noted that the

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[191] Art. 2(12), Basic Regulation 384/96. *See* also Hematite Pig Iron originating in Brazil, the Check Republic, Poland, Russia and Ukraine, OJ 1998 L135/7, recital 27; Bicycles originating in Indonesia, Malaysia and Thailand (definitive), OJ 1996 L91/1, recital 71.
[192] Art. 2(11), Basic Regulation 384/96.
[193] Ibid.
[194] Case 240/84, *NTN Toyo Bearing Co. v. Council*, [1987] ECR 1809, recital 23.
[195] Art. 9(3), Basic Regulation 384/96
[196] Seamless Pipes and Tubes of Iron or Non-Alloy Steel originating in Hungary, Poland, Russia, the Check Republic, Romania and Slovakia (provisional), OJ 1997 L 36/36, recital 28.
[197] Farmed Atlantic Salmon originating in Norway (definitive), OJ 1997 L267/1, recital 26.

Commission is penalizing sales made through related sales companies in the foreign domestic market and in the EC. Due to the failure to make the proper level of trade adjustments for balancing normal value with export price, the Commission significantly inflates the dumping margin. This is due to the fact that the Commission deducts all direct selling expenses incurred by either the producer or its subsidiary in the EC, as well as all indirect expenses and a reasonable profit for the subsidiary from the export price, thus leading effectively to construction of export price at ex-factory level. However, on the normal value side, the Commission only deducts direct selling expenses incurred by either the producer or its subsidiary in the domestic market, thus effectively creating a price ex-distributor, rather than ex-factory.[198]

Therefore, the Commission should make adjustments for the same costs to the normal value as it deducts from the constructed export price to determine the actual dumping margin.

Nevertheless, even when direct sales to unrelated customers are involved, the Commission can still inflate dumping margins through its discretionary choice of particular calculation methods. Therefore, it must be noted that the Commission does not offset positive and negative dumping margins, where the margin is based on an 'average-to-individual' basis. However the WTO Appellate Body has declared the use of 'zeroing' practice by the Commission as contrary to the WTO Antidumping Agreement but only on an 'average-to-average' basis.[199] Therefore, it is important to analyze zeroing technique in more detail below.

Moreover, the Basic Regulation distinguishes between market economy and non-market economy countries which are subject to different calculation methodologies and, in the case of the latter, usually leads to excessive antidumping duties which will be shown after analysing zeroing in the subsection below.

1.4.4.2. NEGATIVE DUMPING

Usually every investigation covers more than one model or product line of like products. Thus, an average of the individual dumping margins is calculated on average-to-average basis. Therefore, when calculating the total dumping margin, the Commission multiplies the volume of imports by the weighted average dumping amount for each model.[200] However, before the Commission applies averaging, it goes through a zeroing process, whereby any negative dumping amount, resulting in cases where the export price is above the normal value for the product concerned, is reduced to zero. The Commission then divides that total dumping amount, calculated with zeroing, by the CIF value of the exports involved.[201] However, it

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[198] Vermulst & Waer, *supra* note 117 at p. 239.
[199] European Communities – Antidumping Duties on Imports of Cotton Type Bed Linen originating in India (Bed Linen Case), Report of Appellate Body, WT/DS141/AB/R, 2001, recital 51.
[200] Adamantopoulos & De Notaris, *supra* note 65 at p. 30.
[201] Ibid.

is very important to note that the CIF value also includes the value of those models for which the dumping amount is negative and which have been counted as zero when determining the total dumping margin explained above, so different rules are being applied to figures that are being used in the same equation.

Even though the Commission justified its zeroing technique on the grounds that it is used to counteract price manipulations between products concerned, the WTO Appellate Body has found the latter method inappropriate in the Bed Linen case.[202] The WTO Appellate Body confirmed the Panel's finding that the antidumping duties should cover all the products concerned, as the duties fell on the products being dumped to compensate for the fact that they are also imposed on products that are not the object of dumping.[203] However, it is too early to say whether the Commission will follow the ruling in practice.[204]

Even though the average-to-average comparison does not allow zeroing practice anymore, the Commission can nevertheless still implement that methodology when determining dumping margins on average-to-individual basis. However, the use of zeroing on the latter basis differs from that analyzed above as it is applied at a transaction level, rather than after dumping margins have been determined for groups of individual products by weighted averaging.[205] Furthermore, the Commission has first justified its zeroing practice due to the fact that the dumping margin is the amount by which the normal value exceeds the export price; negative dumping margins can, therefore, be disregarded.[206] Also, the Court of Justice has approved zeroing practice as the only method capable of dealing with 'certain manoeuvres in which dumping is disguised by charging different prices, some above the normal value and some below it'.[207]

1.4.5. Non-Market Economies

As noted at the beginning of this paper, a majority of the antidumping proceedings has been initiated against NME countries so far.[208] There are specific provisions laid down in the Basic Regulation concerning the calculation of their normal values, as

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[202] M. Clough, 'Antidumping and Jurisprudence of the WTO Panel and Appellate Body Reports (1995–2001)' in (2001) 3 *International Trade Law Review* 76 at 78.

[203] E. Vermulst & F. Graafsma, 'WTO Dispute Settlement with Respect to Trade Contingency Measures: Selected Issues' in (2001) 35(2) *Journal of World Trade* 209 at 218.

[204] D. Horovitz, 'A Regulated Scope for EU Compliance with WTO Rulings' in (2001) 6 *International Trade Law Review* 153 at 156.

[205] Vermulst & Waer, *supra* note 117 at p. 234.

[206] Ball Bearings and Tapered Roller Bearings originating in Japan (provisional), OJ 1984 L340/37, recital 12.

[207] Case 240/84, *NTN Toyo Bearing Co v. Council*, [1987] ECR 1809, recital 23.

[208] Under the Basic Regulation, the following countries are considered as state-controlled for the purposes of application of the antidumping law: Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan, and Uzbekistan.

imports from NMEs are in general regarded as not in the 'ordinary course of trade'.[209] Therefore, normal value is based on the prices or costs plus profit of the product in a third, so-called 'analogue' or 'surrogate', country and must be selected in a 'not unreasonable manner' and, where appropriate, using a market economy country that is 'subject to the same investigation'.[210] The parties concerned can suggest an 'analogue' country but the Commission is not obliged to consider it. However, they must examine that suggestion in great depth along with any proposals concerning the choice.[211] The Commission must inform the parties concerned of its choice of the analogue country shortly after initiation and parties have at least ten days to comment, since the choice usually leads to great controversy.[212] In cases where there are doubts regarding the suitability of the Commission's choice of analogue country it must carefully examine the other alternatives.[213]

As regards the determination of the export price of exports from the NME country concerned, the Commission verifies all exports to the EC or at least considers a representative volume of those sales, thus establishing a 'country-wide' export price.[214]

There are many factors that reflect on the Commission's choice of a particular surrogate country that are applied on a case-by-case basis.[215] However, the Commission, due to its broad discretion which was approved by the Court of First Instance, usually selects an analogue country that does not reflect the comparative advantages, such as labour, raw materials and power unit costs enjoyed by producers in their domestic market. This can lead to greatly inflated dumping margins.[216] In many cases the Commission chooses the analogue country that is at a much higher level of economic development, therefore again leading to an excessive dumping margin.[217]

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[209] Art. 2(7), Basic Regulation 384/96.
[210] Art. 2(7)(a), Basic Regulation 384/96.
[211] Case C-26/96, *Rotexchemie v. Hauptzollamt Hamburg-Waltershof*, [1997] ECR I–2817, recital 21.
[212] Art. 2(7)(a), Basic Regulation 384/96.
[213] Case C-16/90, *Nolle v. Hauptzollamt Bremen-Freihafen*, [1991] ECR I–5163, recital 32.
[214] Muller et al., *supra* note 70 at p. 170.
[215] As it is clear from the Commission's practices it mainly bases its choice on factors such as the following: the similarity of products; levels of economic development; costs; access to raw materials; production environment; the existence of reasonable but not excessive profits; the absence of price controls; the adequacy of production in the analogue country compared to exports to the EC from the dumping country; the existence of sufficient competition due to substantial domestic production and/or imports from third countries; low tariffs; the absence of quantitative import restrictions, and of subsidies, or subsidized imports; etc.
[216] Case T-164/94, *Ferchimex v. Council*, [1995] ECR II–2681, recital 67. For more discussion *see* U. O'Dwyer, 'Chinese Walls – Will the Amendment to the EC's Basic Antidumping Regulation Make a Difference?' in (1998) 6 *International Trade Law Review* 195 at 195.
[217] J. Wang, 'A Critique of the Application to China of the Non-Market Economy Rules of Antidumping Legislation and Practice of the European Union' in (1999) 33(3) *Journal of World Trade* 117 at 133.

Furthermore, the Commission must make some adjustments to balance the actual and analogue country's prices.[218] Usually the price comparison is made at a Free On Board (FOB) national frontier level, which differs from the practice to base it on the CIF export price that is applied in the proceedings involving market economies.[219]

Therefore, the Commission generally imposes a single average rate of antidumping duty on all exports from NMEs on a country-by-country basis.[220] The idea behind this is that, in an NME country, all the production means and resources belong to the State, and thus it is impossible to distinguish between individual producers.[221] As a result the country-wide margins for the NMEs are usually very high, often exceeding 50 per cent. The consequence is a clear discrimination against imports from those countries which means that, most often, producers are simply stopped from being able to export their product into the EC market.[222]

1.4.5.1. EXCEPTIONS

However, there are two exceptions to the above general principle. First, producers operating in NMEs, namely in China, Russia,[223] Kazakhstan, Ukraine and Vietnam and in any other NMEs that are Members of the WTO, can claim the 'market economy treatment', but only if 'market economy conditions prevail for these producers in respect for the manufacturer and sale of the like product concerned'.[224] Therefore, the use of actual prices, as opposed to the use of analogue process or

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[218] Fluorspar originating in China (definitive), OJ 2000 L241/5, recital 26.

[219] Ferro-Sillico-Manganese originating in China, Ukraine, Brazil, South Africa and Russia, OJ 1998 L62/1, recital 63. But *see* Urea and Ammonium Nitrate originating in Algeria, Belarus, Lithuania, Russia, Slovakia and Ukraine, OJ 2000 L195/15, recital 24.

[220] Art. 9(5), Basic Regulation 384/96.

[221] A. Macgregor, 'The Special Market Economy Regime in EC Antidumping Law: An Assessment of the Commission's Practice to Date and a Case Study' in (2001) 2 *International Trade Law Review* 26 at 27.

[222] R.M. Maclean, 'Defending Hong Kong's Interests Against EU Protectionist Antidumping Measures' in (2000) 2 *International Trade Law Review* 37 at 37. *See* also V. Ilichev, 'Antidumping Activity against Russia' in (1999) 3 *International Trade Law Review* 69 at 69.

[223] Recently Russia has been awarded the fully-fledged 'market economy status' by the new Council Regulation (EC) No 1972/2002 amending the Basic Regulation 384/96 on 5 November 2002 (OJ 2002 L305/1). However, it remains to be seen how effectively the new status of Russia will be implemented. Apart from the less burdensome procedure, which does not include the requirement of filling the MES questionnaire anymore, Russian producers will be faced with same difficulties as before as regards the establishment of their normal and export values. Amended Art. 2(5) of the Basic Regulation entitles the Commission to disregard domestic production and sale costs of Russian goods and choose the costs of other producers or exporters instead. It means that *de facto* Russian producers will not be treated any differently than before, mainly due to low energy prices within Russia.

[224] Art. 2(7)(b), Basic Regulation 384/96; Council Regulations (EC) 905/98 of 27 April 1998 and 2238/2000 of 9 October 2000 amending the Basic Regulation 384/96, OJ 1998 L128/18 and OJ 2000 L257/2.

constructed values, should significantly lower dumping margins due to the removal of 'arbitrary elements and discriminatory practices' applied by the Commission, when determining individual antidumping duties.[225] Secondly, the Commission may grant 'individual treatment' for the NME producers who then also receive an individual dumping margin based on their own export prices which, however, is compared with the NME 'country-wide' normal value determined pursuant to the analogue country approach.[226]

There are five elements that need to be present on a cumulative basis in order for the producer from the NME country to qualify for market economy treatment.[227] However, out of over 45 applications for the market economy treatment, only five Chinese companies, one Russian and two Ukrainian producers have managed to qualify so far.[228] It is evident that it is excessively burdensome to qualify for the market economy treatment in practice, which again proves the protectionist scope of the EC antidumping legislation. Moreover, market economy treatment determination 'shall remain in force throughout the investigation', which means that, once the Commission has refused to grant the latter treatment or the producer was not eligible for one at the time, the company will not be able to claim a new one.[229] Thus, the legislation discriminates against those producers who could not qualify for the market economy treatment at the beginning of the investigation but could do so by the end, as a result of the radical reforms taken or of the fact that the company has been privatized, leading to a market economy environment.

Furthermore, in order be granted individual treatment, it is necessary to show that a company is free to determine export prices and quantities, as well as their terms and conditions, thus it must prove that it acts independent of the influence of State authorities.[230] There is a four-criteria test to be met in order for a company

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[225] R.M. Maclean, 'Evaluating the Impact of the EC's Conditional Market Economy Principle in Chinese and Russian Antidumping Cases' in (2001) 3 *International Trade Law Review* 65 at 74.

[226] Vermulst & Driessen, *supra* note 188 at 142.

[227] Art. 2(7)(c), Basic Regulation 384/96, in order to claim for MET elements such as the following must be met: '[d]ecisions by the firm on prices, costs and inputs, showing market influence and the reflection of market values; basic accounting records which are independently audited in line with international accounting standards; absence of distortions carried over from the former NME system; evidence that the firm is subject to bankruptcy and property laws which guarantee legal certainty and stability for its operations; and the fact that exchange rate conversions are carried out at the market rate'.

[228] Maclean, *supra* note 225 at p. 65. For MET concerning one Russian company, *see*: Aluminium Foil originating in China and Russia (definitive), OJ 2001 L134/1, recitals 21–24; and for MET concerning two Ukrainian companies *see*: Urea originating in Belarus, Bulgaria, Croatia, Estonia, Libya, Lithuania, Romania and Ukraine (provisional), OJ 2001 L197/4, recital 120.

[229] Art. 2(7)(c), Basic Regulation 384/96.

[230] Muller et al., *supra* note 70 at p. 177.

from NME to be granted individual treatment.[231] This is also a reasonable alternative for the producer, whose application for the market economy treatment was rejected, to claim individual treatment. The criteria for the latter treatment are also less demanding than for market economy treatment. Furthermore, the Commission can, after granting individual treatment, still 'change its mind' during the course of the proceedings. However, after market economy treatment determination, no such flexibility exists.[232] In practice, the Commission has wide discretion to decide on individual treatment applications. However, it quite often refuses to grant one for fear of circumvention or on any other arbitrary grounds.[233]

There are also complexities involved with both treatments from the procedural point of view, since the Commission puts the NME producers at a great disadvantage by requiring applications for market economy/individual treatments to be submitted within 21 days, bearing in mind that it has to be done at the same time as completing the main questionnaire.[234] In practice, therefore, it is necessary to have the time limit for submitting the latter application extended, as it conflicts with the preparation of the main questionnaire. Nevertheless, the Commission is discriminating against NME producers, having to work twice as hard as similar producers in market economy countries in order to be able to defend themselves effectively.[235]

1.4.6. Urgency for Reform

As is evident from the above, the degree of economic analysis exercised in the calculation of the dumping margin is limited. The Commission's extensive practice to construct prices is very penalizing for foreign exporters mainly because of the wide margin of discretion enjoyed by the Commission. However, the legitimacy of such practice is questionable since the Commission is intentionally ignoring the other calculation methods because of its result-oriented approach, thus ensuring the finding of the highest dumping margin possible. Furthermore, the Commission's unwillingness to provide detailed information for the computation of costs greatly

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[231] Proposal for a Council Regulation amending Regulation (EC) 384/96 on Protection Against Dumped Imports from Countries not Members of the European Community, COM 2000 363 final of 15 June 2000, the Annex to the Explanatory Memorandum lists criteria for individual treatment as follows: 'Exporters are free to repatriate capital and profits; export prices and quantities, and conditions and terms of sale are freely determined, and the majority of the shares belong to private companies and state officials appearing on the board or in key management should be in a clear minority; exchange rate conversions are carried out at the market rate; state interference is not such as to permit circumvention of measures if the exporters are given different rates of duty'.

[232] Macgregor, *supra* note 221 at 28.

[233] Certain Malleable Cast Iron Tube or Pipe Fittings originating in Brazil, the Check Republic, Japan, China, Korea and Thailand (definitive), OJ 2000 L208/8, recital 61.

[234] Macgregor, *supra* note 221 at 37.

[235] Ibid., at 38.

supports the unfairness of the system and proves the protectionist use of antidumping duties.

Therefore, in cases where the exporter does not make sufficient sales or does not sell its products at all in the domestic market or sells below costs, the Commission, rather than calculate normal value on the basis of the price to the largest third export market, seeks to construct normal value. Such arbitrary practice also results from the incorrect implementation of the WTO Antidumping Agreement norms, which clearly gives the priority for third-country sales over the practice to construct prices.[236]

Moreover, it is important to note that the Commission chooses to construct prices even when the double sufficiency test of five per cent is not met. However, it is difficult to approve the logic behind the latter test, as it clearly discriminates against foreign producers, being unsound to require that each product type be sold in the domestic market, bearing in mind the broad like-product definition which usually includes a wide variety of similar products. Moreover, it is always the weighted average rather than individual normal value that is used for the comparisons. Furthermore, the below-cost sales are clearly not reflecting the economic factors as it is unsound to require that sales must be made above fixed and variable costs. The Commission disregards any below cost sales in cyclical markets, rather than using the actual data of sales and profits that could be tested as an average over the relevant business cycle.[237] Therefore, the Commission's current practice needs radical reform whereby the preference should always be for actual prices or the use of the exporter's prices to the largest third country, rather that applying the discriminatory and arbitrary practice reflected today in the use of the constructed prices.

The Commission is actually discriminating against the foreign exporters that are making sales through intermediary companies, as no proper level of trade adjustments is made, resulting in unfair comparison which in turn leads to high dumping margins. Therefore, the Commission must abandon the restrictive interpretation of allowable adjustments in order to avoid comparisons on an ex-distributor to ex-factory basis, thus restoring the principle of fair comparison.[238]

As regards the dumping margin calculations, the Commission must be prohibited from routinely comparing prices on average-to-individual basis. It should be borne in mind that the latter method is an exception and not in any way a general norm. Therefore, it needs to be interpreted narrowly rather than be used as a substitute for the other two main calculation methods, which in practice are not used as much or at all.

Thus the average-to-average general rule should in all cases apply not only on

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[236] Art. 2.2.1, the WTO ADA 1994.

[237] C.A. Conrad, 'Balancing the GATT Antidumping Code' in (1999) 22(2) *World Competition* 123 at 126.

[238] S. Farr, *EU Anti-Dumping Law: Pursuing and Defending Investigations* (Bembridge Palladian Law Publishing Ltd. 1998) at p. 87.

each model level, but also when the different model dumping margins are averaged for producing a single 'like-product' margin.[239]

Furthermore, the Commission must withdraw from the application of zeroing technique on the average-to-individual basis, since it was forced to do by the WTO Appellate Body on average-to-average basis, as this is a great tool for inflating the dumping margin, thus discriminating against foreign producers.

Finally, as regards NME countries, the Commission is discriminating against them severely by failing to analyze the particular market conditions involved when choosing the data of an analogue country, thereby most often resulting in punitive dumping margins. Instead, the Commission should carefully analyze the market structure of the particular NME country concerned in order to make an appropriate choice of surrogate country for obtaining the data, which must be on similar and in no way excessive grounds. Otherwise, the Commission increases the discrimination level, since an application of a countrywide duty to all NME exporters is already a heavy burden to meet for the latter. Moreover, the conditions for a market economy treatment and an individual treatment application should not be unnecessarily of such a strict interpretation. The loosened up criteria and the extension of time limits for the application of the latter treatment would encourage NME producers rather than discourage them, as is currently the case, to make substantial reforms in order to qualify for fair treatment or escape from the antidumping proceedings.

In case the Commission does not take appropriate reforms in order to ensure a transparent and fair dumping margin calculation process, the level of its arbitrariness will be reduced under the WTO DSB level, as there will be more cases to come prohibiting the use of current discriminatory practice.

1.5. Injury

The second major step in all antidumping proceedings is proving 'injury' to the EC industry. This is an essential element in order for the Commission to be able to adopt antidumping measures. Antidumping duty can be applied to particular dumped like products only if the 'release of the product for free circulation in the Community causes injury'.[240] The Basic Regulation identifies three types of injury, of which only two are used in practice, which are defined as 'actual material injury' or 'threat of material injury' to the EC industry.[241] The aim of the injury determination is to show the effect of the dumped imports on the EC industry during the investigation period, which is usually of three to four years, in order to identify trends in volume, market

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[239] Didier, *supra* note 177 at 45.

[240] Art. 1(1), Basic Regulation 384/96.

[241] Art. 3(1), Basic Regulation 384/96: Injury is defined as 'material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry'. The only one case where material retardation was considered was Electronic Microcircuits known as DRAMs originating in Japan (provisional), OJ 1990 L20/5, recital 93.

shares and other economic factors.[242] The Commission has broad discretion when choosing the investigation period and is required to make a careful determination in order to prove injury. [243] Furthermore, the Commission must determine whether the dumped imports cause the EC industry material injury. Injury caused by other factors must not be referred to the dumped imports.[244]

Moreover, during the course of every proceeding the Commission calculates not only dumping margins, but also injury margins. Antidumping duties are imposed on the basis of the lower of the two and the amount of dumping duty 'should be less if such lesser duty would be adequate to remove the injury'.[245] Failure to 'ascertain whether the amount of the duties is necessary in order to remove injury' will result in annulment of the measure imposed.[246]

However, injury findings are 'by their very nature findings that could only be based on an assessment of complex economic facts'[247] thus the absence of clear rules and exact thresholds for injury determinations leaves the Commission a wide margin of discretion leading to abusive results which will be identified in the analysis below.

Lastly, in order to find injury the Commission must determine that the EC industry has suffered material injury resulting from the dumped imports, thus the injury margin is fixed to eliminate the negative effects.

1.5.1. Industry

The 'Community industry' consists of all the EC producers producing like-products or those who produce a 'major proportion' of the total EC production.[248] Therefore, when a majority of the producers are involved it is clear that there is no obstacle for industry assessment. However, it is doubtful what constitutes the industry when the 'major proportion' determination is being considered. The Basic Regulation defines the latter as consisting of producers accounting for 50 per cent of total production of those 'supporting or opposing' the antidumping complaint, provided these account for 25 per cent or more of total production.[249] The link between those thresholds is unclear, but it is most likely that the EC producers accounting for at least 25 per cent

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[242] Art. 3(2) and (3), Basic Regulation 384/96; *see* also Synthetic Staple Fibres of Polyester originating in Australia, Indonesia and Thailand, OJ 2000 L175/10, recital 87; Polyethylene Terephthalate Film originating in India, OJ 1999 L316/1, recital 97.

[243] Case C-121/86, *Epichiriseon Metalleftikon v. Council*, [1990] ECR I–3919, recital 30. *See* also art. 3(2), Basic Regulation – which puts an obligation on the Commission to determine injury 'based on positive evidence and shall involve an objective examination of both (a) the volume and the effect of the dumped imports on prices in the Community market for like products, and (b) the consequent impact of these imports on the Community industry'.

[244] Art. 3(6) and (7), Basic Regulation 384/96.

[245] Art. 7(2), Basic Regulation 384/96.

[246] Case 53/83, *Allied Corporation v. Council*, [1985] ECR 1621, recital 18.

[247] Vermulst & Waer, *supra* note 117 at p. 282.

[248] Art. 4(1), Basic Regulation 384/96.

[249] Art. 5(4), Basic Regulation 384/96. *See* also section 1.2. of this article.

of total Community production are to be regarded as the 'industry', but only when the remaining producers constituting a larger share do not oppose the complaint.[250]

Furthermore, as an exception, the Commission can identify a separate industry for two or more 'competitive markets' where producers sell all or almost all of their production and have sustained injury from the dumped imports which have mainly concentrated on that market.[251] However, the Commission no longer refers to the above exception as it considers even a single EC producer represents the industry if its share in total production is sufficiently large.[252] The Commission can base the injury finding on the existence of injury to the industry of one Member State or several but not all Member States.[253] Therefore, the 25 per cent bottom line to constitute the industry is clearly too low, as the least competitive EC producers are encouraged to join forces and lodge the complaint, instead of modernizing their plants, and by doing so they intentionally penalize efficient foreign producers. Therefore, an assessment of whether complaining EC producers constitute a major proportion 'may turn out to be a speculative exercise'. The Commission should, therefore, not encourage but rather it must prevent such a discriminatory practice.[254] Moreover, EC producers owned or controlled by a Member State are included in the industry assessments, thus it is difficult to justify the Commission's attitude towards the NME producers who are then more than discriminated against.[255]

Furthermore, it is unclear to what extent the producer must be committed to EC production which raises problems when considering the position of certain EC producers that are also manufacturing outside the EC or are owned by or are having links with foreign producers concerned. The Commission decides these questions on a case-by-case basis so it is based on the Commission's discretion whether to include or exclude certain EC producers from the category of the industry.

For a producer not only producing within the EC the Commission requires the major part of their total production to be manufactured in the EC and it has to show its 'commitments as a Community producer'. The finding also depends on the level of technology in the work done and where the producer's head office is located.[256]

The Court of Justice has affirmed the Commission's discretion to determine whether or not it should exclude from the industry producers related to exporters, or which are themselves importers of the dumped products.[257] However, the definition of injury under the Basic Regulation suggests the opposite, namely, that the latter

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[250] Stainless Steel Household Cooking Ware originating in Korea, OJ 1986 L74/33, recital 16.
[251] Art. 4(1)(b), Basic Regulation 384/96.
[252] Unwrought Magnesium originating in Russia and Ukraine (provisional), OJ 1995 L312/37, recital 2.
[253] Ammonium Nitrate originating in Lithuania, Russia, Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan (accepting undertaking), OJ 1994 L129/24, recital 7.
[254] Vermulst & Waer, *supra* note 117 at p. 291.
[255] Magnetic Discs originating in Japan, Taiwan and China (provisional), OJ 1993 L95/5, recital 45.
[256] DRAMs originating in Korea (provisional), OJ 1992 L272/13, recital 35.
[257] Case C-179/87, *Sharp v. Council*, [1992] ECR I–1635, recital 39.

forms of relationships should not be included in the industry.[258] Therefore, for the parties to be 'related', the Commission looks at the level of control and checks whether they behave differently when compared to unrelated producers.[259]

Usually the Commission does not exclude the producer if the related exporter acts independently, if the volume of exports to the EC is small and if the producer is not protected from the unfair practice of other exporters.[260] Although no threshold has been specified in the Basic Regulation for the 'minimum value added' that would form the basis for the producer to be accepted as forming part of the industry, the Commission has nevertheless included certain subsidiaries under the industry definition.[261] Moreover, it includes also producers having links with exporters if they have behaved 'to a great extent as autonomous economic agents'.[262] However, the Commission does not include the subsidiary of the exporter in the EC if it is involved in product distribution to a number of countries.[263]

Moreover, producers importing dumped products are not excluded if they are independent of dumping exporters and it is done as an 'act of legitimate self defence' in order to 'complete the producer's product range' or 'to protect its customer base in the face of unfair imports'.[264] Thus it is interesting to note that an 'act of self defence' are treated as a normal thing for EC producers to use, but the Commission never bothers to take the interests of the foreign producers into account. However, EC importing producers are usually excluded if they contribute to a fall in prices or reduce the use of EC manufactured products, thus causing 'self-inflicting' injury.[265]

It is evident from the above that the Commission has wide discretion in determining the scope of EC industry and in many cases it is uncertain why it has included one or excluded the other, but it is evident that EC importing producers are better off than producers linked with foreign manufacturers.

1.5.2. Material Injury

First, it must be noted that there are no exact criteria for determining the existence of injury as the only essential requirement is that the injury should be 'material'.[266] Therefore, it is not enough for the Commission to determine the mere existence of

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[258] Art. 4(1)(a), Basic Regulation 384/96.
[259] Art. 4(2), Basic Regulation 384/96. *See* also Polyester Textured Filament Yarn originating in Indonesia and Thailand, OJ 1996 L128/3, recital 37.
[260] Ethanolamine originating in the US (definitive), OJ 1994 L28/40, recital 9.
[261] Photocopiers originating in Japan (definitive), OJ 1987 L54/p. 12, recital 68.
[262] Polyester Yarn originating in Mexico, Korea, Taiwan and Turkey, OJ 1988 L151/39, recital 33.
[263] Audio Tapes in Cassettes originating in Japan, Korea, Hong Kong, OJ 1990 L313/5, recital 16. *See* however Plain Paper Copiers originating in Japan, OJ 1995 L244/1, recital 24.
[264] Integrated Electronic Compact Fluorescent Lamps originating in China, OJ 2001 L38/8, recital 51; Magnetic Discs originating in Japan, Taiwan and China, OJ 1993 L95/5, recital 44.
[265] Muller et al., *supra* note 70 at p. 244.

injury but it has to be found to be 'material'.[267] For this purpose, the Commission again enjoys a wide margin of discretion approved by the Court of Justice.[268] Therefore, even where some facts show that there is no injury, this does not preclude the Commission from a positive finding, as will be seen below.[269]

Because the EC industry consists of producers of the like-product, it is vital that the Commission determines the injury on the basis of the like-products only.[270]

However, the absence of imports of a certain model falling within the scope of the proceeding is not to preclude a finding of injury.[271] In this case the Commission determines injury by 'examining the production of the narrowest group or range of products including the like product'.[272] Thus in reality the Commission need not limit itself to the like product alone. This discriminates against foreign producers as they are punished for dumping products that they did not even export or that they exported at non-dumped prices.

Moreover, the Commission is not obliged to make 'a comprehensive analysis of the market as a whole'. It is, therefore, free to choose any sufficient factors in order to determine injury.[273] However, the Basic Regulation requires 'positive evidence', first, of the volume, secondly, the prices of the dumped imports, and, thirdly, the consequent impact on the EC industry factors based on 'all relevant economic factors and indices having a bearing on the state of the industry', thus making it difficult to approve the Commission's practice explained above.[274] Thus it means that the Commission must consider all three factors listed above and in the absence of any one of those must terminate the proceedings. A limitation here is that the requirement of 'positive evidence' involves determinations only of the facts, their interpretation is solely within the Commission's discretion which sometimes leads to absurd results.

As to the volume factor, the Commission is likely to find injury when there are absolute increases and increases in market share of the imports taking place.[275] However, most attention is paid towards the increase in volume of dumped imports which is calculated as one weighted average dumping margin per producer, thus if a dumping margin is found only on one transaction out of one hundred, then all those imports are considered to be dumped through the zeroing practice applied.[276] This is a discriminatory practice that is being applied here by the Commission, leading not only to inflated margins but also having to pay for non-existent dumping. Likewise, absolute

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[266] Art. 3(1)–(6), Basic Regulation 384/96.
[267] Ammonium Nitrate originating in Russia (definitive), OJ 1995 L198/1, recital 75.
[268] Case C-177/87, *Sanyo Electric Co. Ltd. v. Council*, [1992] ECR I–1535, recital 31.
[269] Case T-97/95, *Sinochem v. Council*, [1998] ECR II–85, recital 108.
[270] Art. 3(8), Basic Regulation 384/96.
[271] Barium Chloride originating in China and GDR (provisional), OJ 1989 L227/24, recital 55.
[272] Art. 3(8), Basic Regulation 384/96.
[273] Joined Cases 277/85 and 300/85, *Canon v. Council*, [1988] ECR 5731, recital 44 and 56.
[274] Art. 3(5)–(6), Basic Regulation 384/96.
[275] Disodium Carbonate originating in the US (provisional), OJ 1995 L83/8, recital 29.
[276] Vermulst & Waer, *supra* note 117 at p. 310.

decreases of imports do not preclude the finding of injury if the market share of the imports increases.[277] Therefore, if even a single foreign producer has increased his sales during the investigation period, antidumping duties are to be imposed on all dumped imports resulting from cumulation considered in the following subsection. However, the Commission must terminate the antidumping proceedings if the overall situation of the EC industry is improving and thus can even disregard the submissions on some existing factors of injury by the industry.[278] Moreover, the Commission often 'samples' EC producers by choosing the 'largest representative volume option' meaning that all different sorts of models within the like product group are to be determined as one product.[279] Again, sampling is not only discriminatory but also leads to dumping duties on products that were not even dumped. Also, some products included may be many times more expensive than the others as in the case of high quality brand-name items.[280]

Furthermore, with respect to the price factor, in most of the cases injury findings are accompanied by affirmative 'price undercutting' determinations. 'Price undercutting' as an injury indicator is calculated by comparing prices of dumped imports with the prices charged by EC producers for their sales on the EC market.[281] Therefore, even a small price undercutting can be a sign of injury. However, the Commission can also calculate price undercutting under the 'price underselling' method. The latter method is applied when prices of dumped imports are compared with upwardly adjusted EC industry prices, including a certain amount of hypothetical profit, thus greatly increasing the chances of injury findings.[282] As discriminatory as this methodology is, however, the Court of Justice finds it an appropriate means for injury findings.[283]

Finally, in examining the impact of dumped imports on the industry, the Commission must examine 'all relevant economic factors'. However, since there is no exhaustive list prescribed, the Commission is not obliged to examine all the factors involved.[284] In practice it is the profitability factor that is considered most, as usually the industry is found to be operating at a loss or at insufficient profit levels. However, improved

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[277] Joined Cases C-320/86 and C-188/87, *Stanko France v. Commission and Council*, [1990] ECR I–3013, recital 6.

[278] Polyester Film originating in Korea (termination), OJ 1989 L305/31, recital 10.

[279] Art. 17, Basic Regulation 384/96 allows the Commission to sample products where 'the number of complainants, exporters or importers, types of product or transactions is large'.

[280] Cotton Type Bed Linen originating in Egypt, India and Pakistan (provisional), OJ 1997 L156/11, recital 14.

[281] Muller et al., *supra* note 70 at p. 199.

[282] Ibid., at p. 301.

[283] Joined Cases 273/85 and 107/86, *Silver Seiko Ltd. and Others v. Council*, [1988] ECR 5927, recital 41–42.

[284] Art. 3(5), Basic Regulation 384/96 – (Among the factors most often considered are: sales, production, capacity and capacity utilization, plant closures, stocks, and price depression or suppression).

profitability does not preclude injury findings.[285] Thus it is important to note that the Commission speculates on the factors in order to justify the injury by any means.

1.5.3. Threat of Material Injury

Findings of threat of injury are quite rare as the determination of a threat must be based on facts rather than allegations, requiring a situation in which dumping could cause injury to be clearly foreseeable.[286] The Commission will be precluded from using the latter option if the test for actual material injury has failed.

The Commission must consider certain factors in order to determine the existence of a threat of material injury and the totality of those factors must lead to the conclusion that further dumped exports are foreseeable and that, unless protective action is taken, material injury would occur.[287]

Therefore, a strict interpretation of a threat of material injury determination limits the Commission's discretion to act and the same strict interpretation should be applied in the actual material injury determinations as well.

However, it must be noted that the threat to material injury consideration is often used in 'sunset review' proceedings to justify the prolongation of existing measures for another five years by analyzing past, present and future import volume trends.[288]

1.5.4. Causality

The determination of injury can only be made if the dumped imports are causing injury to the industry. The Commission mainly looks at the 'volume' and 'price' factors of the dumped imports in order to establish a 'causal link' between the dumped imports and the injury sustained by the industry.[289] Therefore, causation is most likely to be found where the EC industry is suffering injury and if this injury occurs at the same time as increases in volume and decreases in prices of imports.[290] Thus, the two factors are somehow connected, because usually where the volume of imports is small, the degree of 'price undercutting' is relatively large in order to have the causation established.[291]

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[285] Tungsten Carbide and Fused Tungsten Carbide originating in China (provisional), OJ 1990 L83/36, recital 41.

[286] Barium Chloride originating in China (definitive), OJ 1991 L60/1, recital 27; Small Screen Colour Television Receivers originating in Korea (provisional), OJ 1989 L314/1, recital 48.

[287] Art. 3(9), Basic Regulation 384/96, lists four factors for determining threat of injury: 'a significant rate of increase of dumped imports into the Community; sufficient freely disposable capacity of the exporter; imports enter at prices that depress prices or prevent price increases which otherwise would occur; inventories of the products being investigated'.

[288] Vermulst & Waer, *supra* note 117 at p. 313. *See* also art. 11(2), Basic Regulation 384/96.

[289] Art. 3(6), Basic Regulation 384/96.

[290] Vermulst & Waer, *supra* note 117 at p. 314.

[291] Compact Disc Boxes originating in China, OJ 1999 L310/17, recital 59.

Due to the Commission's broad discretion in injury determinations this wide discretion is automatically extended to the causation determinations.

The Commission takes all exports from the countries concerned into account including the ones with *de minimis* margins. However, this is unnecessary as it is most likely that those margins are too low to cause any injury.[292] Although the Basic Regulation provides that 'magnitude of the margin dumping' is one of the factors to be considered, the Commission ignores margin analysis.[293] In some cases the price undercutting is a few times greater than the level of dumping margin, which usually leads to higher prices for consumers without improving the situation of the EC industry, but this fact is ignored by the Commission.[294]

Moreover, the Commission has also found a causal link because of the greater marketing power available to an exporter in his domestic market, which is a curious decision given that it deprives the foreign producer directly from the comparative advantages it has in the domestic market.[295]

The Commission normally finds a causal link in cases where the EC industry suffers injury as a result of a sudden drop in the prices of imports.[296] Furthermore, a reduction in the market share of the dumped imports does not prevent the finding of a causal link as the Commission presumes that a significant injury has been caused by them.[297] Thus foreign exporters, once a finding of dumping and a causal link has been made, are presumed responsible for all the dumping that the Commission has determined during the course of the investigation procedure.

The Commission is obliged to examine 'known' factors 'other than the dumped imports' which could be causing injury to the EC industry at the same time.[298] However, the Commission can use its wide discretion to disregard the latter norm since the Basic Regulation requires 'other factors' to be known which is subject to interpretation, thus it is important that parties concerned propose the existence of those factors themselves.[299] Once the proposal for the other factors is made the Commission must consider them, failure to do so might result in the annulment of the adopted measures.[300] Therefore, the competition arguments are more closely examined in order to check whether the EC producer has not caused a 'self-inflicted' injury. However it is still rare that the Commission accepts the latter argument.[301] Thus, the Commission must terminate the proceedings in cases where injury is

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[292] Disodium Carbonate originating in the US (definitive), OJ 1995 L244/32, recital 19.
[293] Art. 3(5), Basic Regulation 384/96.
[294] Potato Granules originating in Canada (provisional), OJ 1981 L116/11.
[295] Audio Tapes in Cassettes originating in Japan, Korea and Hong Kong (provisional), OJ 1990 L313/5, recital 86.
[296] Case T-97/95, *Sinochem v. Council*, [1998] ECR II–85, recital 94.
[297] Case T-51/96, *Miwon v. Council*, [2000] ECR II-1841, recital 105.
[298] Art. 3(7), Basic Regulation 384/96.
[299] Case T-164/94, *Ferchimex v. Council*, [1995] ECR II–2681, recital 49.
[300] Case C-358/89, *Extramet Industrie v. Council*, [1992] ECR I–3813, recital 16.
[301] Ibid. *See*, however, Dead Burned Magnesia originating in China, OJ 1993 L305/16.

caused by non-dumped imports, or any other known factor and it is not allowed to justify the causation on recession grounds within the EC industry.[302]

The Commission refuses to consider such factors as contraction in demand, decrease in exports from the EC and competition from substitutable products.[303] Again, efficient foreign exporters that are able to produce sufficient quantities in order to satisfy foreign markets are punished, while the EC producers are not even trying to meet competition from abroad. They choose to go for protective measures straight away without trying to improve their own efficiency.

1.5.5. Cumulation

The Commission normally 'cumulates' the exporters on the grounds that treating any exporter separately is to discriminate against the rest.[304] Therefore, the Commission cumulates either where there are several exporters in the exporting country concerned or where there are several exporting countries.[305] The consequence of cumulating exports is that all volume and price effects are considered on a 'global' basis rather than on 'a country-by-country' basis.[306] Therefore, injury is determined as a whole and it is unnecessary to specify the share to each of the foreign exporter concerned.[307] This practice by the Commission is problematic as cumulated exporters have different levels of dumping, thus the fact that one exporter has been involved in heavier dumping than the others most likely guarantees injury findings against all of them. However, individual companies are excluded from cumulation either where their exports are very small or there is a *de minimis* dumping margin involved, or based on other factors.[308] The list of factors under which cumulation is allowed depends on the circumstances of each case, falling once again under the Commission's wide discretionary powers. Usually the test is that the Commission

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[302] Portland Cement originating in the GDR, Poland and Yugoslavia (termination), OJ 1986 L202/43, recital 24, lists four 'other factors': 'a significant decrease in demand; the restructuring and the rationalization of some of the EC producers; the cost involved in important investment; the competition resulting within the EC market'. *See* also Joined Cases T-163/94 and T-165/94, *NTN and Koyo Seiko v. Council*, [1995] ECR II–1381, recital 99. The Court of First Instance annulled the measures as the causation in any case is not justifiable on 'recession' grounds.

[303] Van Bael & Bellis, *supra* note 129 at p. 194.

[304] Art. 3(4), Basic Regulation 384/96.

[305] Ibid.

[306] Unwrought Magnesium originating in Russia and Ukraine (provisional), OJ 1995 L312/37, recital 46.

[307] Case 255/84, *Nachi Fujikoshi v. Council*, [1987] ECR 1861, recital 46.

[308] NPK Fertilisers originating in Hungary, Poland, Romania and Yugoslavia, OJ 1990 L188/63, recital 18 (maximum individual market share 0.6 per cent); Polypropylene Binder or Baler Twine originating in Poland, the Check Republic and Hungary, OJ 1999 L75/1, recital 29 and 71 (*de minimis* margins); Tube or Pipe Fittings or Iron, or Steel originating in China, Croatia, Thailand, Slovakia and Taiwan, OJ 1995 L234/4, recital 43 (declining in volume and market share).

checks whether the products are interchangeable and whether the imports are not negligible.[309] Another criterion is to check whether the products are in competition and whether the behaviour of the various exporters in the EC market is comparable.[310] However, usually the Commission cumulates all dumped imports as a rule, and it seems that it is the foreign exporter that must raise the question of incompatibility of such action. Therefore, the Commission again uses cumulation as a tool to discriminate against the foreign producers since it makes the injury finding an easy/non-barriersome criterion.

1.5.6. Injury Margin

There is no direct relationship between the levels of dumping and injury margins and it is possible that some exporters with lower dumping margins might have higher injury margins. However, the Commission has wide discretion in the choice of the calculation methods and thus the choice of the level of duty to be imposed. The Commission chooses either the dumping margin at its upper level or the duty which is less if that is 'sufficient to eliminate injury', that is, the injury margin.[311] Therefore, it is important to stress the importance of the latter rule as duties in almost 50 per cent of investigations are being imposed on the basis of injury margins.[312]

In order to determine what level of duty is to be adequate to remove injury, the Commission calculates the 'injury margin' or the so-called 'injury elimination level' by determining the extent to which the dumped imports undercut EC producers.[313]

The injury margin is determined by comparing the adjusted weighted average resale prices of the exporters' prices with the adjusted weighted average sales prices of similar models belonging to EC producers.[314] The difference between the two is the amount of the injury, after expressing it as a percentage of the CIF export price, which results in the injury margin.[315] However, as the comparison is made on particular product types the Commission applies a zeroing process in order to eliminate the above cost sales of the foreign producer's export sales and so inflate the injury margin.[316]

It must be noted that the process of calculating the margin of injury is quite similar to the dumping margin calculations. The aim is to determine a margin which is then applied to imports as a duty, raising prices to the level where injury is no longer being caused.

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[309] Audio Tapes in Cassettes originating in Malaysia, China, Korea, Singapore, Thailand, OJ 1994 L255/50, recital 27.
[310] Dihydrostreptomycin originating in China, OJ 1991 L187/23, recital 27.
[311] Art. 7(2), Basic Regulation 384/96.
[312] Vermulst & Waer, *supra* note 117 at p. 345.
[313] Case 260/85, *Tokyo Electric (TEC) v. Council*, [1988] ECR 5855, recital 48–50.
[314] Van Bael & Bellis, *supra* note 129 at p. 215.
[315] Ibid.
[316] Vermulst & Waer, *supra* note 117 at p. 345.

However, problems arise concerning the allowances to be made for the differences in physical characteristics and for the level in trade adjustments. The physical differences between comparable products in the injury margin calculations are usually greater than between the products concerned in the dumping margin comparisons since the products are closer to each other in the latter comparison, being manufactured by the same producer, as opposed to the former method where there are different products produced by different manufacturers. The Commission makes only minor allowances for different direct selling costs and for the difference in the sales channels involved while distributing the products, it is the differences in quality that are more often considered.[317]

Moreover, in most cases the Commission finds that it is not possible to compare the exporters' prices with those of the EC industry as the latter has been depressed resulting from dumped imports and can no longer be made at profitable levels.[318] Thus the Commission ignores the actual industry's prices and constructs the 'target price', so-called 'price underselling', consisting of the full costs of the EC producers, including SGA, plus target profit.[319] This is where the problems begin, since the EC producers usually manufacture products at different production costs and this is where the Commission can be very creative by trying to formulate an 'ideal' case product price. Consequently, the Commission constructs the target price based either on the costs of the most efficient EC producer or on costs of a 'representative' producer or on weighted average costs of production of all EC producers but excludes the least efficient producers from the list.[320] Therefore, by not taking into account the inefficient producers and using a more averaged-out level for the EC industry as a whole, foreign importers are measured only against the highest possible criteria, resulting in the highest possible target price.

Moreover, the Commission does not give proper justification for its choice of particular profit levels, due again to its wide discretion enjoyed when making the calculations.[321] Therefore, the profit levels selected for the EC industry must not be exceeding those which could be reasonably obtainable under normal conditions of competition, in the absence of dumped imports. However, the Commission usually selects much higher profits, which vary between one and five per cent for commodity goods and as high as 45 per cent, in cases involving specialized goods, that can hardly be considered as being 'normal'.[322] The Commission's latter practice proves

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[317] Colour Television Receivers originating in Malaysia, China, Korea, Singapore and Thailand, OJ 1995 L73/3, recital 36; Video Cassettes originating in Korea and Hong Kong, OJ 1989 L174/1, recital 21.
[318] Muller et al., *supra* note 70 at p. 410.
[319] Vermulst & Waer, *supra* note 117 at p. 348.
[320] Ibid., at p. 349. *See* also Silicon Metal originating in China, OJ 1990 L80/9, recital 35; Polyester Yarn originating in Mexico, South Korea, Taiwan and Turkey, OJ 1988 L151/39, recital 35.
[321] Case T-210/95, *EFMA v. Council*, [1999] ECR II-3291, recital 57.
[322] Vermulst & Waer, *supra* note 117 at p. 351.

once again the real purpose of the EC antidumping laws, which concerns chiefly protection.

Comparison between the exporters' and EC producers' prices can be executed either on an 'individual basis' or on a 'global basis', each producing different results.[323] Therefore, the Commission calculates the individual injury margin based on the percentage of an average increase that is necessary to remove the injury caused by each exporter, adjusting it with each individual exporter's margins of undercutting and volumes of exports.[324] The latter method is more often used by the Commission than the former and the global method is extremely unfair towards the foreign producers, as will be seen from the explanation below.

Where the global injury margin is used, the Commission determines an overall target profit that should be reached by the EC industry. Then the amount of duty is computed in order for prices of imported products globally to reach a limit where the EC industry would be able to make that target profit.[325] The resulting injury margin is greatly inflated due to the unfairness of having grouped all the foreign producers together notwithstanding the differences in their manufacturing and pricing policies and having selected the best EC producers – which has greatest effect.

Besides the two methods explained above, the Commission has departed from its own practice and used a few other rather abusive methods, penalizing foreign exporters for selling above the EC industry prices. These innovative methods relate to situations where the above calculations would have led to zero injury margins, thus the Commission has accused the producers of causing injury for 'non price-related reasons'.[326] In Audio Tapes Cassettes, the Commission calculated a target market share based on full capacity exploitation and introduced the volume factor, thus creating dumping rather than finding it.[327] Moreover, in Compact Disc Players, the Commission calculated the injury margin based on comparison of the target prices with the prices of the imported models and increased by an amount representing the difference between the sales prices and the target prices of the most competitive EC industry models.[328] Thus, foreign exporters which did not undercut EC industry prices and even sold above the target prices were still 'awarded' inflated injury margins.

Finally, as is evident from the above analysis, the calculation of injury margins is dependent on the Commission's very wide discretionary powers, allowing for no certainty about which methods it will use in which case. This result-oriented approach and the fact that cost and pricing data is subject to confidentiality rules

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[323] Van Bael & Bellis, *supra* note 129 at p. 216.
[324] Dot Matrix Printers originating in Japan (definitive), OJ 1988 L317/33, recital 69.
[325] Plain Paper Photocopiers originating in Japan, OJ 1987 L54/12, recital 102.
[326] Vermulst & Waer, *supra* note 117 at p. 354.
[327] Audio Tapes in Cassettes originating in Japan, Korea and Hong Kong, OJ 1990 L313/5, recital 107.
[328] Compact Disk Players originating in Japan and Korea (definitive), OJ 1989 L205/5, recital 145.

removes much legal certainty for foreign producers as it is impossible for them to double-check calculations made by the Commission, a situation made even more difficult by the lack of proper details in the disclosures provided in the injury finding analysis.

1.5.7. Possible Improvements

First, as is evident from the above, the Commission's obligation as regards the depth of analysis of the factual situation in injury determinations is handled by assessing a kind of broad formalistic approach rather than following a thorough economic analysis. As a starting point towards reform there should be the obligation to provide more economic analysis throughout the injury finding procedures to prevent foreign producers from being precluded from opportunities for fair competition within the EC market.

It is difficult to approve the Commission's practice to exclude related producers with the exporting producers from the industry category. However there are cases where the latter groups do not or no longer import like products from the foreign producer concerned, but mainly produce in the EC.[329] Thus the approach towards related parties needs to be reformed to reflect the economic realities within the EC market.

The Basic Regulation provides various injury determinants but only one out of the three provided is used by the Commission in practice. The lack of mandatory and strict criteria for the determinations of material injury most often leads to affirmative injury findings due to the Commission's enormous margin of discretion.

Therefore, clear and mandatory rules are necessary in order to prevent the Commission from arbitrary findings, findings which should not be based on allegation of facts but should be dependant upon comprehensive economic analysis.

Moreover, the standard for determining causality is too low as the Commission simply selects a finding of injury even if the fact of the dumped imports and the increase of price depression within the EC market is a mere coincidence. Thus, the Commission is likely to find causality where there is a coincidental time factor involved between the increase of dumped imports and a certain level of deterioration of the EC industry. This is clearly discriminatory practice as efficient foreign producers should not be prevented from competing with less-efficient EC producers.[330] Moreover, it is important to note that effective reform is needed in order for the Commission to determine the category of dumped imports correctly. Where the investigation shows that part of the imports from a country or part of the sales of an investigated company were not dumped, then the latter should not be included in the injury assessments as zeroing practice does the opposite.

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[329] Didier, *supra* note 177 at 48.

[330] Stainless Steal Fasteners and Parts originating in China, India, Malaysia, Korea, Taiwan and Thailand (provisional), OJ 1997 L243/17, recital 74.

Furthermore, there is a lack of procedural requirements laid down under the Basic Regulation in order for the Commission to disregard the injury finding because of the existence of other known factors. Therefore, there should be a more stringent requirement for the effective interpretation of the 'other factors' and the latter should be analyzed by the Commission with the same weight given to evaluation of the impact of the dumped imports on to the EC industry. Thus the Commission should ensure the proper analysis of the causal link to a degree of depth far beyond its current practice.

It is extremely important that fair competition is ensured, otherwise there will always be a risk that measures provide protection to situations of self-inflicted injury, such as mismanagement or inefficiency of the domestic industry, or that they lead to anti-competitive behaviour of the domestic industry, namely, abuse of dominant position and concerted practice in order for the EC producers to raise prices.[331] Placing more weight on competition principles provides greater accuracy and more economically correct analysis and through this the Commission would be able to guarantee that antidumping procedures are used in order to protect EC industries from harmful, unfair foreign competition rather than penalize legitimate foreign producers by setting impossible criteria.

Moreover, the Commission cumulates the dumped imports any time where competition theoretically exists, without even considering the nature of the competition involved. Thus the Commission automatically proceeds with the cumulation process even though the actual competition is limited.[332] The requirements for cumulation must be of strict interpretation requiring the cumulation to be done on the same like products which are at the same level of competition when compared by factors such as volume, market share and price depression, and so on, and, where there are differences in market share or export volume trends between the foreign exporters concerned, the dumped products cannot be subject to cumulation.

As regards the injury margins calculation, the parties concerned are only given information on the method of comparison used and the percentage of the level of trade adjustments applied, without being provided with any details of the actual calculations.[333] Thus calculation of injury margin is not transparent, since the actual data on sales, target profits and determinations of target profits are not disclosed, making it difficult for the parties concerned to present arguments with respect to the calculations.[334] There is a great necessity for the system of disclosures to be reformed as access should be granted to verify the confidential data under a protective order system, the same as granted in the US.[335]

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[331] Adamantopoulos & De Notaris, *supra* note 65 at p. 41.
[332] R. Gottlieb, P. Vander Schueren, D. Pearson and K. Georgi, 'Antidumping Law and Practice in Canada, the European Union and the United States after the WTO Antidumping Agreement – Part II' in (2001) 6 *International Trade Law Review* 204 at 207.
[333] Vermulst & Waer, *supra* note 117 at p. 360.
[334] Gottlieb et al., *supra* note 332 at 208.
[335] Vermulst & Waer, *supra* note 117 at p. 360.

Moreover, by adding a theoretical target profit the Commission does not consider whether such return is actually achievable under the circumstances of the market. No account is taken of the fact that the price difference can be caused by a number of factors other than dumping, such as lower costs of exports, better sales policies, differences in quality, reputation and a depreciating currency.[336]

Therefore, due allowances should be made for any known factors other than dumping which at the same time are causing the differences in prices and it is of great relevance that zeroing practice is prohibited as all export transactions need to be considered in order not to discriminate against foreign exporters.

Finally, the Basic Regulation must contain a clause requesting the restructuring plan from the EC industry producers when submitting complaints, otherwise, there will be no end to the application of antidumping duties for protectionist purposes.[337]

1.6. Community Interest

The final step in all antidumping proceedings is the Commission's consideration of whether it is in the 'Community's interest' to have the antidumping duty imposed, which is based either on the dumping margin or the injury margin findings whichever of those two is found to be lower.[338]

The Commission must take into account all different interests 'taken as a whole, including the interests of the domestic industry and users and consumers'.[339] Thus there are two groups with varying interests involved: EC industry on the one hand, and industrial users and consumers on the other. The Commission's task is to balance these competing interests and adopt the necessary measures when they are found to be in Community interest. However, there are no detailed provisions indicating on which grounds the balancing of interests should be based, therefore the Commission has a wide margin of discretion to decide in each case.

In order to have measures imposed, the Commission presumes that it is in the interest of the Community because of the 'special consideration' of two economic factors, namely, the 'need to eliminate the trade-distorting effects of injurious dumping and to restore effective competition' in the EC market for the products concerned.[340] Thus, although the Community interest considerations require assessments to be made by the Commission in order to check whether measures are likely to remove any injury caused by dumped products resulting in a decline in market share, decreasing prices and profitability, and so on, it is rarely the case that the measures could not be adopted because of the latter grounds. The reason for that is that factors considered in the examination of the Community interest overlap with those determined in the injury investigation.

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[336] Adamantopoulos & De Notaris, *supra* note 65 at p. 46.
[337] Ibid.
[338] Art. 21(1) and 7(2), Basic Regulation 384/96.
[339] Ibid.
[340] Ibid.

However, there are several circumstances where the measures are most likely to be considered as not being in the interest of the Community. In cases where the imposition of duties is not going to benefit the EC industry by removing the injurious effects of dumping, it is said to be not in the interest of the Community to adopt such measures.[341] Thus, where products can be easily imported from other third countries and the industry does not suffer any employment problems there are no grounds for the imposition of the measures in such cases. Moreover, it could happen that the imposition of measures might have an impact on other parties concerned like traders, importers, users, and consumers, which means that the impact will have to be assessed on all of them separately.[342] The Commission employs particular principles when making such separate assessments for each group involved, therefore the Commission must check the effect of measures on retailers and importers, on upstream suppliers, on user groups and on consumers in general.[343] However, the Commission usually gives very little weight to the impact on most of those sectors involved, with the exception of the upstream suppliers whose interests are usually taken into account.[344]

In addition, two other main factors are carefully considered, namely, 'the need to remove market distortions caused by dumping' and 'the need to restore a competitive regime of fair pricing'.[345] Thus, duty is not to be imposed if industry is to be forced into substitute products, or where it could only meet part of the demand by users, whose costs would be seriously affected by a duty or where it is unlikely that industry is to benefit from the duty and when the adverse impact on importers and traders would have outweighed any benefits to domestic producers.[346] The Commission favours consumers in cases where the industry is very small and where duties can result in a severe limitation of choice.[347] If there are factors other than dumping causing injury to the EC producer it is not 'a reason for depriving that producer of all protection against the injury caused by dumping'.[348] Moreover, competition policy consideration should be taken into account but the Commission should balance the need to protect the EC industry from injury against the need to

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[341] Handbags originating in China (definitive), OJ 1997 L208/11, recital 106.
[342] R.M. MacLean, 'The Need to Reform the Community Interest Test in European Community Antidumping Law and Policy' in (1998) 4 *International Trade Law Review* 129 at 132.
[343] Ibid., at p.133.
[344] Unbleached Cotton Fabrics originating in China, Egypt, India, Indonesia, Pakistan and Turkey (provisional), OJ 1996 L295/3, recital 129.
[345] Art. 21(1), Basic Regulation 384/96.
[346] Gum Rosin originating in China, OJ 1994 L41/50, recital 5 (measures were not adopted as the negative effects would have been disproportionate); *see* also Ferro Silicon originating in Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela, OJ 2001 L84/36, recital 151 (measures were not adopted as other countries would have started exporting).
[347] Laser Optical Reading Systems and the Main Constituent Elements thereof originating in Japan, Korea, Malaysia, China and Taiwan, OJ 1999 L18/63, recital 18.
[348] Joined Cases 277/85 and 300/85, *Canon v. Council*, [1988] ECR 5731, recital 63.

ensure that competition in the common market is not distorted. Thus, to refrain from imposing a duty because it might put the producer with the highest costs out of business would be contrary to the EC Treaty objective of avoiding distortion of competition.[349]

Finally, as is evident from the above considerations, the Commission in most of the cases presumes the existence of Community interest after making rather primitive findings in order to justify imposing measures. Thus, the Commission takes the view that imposing antidumping measures is in Community interest unless the contrary is proven by the parties concerned.

1.6.1. Call For A Different Approach

When considering the presence of the Community interest the Commission must not simply grant the protection to the complaining EC industry, but rather it must make comprehensive studies in each case in order to evaluate the additional burdens imposed on other affected groups and consumers. Moreover, not only must the level of competition on the EC market be examined, but the competitive situation on the foreign exporting country's market must also be taken into account by the Commission. Otherwise the Community interest is only a formalistic criterion, the presence of which is found to exist in most of the cases. Thus, the Commission must not treat the existence of the Community interest as a rule, but must determine the latter on a case-by-case basis in order to have the interests of the affected groups involved effectively balanced.

It must also be noted that there is a high degree of political interference by the Member States in the administration and implementation of EC antidumping policy. Furthermore, countries such as France, Spain, Portugal, Italy and Greece in most cases vote for the imposition of antidumping measures, thus expressing their protectionist view towards EC trade policy.[350] Therefore, current simple majority voting must be changed so that a qualified majority is required in order to have definitive antidumping duties imposed.[351] Otherwise, the antidumping duties serve the protectionist needs of particular Member States rather than representing the

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[349] Case T-2/95, *IPS v. Council*, [1998] ECR II–3939, recital 308.

[350] MacLean, *supra* note 342 at 134.

[351] Under art. 9(4), Basic Regulation 384/96, it is sufficient if eight Member States are in favour of the imposition of definitive antidumping duty due to the simple majority voting. However, art. 9(2), Basic Regulation 384/96, requires qualified majority votes in order to terminate the proceedings. Therefore, it is necessary to extend the requirement of the qualified majority voting to the imposition of the antidumping measures also, otherwise the political interference by the Member States is most likely to lead to the 'award' of antidumping duties in most of the cases. Finally, for a qualified majority, 62 of 87 votes are necessary. The votes of the Member States are weighted as follows: Germany, France, Italy and the United Kingdom have ten votes each; Spain has eight; Belgium, Greece, the Netherlands and Portugal have five votes each; Austria and Sweden four votes each; Denmark, Finland and Ireland have three votes each; and Luxembourg has two votes.

Community interest in order to have fair and open competition re-established in an EC market distorted by unfair trade practices.

2. The Way Forward for EC Antidumping Law & Policy

2.1. Necessity for Change

As is evident from the analysis in Section 1 above, EC antidumping law and policy constantly punishes normal competitive business practices and discriminates against foreign goods by subjecting them to requirements that are not applied to the products of EC industry. Antidumping law routinely violates the 'National Treatment' principle of GATT, since the tests applied to EC producers are disregarded as far as foreign producers are concerned.[352] This is a result of the Commission's policy to permit much greater pricing latitude among EC producers than that accorded to foreign producers, with the latter being frequently found guilty of dumping while EC producers are enjoying safety under the regime of EC competition law.

In order to stop the current discrimination between policies applied to domestic producers and those applied to foreign producers, EC antidumping law and policy need to be either reformed or repealed. Antidumping legislation could be combined with or substituted by the norms of competition law. This would ensure an effective and a non-discriminatory approach to imports from third States. Specifically, in the case of cheap imports from foreign countries where current antidumping legislation is misused by the Commission, there are instances that should be tackled through safeguard procedures.

The necessity for change comes down to questions of whether antidumping legislation should be reformed or whether it should be repealed and replaced with appropriate measures under competition law. The role of safeguard measures also needs to be considered.

2.1.1. Antidumping Legislation: Reform or Repeal?

The Basic Regulation offers wide discretion in the application of antidumping rules by its administering authorities, especially the Commission as the main co-ordinator of those rules. Detailed administrative guidelines do exist within the EC but they are considered as confidential internal Commission documents whereas they should be made accessible to the public on grounds of due process.[353]

In order to secure the legal certainty of antidumping rules, there is a necessity for defined limits to be built under the norms of the Basic Regulation. These limits

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[352] Art. III of GATT 1947.
[353] Vermulst, *supra* note 61 at 23.

would ensure that the decisions of the 'unelected and sometimes unaccountable civil servants' of the administering authorities are brought under 'close public scrutiny and good governance principles'.[354]

In order for the EC to cope with the increasing problems of globalization, a much more supranational and democratic approach needs to be adopted. Due to the way the Commission is organized its decision-making process is strongly influenced by the very different national interests of Member States.[355] Currently, the Commission is bound to use antidumping methodology to guarantee the highest level of dumping in order to maintain its credibility, with dumping working as a protectionist measure, compensating for the inability of EC producers to cope with external competition.[356] Antidumping laws make it possible for EC producers to charge higher prices than would otherwise be possible, with foreign producers being prevented from equal participation in price competition.[357] At the same time the Commission, by controlling all the information concerned with antidumping investigations, is able to decide arbitrarily when it is in Community interest to apply antidumping measures and when it is not. For these inequalities to be reformed in order that the EC's trade policy attains democratic legitimacy and becomes more efficient and transparent, the Parliament should be allocated more influence in external trade matters.[358]

Current antidumping legislation is too vague on many key issues which is how the Commission is left with such wide discretion to interpret it in an unduly protectionist manner. Moreover, antidumping rules are full of bureaucracy and complexity, most often resulting in inflated dumping margins due to the Commission's arbitrary use of its competence.[359] Reform of antidumping laws should require that they be interpreted in the most restrictive way.[360] In the presence of more than one possible interpretation of the norm in the Basic Regulation, the most restrictive one should prevail.

As a result of uncertainty within some provisions of the Basic Regulation, a foreign producer is not able to determine in advance the level of duty since it does not know which calculation method is going to be used. Sometimes, owing to the Commission's unpredictable dumping calculation practices and its comparison of products that are not sufficiently similar, the foreign producer is not even able to determine whether or not he is dumping. The Basic Regulation should be reformed to contain sufficiently clear and effective provisions in order to increase legal certainty for the benefit of foreign producers.

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[354] Qureshi, *supra* note 63 at 32.
[355] C.T. Garcia Molyneux, *Domestic Structures and International Trade: The Unfair Trade Instruments of the United States and the European Union* (Oxford Hart Publishing Ltd. 2001) at p. 270.
[356] Ibid., at p. 265.
[357] McGee, *supra* note 11 at p. 3.
[358] Garcia Molyneux, *supra* note 355 at p. 146.
[359] R. McGee, *supra* note 11 at p. 9.
[360] Adamantuopolos & De Notaris, *supra* note 65 at p. 7.

In addition to the above, the Basic Regulation should afford more protection to the interests of developing countries. Current antidumping provisions are not seen as encouraging economic reform, but rather as punitive measures which are annulling substantial trade benefits due to the special rules on the calculation of normal value, especially for NME countries.[361]

Under proposed reform foreign producers should be allowed to provide commercial justification to the Commission against charges of below-cost selling. Thus, no antidumping measures should be applied where a foreign producer is selling below average variable costs or below full unit costs for a limited period of time in order to make profitable sales in the long run.[362] Similarly, there should be no antidumping measures where a finding of dumping results from differences in economic or business cycles in the EC and the foreign market, or from the price differentiation for entering the market and fluctuations in exchange rates or from mere technicalities of dumping margin and/or injury margin calculation methods.[363] This is especially relevant in today's globalizing economy as companies operating on an international level are seeking better opportunities to produce at lower costs and to penetrate new markets with those lower-priced products.[364] These developing trends in globalizing trade policy alone call for reform of the Basic Regulation.

Furthermore, not only antidumping rules but also their application is very abusive since the foreign producer is considered to be guilty until proved innocent.[365] Thus, antidumping laws not only reduce the comparative advantage enjoyed by foreign producers, but also engage them in lengthy and costly antidumping proceedings.

As is evident from the analysis, the Commission constantly disregards general accounting principles and sound economic theory when making comparisons.[366] It compares wholesale prices to retail prices, disregards volume discounts, fails to classify direct and indirect costs and applies 'zeroing' practice in order to disregard domestic sales prices when they are above average and include only those sales that are below average. Such practices call either for reform or repeal.[367]

It is most likely, however, that antidumping laws should be repealed since 'the losers seem to outnumber the winners'; contract and property rights are violated, depriving EC importers and consumers of choice and preventing foreign producers from selling.[368]

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[361] Ibid., at p. 11.
[362] B. Lindsey, 'The US Antidumping Law: Rhetoric versus Reality' in (2000) 34(1) *World Trade Journal* 1 at 30.
[363] Engering et al., *supra* note 10 at 122.
[364] Ibid., at 118.
[365] R. McGee, 'Some Ethical Aspects of Antidumping Law' at p. 9, available online at <http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID242412_code001002510.pdf?abstractid=242412> viewed on 6 February 2002.
[366] Ibid., at p. 15.
[367] Ibid.
[368] M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (London Routledge 1999) at p. 179.

Repeal of antidumping laws is also supported by the fact that antidumping law serves as a convenient tool for EC producers to lobby the Commission to keep foreign competitors out of the EC market.[369] As a sign of inequality, EC producers are never penalized for submitting incorrect information whereas convicted foreign producers are 'awarded' antidumping duties for a number of years for a dumping offence that they might only have committed once.[370] Antidumping laws 'protect' consumers from lower prices, which is difficult to justify, benefiting EC producers at the expense of consumers. Competition is distorted since EC producers are protected from having to meet foreign competition. In conclusion, the most logical step would be not to reform but to abolish antidumping because it is a discriminatory practice protecting EC producers at the expense of others.[371]

2.1.2. Antidumping and Competition Law

Promoting 'fair' competition between domestic products and imported products is one of the basic principles of any trading policy. Competition law protects competition whereas antidumping protects EC producers. The use of antidumping should therefore be restricted as being an unfair trade instrument.

Currently, antidumping investigations rely on rules which create the possibility for dumping to be found even though it does not exist. This results from the actions of the Commission, with its wide discriminatory powers, excluding certain costs from export prices but not from domestic ones, concentrating on the EC market, ignoring not only analysis of the foreign market in terms of goods but also ignoring the demand factor, thereby resulting in 'apples with oranges' comparisons when determining 'like' products.[372] Moreover, antidumping laws are only concerned with injury to EC industry. The inclusion of 'Community interest' considerations does allow the Commission, in principle, to weigh the interests of the industry against 'other' interests, but in practice it is reluctant to look more widely. The application of competition rules would focus not only on the injury to competitors but also on the purchasers of goods sold under price discrimination.[373]

Furthermore, dumping can be deemed to exist even if both the foreigner's domestic and export prices are above costs, with only one condition that normal value exceeds the export price. The Commission, in looking only at total costs and most often using 'constructed value' methods for estimating those costs, including profits, creates a distorted view. Thus, even in those cases where the foreign producer is trying to meet the level of competition by adjusting its prices to those already charged in the EC market, antidumping actions can be taken against that foreign

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[369] McGee, *supra* note 13 at p. 50.
[370] Ibid., at p. 55.
[371] Ibid., at p. 69.
[372] P.A. Messerlin, 'Should Antidumping Rules be Replaced by National or International Competition Rules?' in (1994) Heft II/III *Aussenwirtschaft* 351 at 357.
[373] Ibid., at 360.

producer. Selling above variable costs should be allowed as recognized under competition law.

Moreover, in situations where EC producers decide to lower their prices in the EC market, their foreign competitors may need to lower their prices in this market too, without decreasing the prices they charge in their own home market, but this will result in a charge of dumping. Under competition rules, an intent to harm competitors would have to be proved before such an accusation could be brought.[374] Price differentiation between EC and foreign markets is a legitimate practice under competition law, even where it causes normal injury to competitors.[375] The Commission, by ignoring the motives behind pricing strategies, further neglects to investigate the possibility that the Community industry has a 'dominant position' as it is quite often the case that a limited number of claimants represent more than 45 per cent of the EC market in antidumping proceedings.[376] It is not surprising that price cutting might be initiated by one or two of the EC producers in which case all that the other companies are doing, including the foreign ones, is following that initial move.

The Court of Justice has stated that competition rules should be taken into account in order to determine whether the outcome of antidumping proceedings is affected by the anticompetitive behaviour of the EC industry itself that is seeking protection.[377] However, this still remains an exceptional case where competition rules prevailed, leading to the annulment of antidumping measures.

A careful and well-documented analysis of antidumping cases by the competition authority, the Commission, should make antidumping measures a less attractive option because of the resulting threat of cases being brought under competition against themselves. A system could be established enabling proper account to be taken of competition concerns raised in antidumping cases, where the DG for Competition would be empowered to monitor antidumping investigations. Allegations of anticompetitive behaviours or consequences could be submitted by interested parties to the Commission, at the latest following the provisional disclosure of antidumping measures.[378] By which practice, antidumping duties would only be imposed upon the findings of the competition authority, the Commission, rejecting allegations of the existence of anticompetitive conduct.[379] This would guarantee that antidumping procedures are still used in order to protect EC industry from harmful and unfair competition of foreign origin and it would also encourage more accurate and economically sound analyses to be carried out. It is important to note that antidumping legislation, through the use of competition rules, would be

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[374] Ibid, at 359.
[375] P. Didier, *WTO Trade Instruments in EU Law* (London Cameron May Ltd 1999) at p. 11.
[376] Messerlin, *supra* note 372 at 359.
[377] Case C-358/89, *Extramet Industrie SA v. Council*, [1992] ECR I–3813, recitals 14 and 18.
[378] Adamantuopolos & De Notaris, *supra* note 65 at p. 42.
[379] Ibid., at p. 43.

less protectionist as the competition rules protect competition while antidumping rules protect only EC producers.[380]

Finally, the long-term goal would be to establish a unique set of international competition rules on the WTO level.[381] However, this would be a complicated task due to major differences in the national systems of the Members involved, therefore, the above suggestions should at least solve a most of the current problems.

2.1.3. Use of Safeguard Measures

In the case of a surge of imports or when EC industry is suffering economic downturn, 'safeguard' measures can be applied.[382] As it stands today, however, antidumping legislation is used frequently and unfairly as a safeguard instrument.

The Commission's intensive use of antidumping in preference to safeguard instruments is due to the fact, among other reasons, that the Basic Regulation allows the use of antidumping as a discriminatory action and, in so doing, permits the less stringent injury test that is applied to antidumping in preference to that which is applied to safeguards.[383] Furthermore, the primitive causal link requirement under the Basic Regulation, calling only for a causal link but not for a 'significant' causal link between dumping and injury and not requiring that a substantial distortion of competition within the EC should be taking place, results in the intensive-use antidumping as a 'safeguard' instrument. Moreover, antidumping laws do not involve a compensation requirement and measures are applied over a longer period of five years as compared with four years for safeguards.[384] Safeguard measures, in contrast to antidumping duties, are not to be applied again to a product that has already been subject to safeguards, provided that the period of non-application is at least two years.[385] In addition, antidumping measures place the blame on the exporter for cheaper products, while safeguard measures are applied under the recognition that the domestic industry needs to undergo necessary adjustment due to a surge in imports. An extensive use of antidumping rather than safeguard measures could be explained by the fact that safeguard rules do not offer the same level of protection as antidumping measures.

In order to preserve a fair trade policy while at the same time providing the Commission with the room necessary to assist struggling EC producers in becoming internationally competitive, safeguard rather than heavily protectionist antidumping measures have to be made a primary import relief tool.

Finally, safeguard measures should immediately replace antidumping measures to

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[380] Didier, *supra* note 375 at p. 12.
[381] Messerlin, *supra* note 372 at p. 371.
[382] Art. XIX of GATT 1947.
[383] J. Tavares De Araujo, Jr, C. Macario & K. Steinfatt, 'Antidumping in the Americas' in (2001) 35(4) *Journal of World Trade* 555 at 567.
[384] Ibid.
[385] Ibid.

ensure non-discriminate application of unfair trade instruments, as the EC would have to compensate the third country against which action would be taken.

Conclusion

A product is generally considered to be dumped if its export price to the EC is less than its price on the domestic market of the exporter.

EC antidumping law is intended to target unfair pricing practices and to protect EC industries from harmful foreign competition. In practice, however, it has proved itself to be biased in favour of EC industry not only to the point of allowing itself to be used to protect local industry from legitimate foreign competition and to shelter local industries which are not behaving competitively in the market place, but also to the extent of denying the principles of fair competition, damaging not only foreign producers but also local producers and consumers.

The Basic Regulation is defective at every stage of the investigation proceedings for which it legislates, failing to define clearly the powers and duties of its administering authority and removing all legal certainty and transparency from its proceedings, resulting in a Commission which has such apparently broad discretionary powers that it might be acting in a purely arbitrary manner from case to case.

The role of the Commission is to determine whether dumping is taking place, the extent to which it is damaging EC industry and whether it is in Community interest to impose antidumping duties. It is responsible for calculating dumping and injury margins but in both cases it fails to reveal its calculation methods on grounds of confidentiality, committing foreign producers to lengthy and costly proceedings, and denying them the opportunity to appeal against punitive duties.

Where equivalent products do not exist the Commission must define 'like products', an extremely controversial area, often resulting in definitions which are either too broad or too narrow, preventing fair assessment of normal value.

In the case of non-Market Economies, normal value is based on the prices or costs plus profit of the product in a third, so-called 'analogue' or 'surrogate', country but often the choice of a third country does not reflect the comparative advantages that producers enjoy in their domestic market resulting in greatly inflated dumping margins.

Due to the Commission's result-oriented approach in antidumping proceedings it knowingly violates general accounting principles resulting in inflated dumping margins and/or injury margins due to the arbitrary use of unfair calculation methods.

The main question is whether or not antidumping legislation can be reformed or whether it should be repealed.

Reform of EC antidumping laws would require that they be interpreted in the

most restrictive way. This would require major reform of the Basic Regulation and the procedures of the Commission, resulting in greater transparency and accountability.

Repeal of EC antidumping laws would sweep away a whole system that is being abused, and has become discriminatory and obstructive towards the principles of fair trade in a globalizing market for which it has become outdated.

The use of competition principles in place of antidumping legislation would provide more accurate and economically correct application of antidumping measures, still protecting EC industries from harmful and unfair foreign competition but allowing legitimate foreign producers to engage in competitive trade practices.

The long-term goal would be to establish a unique set of international competition rules on the WTO level. However, this would be a complicated task due to major differences in the national systems of the Member States involved; nevertheless, the above suggestions should at least solve most of the current problems.

In order to preserve a fair trade policy while at the same time providing the Commission with the room necessary to assist struggling EC producers in becoming internationally competitive, safeguard rather than heavily protectionist antidumping measures must be made a primary import relief tool.

The Basic Regulation must contain a clause requesting the restructuring plan from the EC industry producers when submitting complaints, otherwise, there is no end to the application of antidumping duties for the actual protectionist purpose.

No matter what trade protection instruments are applied, there is always a significant risk of abuse. This requires that detailed explicit mandatory norms be laid down covering both procedures and technicalities.