

# Michigan Journal of International Law

---

Volume 11 | Issue 2

---

1990

## European Community Trade Policies Vis-À-Vis Korea and Taiwan in the Eighties: A Comparative Perspective

Jean-François Bellis

*Van Bael & Bellis, Brussels*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>

 Part of the European Law Commons, and the International Trade Law Commons

---

### Recommended Citation

Jean-François Bellis, *European Community Trade Policies Vis-À-Vis Korea and Taiwan in the Eighties: A Comparative Perspective*, 11 MICH. J. INT'L L. 509 (1990).

Available at: <https://repository.law.umich.edu/mjil/vol11/iss2/14>

This Symposium is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# **EUROPEAN COMMUNITY TRADE POLICIES VIS-À-VIS KOREA AND TAIWAN IN THE EIGHTIES: A COMPARATIVE PERSPECTIVE**

*Jean-François Bellis\**

## **1. INTRODUCTION**

This article will review the trade policies of the European Community towards Korea and Taiwan over the past ten years. This time period has been chosen for two reasons. In the first place, ten years ago, on November 28, 1979, the Tokyo Round of multilateral trade negotiations was concluded.<sup>1</sup> At that time, the Tokyo Round was the most comprehensive GATT negotiating round ever, both in terms of trade value affected and in terms of its coverage of topics.<sup>2</sup> An interesting question, therefore, is to what extent the 1979 commitments to trade liberalization were actually kept. Secondly, during the last decade countries such as Korea and Taiwan have become extremely competitive and have started to become a threat to European manufacturers.<sup>3</sup> In addition, the EC has run a persistent trade deficit with these countries in recent years.<sup>4</sup> It is only against such a background that one can expect trade policy responses.

It will be seen that the European Community has not, thus far, established a coordinated trade policy to react to the changing realities of international trade and worldwide shifts of economic power (although some would argue that 1992 is Europe's answer). Rather, the EC authorities have chosen to assist beleaguered domestic industries in a stopgap fashion by relying on existing trade protection in-

---

\* Partner, Van Bael & Bellis, Brussels. The author gratefully acknowledges the helpful assistance of Edwin Vermulst and Thomas Hinterseer in the preparation of this article.

1. For an overview of Tokyo Round accomplishments, see J. JACKSON, J. LOUIS & M. MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND, NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984).

2. For an overview, see 2 GATT, *THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, SUPPLEMENTARY REPORT BY THE DIRECTOR-GENERAL OF GATT*, at Annex G (1980).

3. For an interesting review and analysis of the economic development of Pacific Asia, see Park, *The Little Dragons and Structural Change in Pacific Asia*, 12 WORLD ECON. 125 (1989).

4. The trade deficit with Korea was 2.3 billion ECU in 1987 and 2.6 billion ECU in 1988. The trade deficit with Taiwan was 3.2 billion ECU in 1987 and 3.5 billion ECU in 1988. EUROSTAT.

struments and unilaterally creating new ones where the existing instruments did not suffice.<sup>5</sup> Thus far, Japan and Korea (and, more recently, Hong Kong)<sup>6</sup> have been the prime targets of the EC authorities. For reasons explained below,<sup>7</sup> Taiwan has managed to stay out of the shooting range.

## 2. THE ANTIDUMPING LAW

Since 1979, the trade policy instrument used most frequently by the Community to stem the tide of competitive imports has been the antidumping law.<sup>8</sup> Surely, the Community does not distinguish itself in this respect from other developed countries with adjustment problems, such as the United States, Canada and Australia.<sup>9</sup> The reasons for the relative popularity of the antidumping instrument compared to other trade measures such as safeguard actions,<sup>10</sup> countervailing duties<sup>11</sup> and actions pursuant to the EC's new commercial policy instrument<sup>12</sup> would seem to be:

- antidumping action offers the possibility to attack selective targets (an advantage compared to safeguards);
- antidumping action directly controls the prices in the EC, especially

---

5. For an overview of such instruments, see I. VAN BAEEL & J. BELLIS, *ANTIDUMPING AND OTHER TRADE PROTECTION LAWS OF THE EC* (2d ed. 1990).

6. The following cases have been initiated against Hong Kong during the last few years: Notice of Extension of the Anti-dumping Proceeding Concerning Imports of Certain Cellular Mobile Telephones, 31 O.J. EUR. COMM. (No. C 71) 12 (1988); Council Regulation Imposing a Definitive Anti-dumping Duty on Imports of Video Cassettes, 32 O.J. EUR. COMM. (No. L 174) 1, 14 (1989) [hereinafter Video Cassettes]; Decision Concerning Small Screen Colour Televisions, 32 O.J. EUR. COMM. (No. L 314) 1, 14 (1989) [hereinafter Small Screen Colour Televisions]; Decision Concerning Photo Albums, 32 O.J. EUR. COMM. (No. L 322) 9 (1989); Notice of Initiation of an Anti-dumping Proceeding Concerning Certain Imports of Audio Cassettes and Audio Cassette Tapes, 32 O.J. EUR. COMM. (No. L 11) 9 (1989); Notice of Initiation of Anti-dumping Proceeding Concerning Imports of Silicon Metal, 32 O.J. EUR. COMM. (No. L 26) 8 (1989); Notice of Initiation of an Anti-dumping Proceeding Concerning Imports of 'Denim,' 32 O.J. EUR. COMM. (No. C 73) 3 (1989). The spate of antidumping actions and the disastrous initial results in the video tape case were important reasons for the unique decision of the Hong Kong government at the end of 1988 to retain specialized counsel to assist it in antidumping proceedings.

7. See *infra* section 2.

8. For overviews of the EC antidumping law, see VAN BAEEL & BELLIS, *supra* note 5; E. VERMULST, *ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES* (1987); J. BESELER & A. WILLIAMS, *ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES* (1986).

9. See *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* (J. Jackson, E. Vermulst eds. 1989).

10. Council Regulation on Common Rules for Imports, 25 O.J. EUR. COMM. (No. L 35) 1 (1982), *amended in* Commission 30 O.J. EUR. COMM. (No. C 37) 1 (1987).

11. Council Regulation on Protection Against Dumped or Subsidized Imports, 31 O.J. EUR. COMM. (No. L 209) 1 (1988).

12. Council Regulation on Protection Against Illicit Commercial Practices, 27 O.J. EUR. COMM. (No. L 252) 1 (1984).

- since the introduction of article 13 (11) in 1988<sup>13</sup> (an advantage compared to safeguards, countervailing duties and the new instrument);
- antidumping action is concerned with the behavior of private companies and there is, therefore, no need to consult with foreign Governments (an advantage compared to safeguards, countervailing duties and the new instrument); and
  - antidumping action is a response to unfair trade; there is therefore no compensation requirement (an advantage compared to safeguards).<sup>14</sup>

Nevertheless, one may wonder why there has been such an exponential increase in the use of antidumping actions — both *ratione materiae* and *ratione loci* — since 1979. The most important reasons would seem to be the recession in Europe in the early eighties coupled with the increased competitiveness of countries in Pacific Asia, and the realization by European industries — varying from powerful trade associations such as CEFIC, EACEM and Eurofer to ad hoc coalitions of industrial groups such as the European paint brush and photo album manufacturers — that invocation of the antidumping law (often in the aftermath of failed industry-to-industry restraint negotiations) as a means of limiting the influx of competitively-priced imports offers high chances of success. Indeed, even if the European industry does not succeed in obtaining the relief (or the extent of relief) it requests, the mere initiation of an antidumping proceeding has a chilling effect on trade, especially in the case of newly industrialized economies (NIEs) and developing economies which rely heavily on independent distributors within the EC (as opposed to countries such as Japan and the United States which tend to have sales subsidiaries within the EC). Such distributors are likely to go shopping for other producers that are not under attack as soon as a case is opened. Furthermore, a well-orchestrated defense of an antidumping proceeding involves significant financial (legal fees)<sup>15</sup> and other (manpower) burdens which press — once again — especially on small producers in NIEs and developing countries.

While antidumping action is the favored trade protection weapon of import-competing industries in Australia, Canada, the Community

---

13. For a critical analysis of the amendments to the Antidumping Regulation, introduced in 1988, see Bellis, Vermulst & Waer, *Further Changes in the EEC Anti-dumping Regulation: A Codification of Controversial Methodologies*, 23 J. WORLD TRADE 21 (1989).

14. See Bellis, *The EEC Antidumping System*, in ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY, *supra* note 9, at 41.

15. Legal fees for a trade proceeding in the EC, however, tend to be lower than similar fees in the United States. For a pioneering study of the latter, see Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570 (1984).

and the United States,<sup>16</sup> it is important to bear in mind that an antidumping case also has relative advantages for the foreign producers, that is, if one accepts the proposition that domestically powerful but internationally less competitive industries in the four jurisdictions mentioned above need some kind of safety valve to adjust to the changing realities of global competition. Indeed, it seems naive to think that such industries would just throw their hands in the air and give up; they can be expected to fight for survival by any means. Compared with other possible trade actions, an antidumping case is not that bad for the foreign producers because it offers the opportunity to emerge intact, and sometimes even stronger than before.

Korea is an excellent example of this thesis. At least in the Community, Korean companies have generally obtained very good — and compared to other countries, unprecedented — results in antidumping cases, as the following table shows.

*Initiation*

<i>year</i>	<i>Product</i>	<i>Result</i>
1981	B&W TVs	No injury <sup>17</sup>
1983	Saccharin	No injury <sup>18</sup>
1985	Cookware	No injury <sup>19</sup>
1986	Bicycle tires	Undertaking <sup>20</sup>
1986	Microwave ovens	Termination (no dumping) <sup>21</sup>
1987	Oxalic acid	Duties <sup>22</sup>
1987	Polyester yarn	(Low) duties <sup>23</sup>
1987	CDPs	Duties <sup>24</sup>

16. There are indications that the popularity of the antidumping instrument is spreading fast to other countries, such as Mexico, Korea, Brazil and Pakistan, all of which have recently adopted antidumping laws and are starting to use them.

17. Commission Decision Terminating the Anti-dumping Proceeding Concerning Imports of Certain Monochrome Television Sets, 24 O.J. EUR. COMM. (No. L 364) 49 (1981).

18. Commission Decision Terminating the Anti-dumping Proceeding Concerning Imports of Saccharin, 26 O.J. EUR. COMM. (No. L 352) 49 (1983).

19. Commission Decision Terminating the Anti-dumping Proceeding Concerning Imports of Stainless Steel Household Cooking Ware, 29 O.J. EUR. COMM. (No. L 74) 33 (1986).

20. Commission Decision Accepting Undertakings Concerning Imports of Inner Tubes and New Tire Casings, 31 O.J. EUR. COMM. (No. L 134) 61 (1988) [hereinafter Inner Tubes and New Tire Casings for Bicycles].

21. Commission Decision Terminating the Anti-dumping Proceeding on Imports of Microwave Ovens, 31 O.J. EUR. COMM. (No. L 343) 33 (1988) [hereinafter Microwave Ovens].

22. Council Regulation Imposing a Definitive Anti-dumping Duty on Imports of Oxalic Acid, 31 O.J. EUR. COMM. (No. L 184) 1 (1988) [hereinafter Oxalic Acid].

23. Council Regulation Imposing a Definitive Anti-dumping Duty on Imports of Polyester Yarn, 31 O.J. EUR. COMM. (No. L 347) 10 (1988) [hereinafter Polyester Yarn].

24. Council Regulation Imposing a Provisional Anti-dumping Duty on Imports of Certain Compact Disc Players, 32 O.J. EUR. COMM. (No. L 205) 5 (1989).

<i>Initiation year</i>	<i>Product</i>	<i>Result</i>
1987	VCRs	Undertaking <sup>25</sup>
1987	Video cassettes	(Low) duties <sup>26</sup>
1988	Polyester film	No injury <sup>27</sup>
1988	SCTVs	Duties <sup>28</sup>
1988	Glutamic acid	Undertaking <sup>29</sup>
1988	Tungsten products	No injury <sup>30</sup>
1988	Photo albums	Undertaking
1989	Audio cassettes	Pending

This table, however, and the Commission and Council Regulations that form the basis for it do not tell the complete story. In particular, one will search in vain for references to the long and arduous fights that preceded adoption of some of the regulations and to the desperate measures that the Commission occasionally considered (but eventually deserted) to deal with the problem of Korean imports under the umbrella of antidumping action. A few telling examples may suffice.

In the course of the *Microwave Ovens* proceeding,<sup>31</sup> a case involving both Japanese and Korean producers, the Commission had come to the conclusion relatively early that it was the surge in Korean exports that had caused injury to the EC industry. The Commission was, however, unable to find significant dumping margins for the Korean producers Samsung, Goldstar and Daewoo on the basis of traditional dumping margin calculation methodology.<sup>32</sup> Faced with this unsatisfactory situation, the Commission for some time actively considered reviving the old concept of currency dumping on the basis of the theory that the Korean currency, the won, was undervalued. Because of internal opposition within the commission, this idea was eventually abandoned.

25. Council Decision Accepting Undertakings Concerning Video Cassette Recorders, 32 O.J. EUR. COMM. (No. L 57) 61 (1989) [hereinafter Video Cassette Recorders].

26. Video Cassettes, *supra* note 6.

27. Decision Concerning Imports of Polyester Film, 32 O.J. EUR. COMM. (No. L 305) 31 (1989).

28. Small Screen Colour Televisions, *supra* note 6.

29. Notice of Initiation of Anti-dumping Proceeding on Imports of Glutamic Acid and Its Salts, 31 O.J. EUR. COMM. (No. C 147) 3 (1988).

30. Notice of Anti-Dumping Proceeding Concerning Imports of Tungsten Carbide and Fused Tungsten Carbide, 32 O.J. EUR. COMM. (No. C 322) 7 (1989).

31. Microwave Ovens, *supra* note 21.

32. While the Commission had found high dumping margins for the Japanese producers, it had already become clear that the Japanese producers were not causing injury to the EC industry. Imposition of antidumping duties on Japan would therefore not have helped the EC industry.

In the *Video Cassettes* proceeding,<sup>33</sup> the Commission tried no less than ten different methods of inflating the dumping margin for the Korean companies Saehan, Goldstar, Sunkyong and Kolon. Most of these methods focused on trying to find below-cost sales in Korea (even though all indications were that the Korean video tape industry was very profitable), some of which would have led to dumping margins as high as twenty-five to thirty-five percent. The Korean companies, however, fought such methods tooth and nail, with resulting dumping margins ranging from 1.9 to 3.8 percent.

Finally the *Video Cassette Recorders* case<sup>34</sup> must be mentioned. This case has ended rather disastrously — at least for the time being — for the Korean companies Samsung, Goldstar and Daewoo. It has been the only case of importance (in terms of trade value of Korean exports) with a bad result for Korea. The methods used by the Korean producers were less spectacular than those considered in the *Microwave Ovens* and *Video Cassette Tapes* proceedings, but — perhaps for that very reason — they were harder to attack. The Commission essentially took small bites out of a number of adjustments claimed by the Korean companies on the domestic market such as duty drawback and financing costs; the Commission also used a dubious model comparison. The combination of all these methods led to a finding of definitive dumping margins varying between seventeen and twenty-three percent. In this respect, it should be noted that the Korean producers did not contest that there *was* dumping but rather that the dumping margins were so high.

An interesting side-issue is that, in the middle of the proceeding, discussions were held between the European electronics industry (EACEM) and the Korean electronics industry (EIAK) about "amicable" solutions, *viz.* industry-to-industry arrangements, not only with respect to VCR exports but regarding a whole range of consumer electronics products. While these discussions were initially supported by the Commission (indeed, high-level officials of Directorate-General I attended the meetings), the Commission later withdrew its support after receiving signals from a number of Member States, in particular the United Kingdom, Germany, the Netherlands and Denmark, that restraint negotiations in the middle of the Uruguay Round were not appreciated.

Faced with the prospect of having prohibitively high antidumping duties imposed on their VCR exports, the Korean producers offered

---

33. *Video Cassettes*, *supra* note 6.

34. *Video Cassette Recorders*, *supra* note 25.

undertakings within the framework of the EC's basic Antidumping Regulation, which set minimum prices for Korean exports of VCRs to the EC and for resales made by the companies' EC subsidiaries. The Commission, however, made it clear that it did not consider these propositions sufficient because all three Korean producers were in the process of setting up factories within the EC and they could therefore reasonably be expected to start selling ex-EC factory before too long. The Commission suggested that by analogy to article 13(10) (the anticircumvention provision of the basic Antidumping Regulation) the undertakings contain an anticircumvention provision which would establish a minimum price ex-EC plant for as long as the Korean companies did not produce in the EC using at least forty percent non-Korean parts.

In the *VCR* proceeding, the Commission also ventilated some interesting views on why it considered it to be in the Community's interest to impose protective measures:

VCR production . . . involves technology which is transferable, with some modifications, to other consumer electronics products. VCR production requires high-precision mechanics (micro-motors, heads, etc.) and highly developed electronic circuitry. The loss of VCR production capability would represent the loss of substantial technical know-how in various important industrial fields and, in addition, it would seriously weaken Community consumer electronics manufacturing capability in general, both at present and in the future.<sup>35</sup>

Not only does the above passage suggest that the Commission is using the antidumping law as a tool for industrial policy, but it also indicates that the Commission considers the production of video cassette recorders to constitute the centerpiece of modern technology, a conclusion that few who have seen a production line for VCRs would presumably share. It will be interesting to hear the Commission's rationale as to why protective measures in the on-going proceeding involving photo albums are in the Community interest.

Compared to Korea, Taiwan has had very few antidumping proceedings involving products with a major trade value, as the following table illustrates.

---

35. Council Regulation Imposing Duty on Imports of Video Cassette Recorders, 31 O.J. EUR. COMM. (No. L 240) 5, 15 (1988).

<i>Initiation year</i>	<i>Product</i>	<i>Result</i>
1981	Louvre doors	Undertaking <sup>36</sup>
1982	Iron/steel nuts	Termination <sup>37</sup>
1984	Louvre doors	Termination <sup>38</sup>
1984	Panel doors	Termination <sup>39</sup>
1986	Tube fittings	Termination <sup>40</sup>
1988	Bicycle tires	Undertaking <sup>41</sup>
1988	Oxalic acid	Duties <sup>42</sup>
1988	Polyester fibers	Duties <sup>43</sup>
1988	Polyester yarn	Duties <sup>44</sup>
1988	Glutamic acid <sup>45</sup>	Pending
1989	Dicumyl peroxide <sup>46</sup>	Pending

This seems to result from two intrinsic elements of the Taiwanese economy. First, Taiwan does not have the equivalent of the famous Korean "chaebols" or business conglomerates such as Hyundai, Samsung, Goldstar, Daewoo, Sunkyong, Kolon, etc., which attract attention internationally. Secondly, Taiwanese producers have focused on manufacturing components rather than on finished products. This low-key manufacturing strategy has the dual advantage of being less conspicuous and less likely to lead to complaints from EC producers who may be purchasing those very components from Taiwanese suppliers.

Like Korea, the Taiwanese producers thus far have handled the

36. Commission Regulation Repealing a National Anti-dumping Duty on Louvre Doors, 24 O.J. EUR. COMM. (No. L 158) 5 (1981).

37. Commission Decision Terminating the Review of Special Measures in Respect of Import of Certain Nuts of Iron or Steel, 25 O.J. EUR. COMM. (No. L 254) 15 (1982).

38. Commission Regulation Cancelling the National Anti-dumping Duty on Imports of Louvre Doors, 27 O.J. EUR. COMM. (No. L 11) 13 (1984).

39. Commission Decision Terminating the Anti-dumping Proceeding Concerning Imports of Exterior Panel Doors, 27 O.J. EUR. COMM. (No. L 16) 43 (1984).

40. Commission Decision Terminating the Anti-dumping Proceeding Concerning Imports of Certain Tube and Pipe Fittings, 29 O.J. EUR. COMM. (No. L 313) 21 (1986).

41. Inner Tubes and New Tire Casings for Bicycles, *supra* note 20.

42. Oxalic Acid, *supra* note 22.

43. Council Regulation Concerning Imports of Synthetic Fibres of Polyesters, 31 O.J. EUR. COMM. (No. L 348) 49 (1988).

44. Polyester Yarn, *supra* note 23.

45. Glutamic Acid and Its Salts, *supra* note 29.

46. Notice of Review and Initiation Concerning Imports of Dicumyl Peroxide, 32 O.J. EUR. COMM. (No. C 39) 4 (1989).

dumping and injury allegations of the EC industry well: most cases were terminated without the imposition of protective measures. On the other hand, the above table shows not only that, in the more recent cases, antidumping duties are being imposed more often, but also that dumping complaints against Taiwan are increasing. This trend can be expected to continue in the future. Furthermore, one can assume that the scope of the complaints will shift towards textile products (hand in hand with the professed liberalization of trade in the textiles sector)<sup>47</sup> and products of a high-tech character, as this is one area in which Taiwanese industry is becoming increasingly competitive.

Finally, it should be noted that even though the Community has no official relationships with Taiwan, and Taiwan is not a member of GATT, the EC Institutions have practically always treated Taiwan *de facto* on an equal basis with GATT signatories.<sup>48</sup>

### 3. SAFEGUARD MEASURES

The EC Regulation on safeguards provides for the adoption of protective measures "where a product is imported into the Community in such greatly increased quantities and/or such terms or conditions as to cause, or threaten to cause, serious injury to Community producers of like or directly competitive products."<sup>49</sup> The wording is broad enough to cover any form of protective action, but in practice the Community authorities have thus far predominantly applied quantitative restrictions.

While in earlier cases, *e.g.* *Stoneware*,<sup>50</sup> *Quartz Watches*,<sup>51</sup> and *Urea*,<sup>52</sup> the Community authorities adhered to the non-discrimination

47. In November, 1988 the EC Commission presented a report on trends in the textiles sector in which it made a distinction between long-term and short-term trends. While the Commission saw many positive signs for the long term, the Commission perceived a very worrisome trend for the near future: the increase in exports from Asian and South Asian countries. The Commission noted, however, that many developing countries had made progress in liberalizing their own market and stated that if this trend continued, the EC would be prepared to liberalize its market further, including possibly the abolition of the MFA. The EC textiles industry, however, is more conservative and does not believe that the time is yet ripe for abolition of the MFA.

48. This is clear, for example, in the case of the textile agreements which the EC has concluded with a number of textile-producing developing countries within the framework of MFA. As far as Taiwan is concerned, the Community did not conclude an agreement, but adopted a Regulation which in fact closely mirrors the agreements concluded with GATT Members.

49. Council Regulation on Common Rules for Imports, 25 O.J. EUR. COMM. (No. L 35) 1 (1982) amended in 30 O.J. EUR. COMM. (No. C 37) 1 (1987).

50. Commission Regulation Introducing Protective Measures Concerning Imports of Stoneware, 25 O.J. EUR. COMM. (No. L 369) 27 (1982).

51. Commission Regulation Introducing Protective Measures Concerning Quartz Watches, 27 O.J. EUR. COMM. (No. L 106) 31 (1984).

52. Commission Regulation Concerning Imports of Urea, 29 O.J. EUR. COMM. (No. L 229) 8 (1986).

principle in accordance with the relevant GATT law on the subject, in more recent cases the Commission seems to be moving away from this principle. In *Slide Fasteners*,<sup>53</sup> only the imports from Taiwan were subjected to protective measures. In the *Footwear* cases,<sup>54</sup> the proceeding was limited from the outset to Taiwan and Korea. While this selectivity may be justified vis-à-vis Taiwan, which is not a member of GATT, it would certainly seem to be in violation of article XIX of the GATT as far as Korea is concerned.<sup>55</sup> In this respect, it is surprising that, to the best of the author's knowledge, the Korean Government seems to have accepted this discrimination without any protest.

#### 4. SHIPPING: THE HYUNDAI CASE

On January 4, 1989, the EC Council decided to levy a redressive duty on containerized cargo transported by liner between the Community and Australia by the Korean Hyundai Merchant Marine Company.<sup>56</sup> This was the first time that the Council applied Regulation No. 4057/86 on unfair pricing practices in maritime transport.<sup>57</sup>

The Council decided that Hyundai had received the following non-commercial advantages:

- Benefits accruing to Hyundai from a Korean cargo Reservation Scheme;
- Benefits received by Hyundai under the Shipping Industry Rationalization Plan (S.I.R.P.) which had been implemented by the Korean Government as of 1984. Under this plan, Hyundai had allegedly benefitted from a variety of support measures, including tax benefits, debt moratoria on won loans and on foreign currency loans and the refinancing of interest accrued during the moratoria.

The Council held that "the advantages were substantial enough to make it possible for Hyundai to proceed in the way found in the investigation," i.e., to set "unfair" price levels. As Hyundai's prices had caused injury to the EC industry, the Council decided to impose a

---

53. Commission Regulation Concerning Imports of Slide Fasteners, 30 O.J. EUR. COMM. (No. L 353) 11 (1987).

54. Commission Regulation Concerning Imports of Footwear into Italy, 31 O.J. EUR. COMM. (No. L 54) 59 (1988); Commission Regulation Concerning Imports of Footwear into France, 31 O.J. EUR. COMM. (No. L 166) 6 (1988); Notice of Initiation of an Investigation into Imports of Footwear, 31 O.J. EUR. COMM. (No. C 215) 6 (1988).

55. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

56. Council Regulation Introducing Redressive Duty of Containerized Cargo, 32 O.J. EUR. COMM. (No. L 4) 1 (1989).

57. For a critical overview of the Regulation, see Bellis, Vermulst & Musquar, *The New EEC Regulation on Unfair Pricing Practices in Maritime Transport: A Forerunner of the Extension of Unfair Trade Concepts to Services?*, 22 J. WORLD TRADE 47 (1988); see also Elsner, *Unfair Pricing Practices in Maritime Transport*, 23 EUR. TRANSPORT L. 590 (1988).

redressive duty of 450 ECU per twenty-foot container, corresponding to the difference between Hyundai's freight rate and the normal freight rate.<sup>58</sup>

This author has elsewhere criticized the new Regulation as follows:

The new regulation is a hybrid of antidumping and countervailing duty legislation. It takes the vague concept of "non-commercial advantage," presumably meaning subsidies in all their forms (and therefore not limited to countervailable subsidies in the sense of Track I of the 1979 GATT Subsidies Code) and uses the surrogate company methodology (in a variation of the antidumping law as applied to non-market economy countries) to measure the benefit conferred by such advantages. By not defining the term "non-commercial advantage" and by leaving the Community authorities unlimited discretion in their selection of an appropriate surrogate company, the Regulation offers a great potential for protectionist applications.<sup>59</sup>

The Hyundai case shows that such fears were justified: the non-commercial advantages found by the Commission to have benefitted Hyundai are very broad; the causal link required between the non-commercial advantages and the unfair pricing practices is very weak; and the surrogate used by the Commission to compare Hyundai's freight rates was a Swiss shipping company.<sup>60</sup>

While the Hyundai case of course can be analyzed as a stand-alone proceeding, it would seem more justified to consider it in the broader context of the increasing "get tough" policy of the Community vis-à-vis Korea — which is also apparent in other areas.

A final ironic note is that shortly after the Council found that Hyundai had received subsidies, the Commission approved subsidies to German and French ships, as well as an aid system introduced in Denmark, as being in conformity with the common maximum production aid ceiling in the Sixth Directive.<sup>61</sup> This Sixth Directive on state aid to the shipbuilding industry had been adopted on January 26, 1987 and provided for a maximum ceiling of twenty-six percent for large ships and sixteen percent for small ships costing less than six million ECUs.<sup>62</sup>

---

58. Hyundai has challenged the Regulation before the European Court of Justice. See Dawkins, *Hyundai set to fight EC duties*, at 10, col. 4, FIN. TIMES, June 30, 1989.

59. Bellis, Vermulst & Musquar, *supra* note 57, at 64.

60. Experience with the surrogate country concept in antidumping proceedings concerning non-market economies has shown that comparing countries with very different GNPs leads to findings of enormous dumping margins. Likewise, one can reasonably assume that a Swiss shipping company charges higher freight rates than a Korean shipping company, whether or not the latter receives non-commercial advantages.

61. See Agence Europe, No. 4981 (Mar. 23, 1989) at 5; Agence Europe, No. 5058 (July 15, 1989) at 7.

62. Council Directive on Aid to Shipbuilding, 30 O.J. EUR. COMM. (No. L 69) 55 (1987).

### 5. GSP SUSPENSION TOWARDS KOREA

Like other developed countries, the European Community has a Generalized System of Preferences which grants developing countries preferential treatment in the form of reduced or zero import duties. In 1986, on the occasion of the mid-term review of that system for the 1981-1990 decade, the Community Institutions officially announced for the first time that they would adopt a graduation policy, consisting of the reduction or withdrawal of preferential treatment for certain competitive suppliers of sensitive industrial products. This graduation policy has expanded in scope over the years. For 1989, for example, the EC decided — based on 1986-87 import statistics — to reduce by fifty percent the fixed duty-free amounts in the case of five products originating in Korea and seven products originating in Saudi Arabia. Also in 1989, the EC decided to exclude altogether from preferential treatment products from certain countries to which a fifty percent reduction of the fixed duty-free amounts had been applied in 1988. This measure affected three products from Korea, two from Hong Kong and one from Libya.

On December 18, 1987 the Council took a more far-reaching measure by adopting a Regulation suspending the EC's Generalized System of Preferences (GSP) with respect to Korea as of January 1, 1988. Although not stated in the Regulation, the EC measure was the result of strong lobbying efforts of CEFIC, the powerful European Association of Chemical Manufacturers, which had become irritated at the Korean Government's failure to grant European companies protection in the field of intellectual property similar to that extended to United States' manufacturers in July 1986.

While there can be little doubt that the Korean Government did accord American manufacturers preferential and, therefore, discriminatory intellectual property rights protection, one may nevertheless question the desirability of using the GSP as a trade weapon. In the opinion of this author, use of the new commercial policy instrument would have been more logical because it was specifically designed to deal with such situations. Indeed, initiation of a proceeding under this instrument would have provided the EC with at least a mantle of legitimacy. The suspension of the GSP, on the other hand, amounts to nothing less than blatant use of power politics.

### 6. ARTICLE 115 MEASURES

For a variety of reasons there are still many national quotas in the

Community.<sup>63</sup> Such quotas apply only to direct exports from particular countries. Once a national quota is filled, exporters in the third country to which the quota applies (or their importers) may try to export indirectly to that Member State through another Member State. This is normally permitted under the principle of the free movement of goods: once a product is cleared through customs in any EC Member State, it can move freely throughout the whole Community. This may, of course, defeat the purpose of the national quota. For this reason, article 115 of the EC Treaty allows the Commission to authorize Member States to take protective action against indirect exports in derogation of the principle of the free movement of goods.

Article 115, which was intended to be used only in exceptional circumstances, became an increasingly normal method of conducting trade policy in the late seventies and early eighties. Recently, however, the Commission has exerted stricter control over the requirements for authorization under article 115.<sup>64</sup> This more aggressive attitude has led to a substantial reduction in the number of authorizations under article 115 during the last few years. While in 1980 some 356 demands were introduced, this number decreased to 157 in 1988. This change in policy was the result of decisions of the European Court of Justice<sup>65</sup> and the logistics of the 1992 concept.

A closer look reveals changes not only in the number of authorizations, but also in the types of products involved. While in the early eighties the vast majority of authorizations concerned textile products (over seventy percent), the proportion of textile products in 1988 was only fifty percent. For Korea and Taiwan, in particular, this is a significant change, as the following table shows:<sup>66</sup>

---

63. A substantial number of these are voluntary restraint agreements or voluntary export restraints. Bourgeois, *Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective - II*, 17 INT'L BUS. LAW. 115, 119 (1989) (citing a GATT Secretariat study, stating that, between October, 1987 and April, 1988, 61 VRAs or VERs were in force to which the EC was a party). Petersmann has concluded that "the EEC has become the main international user of 'grey area trade restrictions' in contravention of GATT Law." Petersmann, *Strengthening the Domestic Legal Framework of The GATT Multilateral Trade System*, in E. PETERSMANN & M. HILF, THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 33, 69 (1989).

64. See Commission Decision on Surveillance and Protective Measures in Respect of Imports of Certain Products Originating in Third Countries and Put into Free Circulation in Another Member State, 23 O.J. EUR. COMM. (No. L 16) 14 (1980); Commission Decision on Surveillance and Protective Measures, 30 O.J. Eur. Comm. (No. L 238) 26 (1987).

65. See, e.g., *Donckerwolcke v. Procureur de la République*, 1976 ECR 1921; *Tezi Textiel v. Commission*, 1986 ECR 887 [Tezi I]; *Tezi Textiel v. Commission*, 1986 ECR 889, 900 [Tezi II].

66. The table includes products affected by article 115 authorizations and takes into account repeated authorizations.

<i>Year</i>	<i>Products</i>	<i>Korea</i>	<i>Taiwan</i>
<i>Year</i>	<i>Products</i>	<i>Korea</i>	<i>Taiwan</i>
1986	textiles	14	10
1986	others	6	9
1987	textiles	14	15
1987	others	5	16
1988	textiles	6	13
1988	others	6	8
1989 (1-9)	textiles	3	4
1989 (1-9)	others	8	4

To a certain extent, however, this table is misleading. In the first place, MFA IV, along with the bilateral agreements concluded within its framework, provides for a number of measures which obviate the need for article 115 authorizations. Secondly, the table does not take into account the trade value of imports affected by article 115 authorizations. As Korea and Taiwan are increasingly focusing on production of micro-electronic high-tech products which fall under the category of "others," such sectors might well be affected seriously.<sup>67</sup>

## 7. CONCLUSIONS

If one compares the economic performance of Taiwan with that of Korea, two trends are worth noting. In the first place, the per-capita GNP of Taiwan is substantially higher than that of Korea: USD 4,700 compared to USD 3,400.<sup>68</sup> Secondly, the export surplus of Taiwan with the EC is much higher than that of Korea.<sup>69</sup> Perhaps surprisingly in light of the above, Taiwan has succeeded in avoiding the attention of the EC industry and the EC authorities. While Taiwan has received its share of antidumping (and safeguard) measures in the Community, the value of trade affected by such measures does not come close to that of actions taken against Korea. In other areas, Korea has also attracted more attention in the Community. The main reasons for this difference have been indicated above: (1) the existence

67. Indeed, the 1989 (1-9) measures were aimed at car radios (France), color television receivers (France), television receivers (France), sewing machines (Spain), video cassette recorders (Spain), cars (Spain), color televisions (Spain) and playing puppets (Spain) as far as Korea was concerned, and tools and hand tools (Spain), colour television receivers (France), playing puppets (Spain) and television receivers (France) as far as Taiwan was concerned. Perhaps not surprisingly, most of the measures involved imports into Spain and France.

68. Report of the Section for External Relations, Trade and Development Policy on Relations Between the European Community and the Newly Industrializing Countries of South-East Asia, 1070 CES 88, at 3, 15 (Mar. 20, 1989).

69. *Supra* note 4.

of huge business conglomerates in Korea and (2) the Taiwanese specialization in the production of parts and components. A third reason might be that a number of products in which the Koreans have become extremely competitive are also produced in Europe by large and influential companies such as Philips (microwave ovens (MWOs), compact disk players (CDPs), video cassette recorders (VCRs) and color televisions (CTVs), BASF and AGFA (video tapes and audio tapes).

That Korean products have been the subject of a variety of complaints in the Community, especially dumping allegations, does not mean, however, that Korean producers have suffered as a result. In most cases, they have been able to defend themselves very successfully against the allegations of the EC industry, a record that compares very favorably, for example, with that of Japan. Whether the combination of increased labor costs and the appreciation of the won will allow Korea to continue along this path remains to be seen.

For the moment, things are relatively quiet on the antidumping front, arguably because of the buoyant state of the Community economy and the presence of a more free-trade-minded Commissioner on External Relations. It seems, however, merely a question of time before complaints will pick up again. It can be expected that such complaints will continue to be aimed at newly-industrialized economies such as Korea and Taiwan — probably even more strongly than before. Eventually, the economic structure of Korean business may possibly help the country more than damage it: the Korean conglomerates can arguably set up production facilities within Europe more easily than the scattered small and medium-size Taiwanese companies. In the end, investing in the Community (with a sufficient percentage of non-Korean or non-Taiwanese parts) is the only foolproof way of maintaining access to the EC market.

In the beginning of this contribution, the author posed the question to what extent the commitments to trade liberalization made in the context of the Tokyo Round had been kept. Experience in GATT would seem to have shown that decreases in direct protection are often replaced by increases in indirect — more covert — protection.<sup>70</sup> Although one of the stated purposes of the Tokyo Round was to deal with this phenomenon, and the Round indeed succeeded in producing a number of important Codes on non-tariff barriers, it has paradoxically led many industrialized countries to take recourse to unfair trade

---

70. Compare C. GREY, TRADE POLICY AND THE SYSTEM OF CONTINGENCY PROTECTION IN THE PERSPECTIVE OF COMPETITION POLICY (OECD 1986).

laws (in the EC notably the antidumping law). As has been shown elsewhere,<sup>71</sup> good arguments can be made that the unfair trade laws are themselves unfair in that they contain a number of artificial elements, either in law or in practice, which inflate the likelihood of dumping or injury findings. As more and more countries are starting to adopt (and use) unfair trade laws and pattern such laws especially after the laws of the United States and the European Community, such laws have the potential of becoming the next biggest threat to the multilateral free trading system. The containment and — if at all possible — the rolling back of some of the protectionist or irrational excesses of current unfair trade laws is therefore, in the author's opinion, a top priority for negotiators in the Uruguay Round.

---

71. J. Jackson & E. Vermulst, *supra* note 9. Compare for the EC, Van Bael, *EEC Antidumping Enforcement: An Overview of Current Problems*, 1 EUR. J. INT'L L. (1990); Hindley, *Dumping and the Far East Trade of the European Community*, 11 WORLD ECON. 445 (1988).