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ANTI-DIVERSION RULES IN ANTIDUMPING PROCEDURES: INTERFACE OR SHORT-CIRCUIT FOR THE MANAGEMENT OF INTERDEPENDENCE?

Edwin Vermulst
Paul Waer*

How can we possibly go to other countries and say, "Don't violate the GATT," if we cavalierly and flagrantly violate it ourselves.¹

I. INTRODUCTION

In 1987, the European Communities (EC) amended its antidumping law to adopt a distinct procedure enabling it to counter what it perceived to be circumvention of antidumping duties through the setting up of "screwdriver" plants in the Common Market. In 1988 the United States amended its antidumping law by allowing action against a multiplicity of corporate practices that it considers constitute strategies aimed at circumventing antidumping duties. The other two principal users of antidumping laws, Canada and Australia, have not — thus far — followed the lead of the EC and the United States.² It seems likely, however, that sooner or later similar stipulations will be espoused by these jurisdictions.

In Geneva there would seem to be a consensus that certain forms of diversion should be dealt with explicitly in the General Agreement on Tariffs and Trade (GATT) Anti-Dumping Code.³ The four main users of antidumping laws in varying degrees feel that diversion con-

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1. HEARINGS ON H.R. 4696, HOUSE WAYS AND MEANS COMM., 99th Cong., 2d Sess., at 2 (1986) (Statement of Clayton Yeutter, United States Trade Representative).

2. Both, however, have occasionally acted *de facto* against diversion: Canada by including parts and components within the scope of an antidumping duty order on the finished product and Australia by applying its normal customs classification rules. See *infra* notes 180-94 and accompanying text for more details.

3. GATT, *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade* (1979), BISD, 26 Supp. 171 (1980).

cerns a "new reality" which the present Code does not adequately address. Other Code signatories, in many cases victims of antidumping action, on the other hand, presumably favor multilateral regulation above unilateral interpretations by the four main users.⁴ However, even with the end of the Uruguay Round in sight, the GATT Contracting Parties are miles apart on what actually constitutes diversion.

A GATT panel, instituted at the request of Japan in 1988 to scrutinize the GATT-consistency of the EC's parts amendment, communicated its findings to the EC and Japan on March 2, 1990, and to the other GATT Contracting Parties on March 22, 1990. As has been widely reported,⁵ the GATT Panel has ruled that the measures taken pursuant to the EC provision violate GATT rules.

Part II of this article will diagnose the phenomenon of diversion in the context of antidumping law. Parts III and IV will address the present approaches towards diversion in the United States and the European Communities respectively. Part V will briefly compare the Australian and Canadian approaches. Part VI will evaluate the assorted propositions made in the Uruguay Round. Part VII will probe the GATT Panel report on the EC's parts amendment and its possible repercussions for the anti-diversion debate in GATT. Part VIII will provide conclusions and suggest possible improvements.

II. DIVERSION: A TOPOGRAPHY

For the purposes of this article, we will define "diversion" as conduct undermining the policy objective of antidumping laws while, strictly speaking, not falling within the definition of the sanctionable conduct as defined in current antidumping legislation. The "diversion" precludes the remedies imposed from being effective and accord-

4. In that respect, they have perhaps learned a lesson from what has happened over the last decade in the sales below cost area. For a concise description of sales below cost in GATT, see Koulen, *Some Problems of Interpretation and Implementation of the GATT Anti-Dumping Code*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* 366, 368 (J. Jackson & E. Vermulst eds. 1989) [hereinafter *ANTIDUMPING LAW AND PRACTICE*].

5. See Buchan, *GATT Upholds Japanese Complaint Against EC*, *Financial Times*, Mar. 10/11, 1990, at 2, col. 2 (weekend edition); *EC Mum on Press Report That It Lost GATT Case*, *Wall St. J.*, Mar. 12, 1990, at 2, col. 5 (Eur. ed.); Thomson, *Japan Hopes GATT Ruling Ends EC 'Discrimination'*, *Financial Times*, Mar. 13, 1990, at 9, col. 1; Dullforce, *GATT Backs Japan over Anti-Dumping Duties*, *Financial Times*, Mar. 29, 1990, at 24, col. 1; Buchan, *Brussels Attacks "Narrow" GATT Dumping Ruling*, *Financial Times*, Mar. 30, 1990, at 4, col. 1; Wolf, *EC May Amend "Screwdriver" Legislation After GATT Upholds Japanese Complaint*, *Wall St. J.*, Mar. 30, 1990, at 2, col. 4 (Eur. ed.); Montagnon & Kellaway, *EC Refuses to Adopt GATT Report on Dumping*, *Financial Times*, Apr. 4, 1990, at 18, col. 1; Dullforce, *Brussels at Odds with GATT over Judgment*, *Financial Times*, Apr. 4, 1990, at 4, col. 1; *EC Commissioners Criticize GATT Panel in Antidumping Case*, *Wall St. J.*, Apr. 6, 1990, at 2, col. 6 (Eur. Ed.); Montagnon & Kellaway, *The 'Predators' and the Investors*, *Financial Times*, Apr. 9, 1990, at 16, col. 3. See *supra* notes 220 and accompanying text for analysis of the GATT panel report.

ingly diminishes the practical impact and meaning of the legal provision. "Diversion" thus defined includes both "avoidance" and "evasion" of antidumping duties. "Circumvention" will be used as a functional equivalent of "evasion."

There are two alternative ways to assess the problem of diversion. The first one is that conduct falling outside the ambit of what is legally defined to be sanctionable conduct, by definition, is non-sanctionable conduct. In this view, the legislature (or judiciary) cannot escape its responsibility to define clearly the law without jeopardizing legal predictability, considered to be a cornerstone of every civilized legal system and a pre-condition for rational human behavior.

The other view is that the law is necessarily an expression of underlying policy objectives. Subjects to the law should not be permitted to thwart the obvious policy objectives of the law by verbal architecture, and the administering authorities should be given sufficient leeway to counter such behavior. Within the context of antidumping legislation, however, it will not always be crystal-clear to subjects to the law exactly where the border lies between illegitimate "evasion" of the law by an intrusion upon the "clear" policy objectives of the law, and legitimate and necessary "avoidance" of sanctionable conduct. Indeed, the nucleus of most of the anti-diversion debate involves practices on the borderline of the current legal definition of sanctionable dumping, and it is not always apparent whether the policy objectives stop at or surpass the limits of this legal definition.

Both approaches lead to the conclusion that the anti-diversion debate necessarily touches upon the notion of the sanctionable conduct itself, be it as defined in current legislation or as targeted by the policy objectives, both of which should ideally coincide. Indeed, where it is felt that the legal definition of the sanctionable conduct is no longer adequate to secure the attainment of the policy objectives of the law, the obvious solution is to redefine the sanctionable conduct in legislation. However, this process presupposes that the policy objectives themselves are clearly delineated. Hence, redefining and adapting the legal definition of sanctionable dumping to deter "diversion" compels a debate on the clear demarcation of the underlying policies and an examination of the concepts and sanctions employed in current antidumping legislation.

In the remainder of this section, the authors will discuss diversionary practices in general terms in conjunction with the handicaps inherent in the sanctions and concepts used in contemporary antidumping legislation.

A. *"Diversion" Related to the Product Scope of the Antidumping Measures: Product Alterations (sidestream diversion), Imports of Parts and Subassemblies (upstream diversion) and Imports of Finished Products Incorporating a Dumped Component (downstream diversion)*⁶

According to article 2(1) and article 3(5) of the GATT Anti-Dumping Code, the imposition of antidumping measures requires a finding of dumping and resulting injury with regard to the "like product." "Like product" is defined in article 2(2) of the Code as "a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."⁷ There is nothing in the GATT or in the Code that prohibits an antidumping case (or cases) from being brought against a broad range of products.⁸ However, where a complaint is brought against a variety of products which are not "like products," it will be necessary to conduct separate investigations of dumping and resulting injury with respect to each "like product."⁹

Besides the "like product" definition, neither GATT article VI nor the GATT Code contain any specific rules concerning the technicalities of the imposition of antidumping duties as far as the product scope is concerned. Therefore, within the outer limits of the "like product" definition, administering authorities are free to define the product scope of the investigation. Usually, in order to assist the customs authorities who will eventually have to collect the antidumping duties, the product scope is defined with reference to particular customs headings. However, the definition of the "like product" need not necessarily coincide with the customs classification of products and can be broader or more narrow than a particular customs heading.

6. For a discussion, see also Bierwagen & Hailbronner, *Input, Downstream, Upstream, Secondary, Diversionary and Components or Subassembly Dumping*, 22 J. WORLD TRADE 27 (June 1988).

7. See GATT, *supra* note 3, at 172-74. Compare J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 414 (1969):

Essential to all of these expressions, however, is the concept "like products." It is only a comparison of prices of "like products" that can show dumping and preparatory work suggests that the use of this term in this article meant same product, in contrast to a somewhat broader use of this term in other locations in the General Agreement.

8. Thus, for example, the massive number of antidumping and countervailing duty cases brought by the U.S. steel industry in 1982 against a variety of products and countries were perfectly within the international rules.

9. An exception is use of the product line provision foreseen in article 3(5) of the Code. The conditions for invoking this exception, however, are understandably restrictive.

A first area of "diversion" consists of imports of products which fall outside the limits of the product scope of the antidumping measures. This kind of "diversion" can take various forms.

1. Product Alterations and "New Generation" Products¹⁰

An exporter can try to escape the application of antidumping duties on his products by making alterations to his products so that these no longer fall within the product scope of the duties. He can do this by downgrading or upgrading his product. Generally speaking, in case of upgrading, the exercise will be worthwhile where the level of antidumping duties is considerable, the cost of the upgrading (for example, by adding additional features) is lower than the amount of the antidumping duties, and the end-product can still be sold at a commercially viable price.¹¹

In GATT terms the legal boundaries for the actionability of this conduct lie within the "like product" definition. It seems obvious that minor product alterations cannot be judged to result in a different "like product." For example, a passenger car and the same passenger car with a sunroof option essentially would still be "like products." However, in certain cases there may have been particular reasons for a given restrictive product definition. For example, an investigation can be limited to imports of portable cassette players because there is no injury being caused by imports of non-portable cassette decks. In this case, apart from the problem of whether portable and non-portable cassette players are "like products," a further complexity is introduced by the question whether the result of the investigation would have been different if it had covered a broader product range from the outset.

"New generation" products raise similar — but more serious — "like product" questions. For most consumer products it is normal business practice to improve the products constantly and to introduce new product series regularly, which sometimes differ from the old products in terms of, for example, minor design changes and/or a few additional options. The old and new series will generally not be considered to be different "like products" requiring a completely new investigation of dumping and resulting injury before antidumping duties can be imposed. On the other hand, nobody will dispute that a compact disc player cannot be considered as only a "new generation"

10. Example: an antidumping duty is imposed on color televisions from country X. Producer x in country X starts producing color televisions incorporating a timer.

11. The commercial viability of this operation depends of course also on considerations other than price, such as consumer preferences.

product of a record player because they are clearly physically different products with different characteristics utilizing different technologies.¹² The factual constellations are, however, not always that clear. For example, in the case of semiconductors it is not evident that a 16 K Dynamic Random Access Memory (DRAM) chip and a 16 M DRAM chip are still "like products." While both might be seen to essentially perform the same basic functions, there is a tremendous difference in memory capacity and, accordingly, a tremendous difference in the ability of both to perform these functions.¹³ Open-ended product scopes (16 K and above) may effectively capture un-like products.

2. "Upstream" Diversion¹⁴

When an antidumping duty is imposed on a finished product but not on its parts or subassemblies, an exporter can elude the antidumping duties on the finished products by moving upstream, and start exporting parts and subassemblies which then can be assembled into the finished product (by a related company) in the importing country. Upstream diversion will especially become an attractive option when the level of antidumping duties on the finished product is considerable and the assembly costs in the importing country are not prohibitively high. This "diversionary" conduct has shown to be rather prominent in practice and has caused various responses by administering authorities which will be discussed later in this article. It is also difficult to tackle under current GATT antidumping law.

3. "Downstream" Diversion¹⁵

When an antidumping duty is imposed on a certain product, the exporter can also move downstream and start exporting further processed forms of the product. Additionally, other producers of further processed products could incorporate the dumped input into their production. This relates to the issue of "input" or "secondary" dumping. It should be noted that no international consensus exists on

12. Caveat: the Commerce Department, on the other hand, has held that portable electronic typewriters are "like" portable electric typewriters. In the technical world of antidumping, nothing seems impossible.

13. In the United States, the ITC in its preliminary injury determination, DRAMS of 256 K and Above, 51 Fed. Reg. 9,475 (1986) (preliminary) determined that 256 K DRAMS and 1 M DRAMS were like products.

14. Example: an antidumping duty is imposed on imports of color televisions from country X. Producer x in country X starts exporting color picture tubes.

15. Example: an antidumping duty is imposed on color picture tubes from country X. Producer x in country X starts exporting color televisions.

whether input dumping is or should be actionable. Indeed, in the Committee on Anti-Dumping Practices it has apparently been stated that:

[t]he General Agreement was clear that there was no such thing as 'secondary dumping'. If one applied the normal GATT test, namely the domestic price in the country of exportation, then the conclusion . . . was that there was no dumping. The fact that certain inputs had been dumped would not lead to the conclusion that, as far as the final product was concerned, there had not been normal conditions of trade. The test of cost of production would also lead to a no dumping conclusion because there was nothing abnormal in the fact that producers used imports they could buy in the normal market under normal market conditions even if these normal conditions implied dumping. The investigating authorities had to calculate production costs on the basis of the real costs for the producer. In these circumstances the reply was clear — at least under the General Agreement and the Code — there was no dumping and nothing could be done about it.¹⁶

In the view of these authors, this statement is by and large correct. However, an exception to this might be the situation where the producer of the input and the finished product are the same or related and where the input is "purchased" at a price which does not cover its cost of production. This conclusion seems buttressed by an unpublished draft recommendation of the Committee on Anti-Dumping Practices.¹⁷ Nevertheless, such situations should be relatively rare. The move into downstream products usually entails that the exporter move into quite a different market and therefore this would probably not occur frequently in practice.¹⁸

16. See GATT, ANALYTICAL INDEX, NOTES ON THE DRAFTING, INTERPRETATION AND APPLICATION OF THE ARTICLES OF THE GENERAL AGREEMENT, at VI-3 (1984).

17. The recommendation is described in Hart, *Dumping and Free Trade Areas*, in ANTI-DUMPING LAW AND PRACTICE, *supra* note 4, at 334-35. See Bourgeois, *EC Antidumping Enforcement — Selected Second Generation Issues*, in ANTITRUST AND TRADE POLICY IN THE UNITED STATES AND THE EUROPEAN COMMUNITY 563, 580-81 (B. Hawk ed. 1986). The latter author equates input dumping with *upstream* dumping. In the terminology used by these authors, input dumping should be characterized as *downstream* dumping.

18. Indeed, in "upstream" diversion the exporter can basically stay in the same market if the assembly operations in the importing country are performed by the exporter (or by a related company) because he will continue to sell the same (finished) product in the same market. In the event of "downstream" diversion, the exporter will only stay in the same product market if further processing operations were previously performed in the importing country. This would be the case, for example, if "intermediate products" are subject to an antidumping duty which previously were exported for captive use in processing operations in the importing country. The exporter then can stop the further processing in the importing country and directly export the "processed product."

B. "Diversion" Related to the Concept "Products from a Certain Country"¹⁹

A basic question touching upon the very notion of dumping itself is whether, in defining dumping²⁰ and imposing antidumping duties,²¹ the concept of "country of export" or "country of origin" should be used as a yardstick. A separate, but related, issue is whether the sanctions (imposition of antidumping duties) should necessarily be strictly confined to the objectionable conduct (injurious dumping as defined, among others, by the selection of the basis for determining normal value).

The GATT and its implementing legislation would not seem to provide a conclusive framework of limitations with regard to the provenance of products which may be dumped and subjected to antidumping duties. GATT article VI offers rather vague — one could even say contradictory — descriptions. In article VI(1), for example, the Contracting Parties recognize that:

dumping, by which *products of one country* are introduced into the commerce of another country at less than the normal value of the products, is to be condemned. . . . A product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of *the product exported from one country* to another (a) is less than the comparable price. . . . for the like product when destined for consumption in *the exporting country*, or, (b) in the absence of such domestic price, is less than either (i) the highest comparable price for the like product for export to any third country. . . . or (ii) the cost of production of the like product in *the country of origin*. . . .²²

Article VI(4) stipulates that "[n]o *product of the territory of any contracting party* imported into the territory of any other contracting party shall be subject to antidumping or countervailing duty. . . ."²³ Similar language is used in articles VI(5) and VI(6).

In the view of these authors, article VI therefore does not provide a

19. Example 1: an antidumping duty is imposed on color televisions from country X. Producer x in country X sells and exports the color televisions to the related company yx in country Y who exports the color televisions to the importing country. Producer x knows at the moment of the sale that the color televisions will be exported by producer yx to the importing country.

Example 2: an antidumping duty is imposed on color televisions from country X. Producer x in country X sells and exports the color televisions to the unrelated company y in country Y who exports the color televisions to the importing country. Producer x does not know at the moment of the sale that producer y will export the color televisions to the importing country.

20. In other words, the determination whether the sanctionable conduct occurs.

21. In other words, the molding of the sanction once the sanctionable conduct has been determined to exist.

22. General Agreements on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, 62 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (emphasis added).

23. *Id.*

clear-cut answer to the question whether dumping should be defined and antidumping duties imposed with respect to the country of "origin" or the country of "export" in cases where the two differ. The explanation might be that the typical case which the drafters presumably had in mind in 1947 would have been the case where products are (wholly) produced in one country and then exported (dumped) from that country to the importing country.

The First Report of the Group of Experts,²⁴ established in 1958 to examine the operation of antidumping laws in various countries, however, is more articulate. When discussing "export price," the Group notes that "it seemed that the essential aim was to make an effective comparison between the normal domestic price *in the exporting country* and the price at which the like product left that country. . . ."²⁵ Even more unequivocal is the Group's discussion of "indirect dumping":

In their examination of the problem of the determination of the normal value or the domestic market price in the exporting or the producing country, the Group then considered the question of dumping of goods *where the exporting country is not the producing country of the goods concerned*. Most members of the Group reported that their countries had little or no experience of indirect dumping and that, where legislation existed to deal with this problem, the legislation had not been used. *The Group noted that since the wording of Article VI, paragraph 1(a), referred only to the comparable price in the exporting country, there was some doubt whether action against indirect dumping was strictly in accordance with the letter of the Agreement*. However, despite this doubt, the Group was generally of the opinion that it was reasonable for countries to have the right to protect themselves against indirect dumping (whether of processed or unprocessed goods). . . .²⁶

Perhaps as a result of the Group's discussion, a special provision was devoted to this problem in the Kennedy²⁷ and the Tokyo²⁸ Round Anti-Dumping Codes [Code]. Article 2(3) of the latter now provides:

In cases where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall *normally* be compared with the comparable price in the *country of export*. However, comparison *may* be made with the price in the *country of origin*, if, for example, the

24. GATT, *Anti-Dumping and Countervailing Duties*, BISD, 8 Supp. 145 (1960).

25. *Id.* at 146 (emphasis added).

26. *Id.* at 148-49 (emphasis added).

27. See Article 2(c) of the Kennedy Round Anti-Dumping Code, in GATT, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (1967), BISD, 15 Supp. 24 (1968). See also J. JACKSON, *supra* note 7, at 416 (citations omitted).

28. See GATT, *supra* note 3.

products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.²⁹

The fact that the countries of "origin" and "export" need not necessarily coincide,³⁰ a situation which is sometimes referred to as "indirect dumping,"³¹ was therefore addressed by redefining the concept of dumping through an alternative selection of normal value (based on prices in the country of origin) in limited cases.

From the point of view of the concept of dumping and the prevention of evasion of antidumping duties, the problem is a complex one. On the one hand, it is in the exporting country that the "dumped" prices are set.³² The transshipment provision is an exception to the clear preference set out in article 2(1) of the GATT Anti-Dumping Code for the normal value to be based on the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the *exporting country*." On the other hand, if the exporting country is the exclusive criterion used in defining dumping, a supplier can easily manipulate the selection of normal value, and accordingly, the existence of dumping, by selecting a low normal value

29. *Id.* at 172.

30. Another problem arises where the producer and the exporter within the same country differ, as will happen, for example, where sales are made through trading houses (as is sometimes the case in Far Eastern countries such as Japan and Korea). A first distinction in that regard can be made between sales to related and to unrelated trading houses. In the case of sales to related trading houses, the corporate entity theory justifies the presumption that export prices set by the trading house may be attributed to the producer. In the case of sales to unrelated trading houses, a further distinction would appear necessary, i.e., whether the producer at the moment of sale knew the destination of the product and therefore sold the product for export to a certain destination. If the answer is positive, the producer essentially sets a minimum export price and his price to the trading house should be included in the calculation of the export price for purposes of calculating his dumping margin (for EC cases to this effect, see, e.g., *Ball Bearings and Tapered Roller Bearings from Japan*, 28 O.J. EUR. COMM. (No. L 167) 3 (1985) (definitive); *Housed Bearing Units from Japan*, 29 O.J. EUR. COMM. (No. L 221) 16 (1986) (provisional)). If the answer is negative, the producer and the trading house should each get their own dumping margin (for EC cases to this effect, see, e.g., *Certain Chemical Fertilizer from the United States*, 24 O.J. EUR. COMM. (No. L 39) 4 (1981) (definitive); *Certain Polypropylene Film from Japan*, 25 O.J. EUR. COMM. (No. L 172) 44 (1982) (undertakings, termination)). An exception to this would be the situation where the producer sells to the trading house at a price which does not cover his cost of production.

31. See GATT, *supra* note 24.

32. Indeed, how can a producer in country A who sells his merchandise to a trader in country B, without knowing the destination of the merchandise, be "condemned" for the possible dumping by the trader? But see, e.g., *Mercury from the Soviet Union*, 30 O.J. EUR. COMM. (No. L 346) 27, 28 (1987) (definitive), where the EC Council took the opposite position:

The Soviet exporter claimed that the mercury it exported was sold to international traders and that it had no control over the final destination of the mercury. The investigation showed that the exporter's terms of sale were CIF to a Community port. Furthermore, *it should be pointed out that, for the purposes of the Community rules, the determining factor is the effect of an exporter's behavior, not the search for intentions that could explain [sic] behind such behavior.* (emphasis added)

"country of export." The above provision to some extent addresses these concerns by widening the concept of dumping.

The GATT Code is again obscure on whether the antidumping duties should be levied on products "exported from a certain country" or on products with "origin in a certain country." Article 8(2) of the GATT Anti-Dumping Code merely provides that:

[w]hen an antidumping duty is imposed in respect of any product, such antidumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such products from *all sources* found to be dumped and causing injury, except as to imports from those *sources*, from which price undertakings under the terms of this Code have been accepted. The authorities shall name the *supplier or suppliers* of the product concerned. If, however, several *suppliers* from the same country are involved, and it is impracticable to name all these *suppliers*, the authorities may name the *supplying country* concerned. If several *suppliers* from more than one country are involved, the authorities may name either all the *suppliers* involved, or, if this is impracticable, all the *supplying countries* involved.³³

Logically, sanctions (antidumping duties) ought to be confined to the specific sanctionable conduct itself (the dumping as defined by the selection of normal value). In a transshipment case, for example, if the normal value is determined with reference to the comparable price in the country of export (there is no "obligation" to use the price in the country of origin as the basis for normal value), the resulting antidumping duties should also be confined to products *exported from* that country. If subsequently, products of the same origin are exported from a different country, the determination of the existence of dumping with regard to the exports of the previous country of export cannot automatically be extended to these re-routed exports.

Despite these clear indications in a variety of GATT legislation, it seems customary in jurisdictions such as the EC and the United States to impose duties on *producers* and (a residual duty on) *producing countries*.

1. The Residual Duty³⁴

Article 8(2) of the GATT Anti-Dumping Code provides that while imposing an antidumping duty, "[t]he authorities *shall* name the sup-

33. See GATT, *supra* note 3, at 180. One could argue that use of the words "sources" and "suppliers" indicates that antidumping duties ought to be imposed on the entities that "supply" the products, i.e., the ones that sell the product (and therefore set the price). BLACK'S LAW DICTIONARY 1291 (5th ed. 1979) defines "supplier" as "[a]ny person engaged in the business of making a consumer product directly or indirectly available to consumers," while CURZON, A DICTIONARY OF LAW (2d ed. 1983) defines "supplier" as "a person carrying on a business of selling goods."

34. Example 1: an antidumping duty is imposed on color televisions from country X. The

plier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is *impracticable* to name all these suppliers, the authorities *may* name the supplying country concerned."³⁵

Most administering authorities seem to have interpreted the obligation to name the suppliers rather liberally. Indeed, it has become common practice to impose a residual duty as an easy catch-all provision of "all other imports," without there being any serious examination about whether it is really impracticable to name all the suppliers. This practice seems largely inspired by concerns about the effective enforcement of antidumping duties.³⁶ The residual duty is an easy solution to cover at the same time the problems of "non-cooperating" and "newcomer" producers. It can be questioned whether both categories deserve to be caught in the same net. Indeed, the non-cooperating producers essentially had a choice to cooperate in the proceedings but *chose* not to do so. According to article 6(8) of the GATT Anti-Dumping Code, the administering authorities are then allowed to base their preliminary and final findings "on the basis of the facts available."³⁷ The "newcomers," i.e., producers which did not produce or export during the investigation period used in the proceeding, essentially *could not* cooperate in the proceeding, even if they had wished to do so. These newcomers will then be subject to the antidumping duty applying to "all other imports" without there having been any investigation whether imports from these "newcomers" have actually been

residual duty will apply to producer x who did not cooperate in the proceeding (non-cooperating producer).

Example 2: an antidumping duty is imposed on color televisions from country X. The residual duty will apply to producer x who did not export during the investigation period (newcomer).

Example 3: an antidumping duty is imposed on color televisions from country X. The residual duty will apply to producer x who only started producing after the end of the investigation period (newcomer).

35. See GATT, *supra* note 3, at 180.

36. See, e.g., Bourgeois, *supra* note 17, at 595:

Without a "residual" duty, there would be a major loophole creating a considerable risk of circumvention. It would obviously make sense for exporting firm A, subject to an antidumping duty of 20 percent, to channel its exports through firm X not subject to an antidumping duty. This "residual" duty is generally set at the level of the duty applying to the exporter with the highest duty for similar reasons. It would likewise make sense for A, subject to an antidumping duty of 20 percent, assuming this is the highest, to channel its exports through firm X, subject as an unnamed exporter to a residual duty of 10 percent.

37. Article 6(8) of the Code provides:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available.

See GATT, *supra* note 3, at 178 (citations omitted).

injuriously dumped.³⁸ Moreover, the residual duty will often prove to be an effective market entry barrier preventing "newcomers" to start exporting at all!³⁹

2. Third Country Production⁴⁰

A producer could dodge the application of antidumping duties by starting to produce its merchandise in and export it from a third country which is not covered by an antidumping duty.⁴¹ This move will not necessarily shield the producer from exposure to future antidumping investigations. However, if the shifting of production is also based on comparative advantage considerations and combined with effective export price monitoring, it may not only offer the producer a temporary alternative route of supply but also place the producer in a better position to face any future investigations.

The most controversial forms of third country production are cases in which the producer in its third country production essentially relies on parts and subassemblies originating in the country subject to antidumping duties and the production operations carried out in the third country are of a marginal nature. Such cases are sometimes

38. In this respect, it is interesting to note the recent change in EC practice. In the EC, "newcomers" have in recent years traditionally been subjected to the residual duty which is set at the level of the highest duty imposed. See Bourgeois, *supra* note 17, at 597, who provides the following logic for this policy choice:

In general, the Commission has not considered it possible to take special measures for new exporters. It is indeed difficult to make determinations with respect to a firm that has not exported to the Community. In addition, if any new exporter were to be investigated this would either lead to continuous extensions of the proceeding or re-opening of proceedings, which would hardly be in the interest of the other parties. This approach can be disadvantageous to the new exporter but on balance it does not appear unreasonable if one bears in mind that if a new exporter begins to export to the Community, it may be appropriate to apply the provisions of the Antidumping Regulation relating to refunds of antidumping duties and to reviews. As a rule, however, the new exporter would have to show a "track-record" of no dumping or of lower dumping than the highest dumper for at least one year before he would be eligible for a review.

See also *Sodium Carbonate from the United States of America*, 27 O.J. EUR. COMM. (No. L 311) 26 (1984), where the Commission reversed its previous practice to consider undertakings offered by new exporters regarding possible future exports. The issue is on the agenda in the bilateral GATT consultations between Hong Kong and the EC, initiated by Hong Kong in the aftermath of the Video Cassette Tape case under article 15(2) of the GATT Anti-Dumping Code, in which case the EC Commission under pressure of the Hong Kong government retraced its steps and declared its willingness to initiate "without delay" a review for newcomers. *Video Cassette Tapes from Korea and Hong Kong*, 27 O.J. EUR. COMM. (No. L 174) 6 (1989).

39. For a more detailed discussion, see P. WAER, *MULTINATIONAL ENTERPRISES AND THE EUROPEAN COMMUNITIES' EXTERNAL COMMERCIAL POLICY* (forthcoming 1990).

40. Example: an antidumping duty is imposed on color televisions from country X. Producer x in country X starts producing color televisions in and exporting them from country Y.

41. Even if antidumping duties are in place with respect to the third country, it might still make sense to start producing there if the antidumping duties (or, indeed the costs of production) are significantly lower.

viewed as attempts to evade the antidumping duties and one could argue that these third country imports ought to be subjected to antidumping duties without a new full-fledged investigation into dumping and injury.

3. The Multinational Corporation Problem⁴²

The multinational corporation problem arises in situations where low-priced exports originating in a given country are cross-subsidized through profits realized by the same producer (through a related company) in a third country. The objections to this practice seem to go back to the assumption that dumping can only occur in a world economy characterized by imperfect competition, namely where "market isolation" prevents re-importation of the dumped products. The "unfair advantage" enjoyed by the producer does not necessarily have to take place in the country of production or export but can take place in any market. As long as it accrues to the same producer (even through a related company), it justifies the assumed economic rationale to sanction the "dumping." The issue at stake is the very notion of dumping itself, in particular whether the antidumping law should evolve into a worldwide price discrimination prohibition and whether it is appropriate that a particular importing country should be allowed to sanction this conduct by the imposition of antidumping duties.

C. *"Diversion" Related to the Dormant "Third Country Dumping Provision"*⁴³

Material injury can be caused to a domestic industry in a third country as a result of dumping which occurs in another importing country. Such injury can take various forms. It can consist of a reduction in exports by the domestic industry in the third country to the importing country. More complicated is the situation where injury is caused by components being dumped in the importing country where they are incorporated in a finished product which is subsequently exported to a third country where it causes material injury to the domestic industry (either of the components or of the finished product).

GATT article VI(6)(b) already provides that the Contracting Par-

42. Example: producer x produces color televisions in countries X, Y and Z. He is able to make high profits on sales in country X, but does not sell the color televisions in countries Y and Z. He makes low(er) profits on export sales of color televisions from countries Y and Z.

43. Example 1: producer x in country X dumps color televisions in country Y. Producer z's exports to country Y suffer material injury.

Example 2: producer x in country X dumps color picture tubes in country Y. Producer y in country Y produces color televisions, incorporating the color picture tubes, and exports them to country Z.

ties may permit a Contracting Party to impose antidumping duties to offset dumping which causes injury to the domestic industry of another Contracting Party. Article 12 of the GATT Anti-Dumping Code⁴⁴ confirms this, but then adds:

The authorities of the importing country in considering such an application shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.⁴⁵

In practice, article 12 has remained a dead letter, despite its potentially broad scope of application.

In the current anti-diversion debate, it seems few efforts are being made to revive or expand this provision. Indeed, it would seem that any such debate would result in a discussion about a worldwide "fair" price control system. In a system such as GATT which essentially promotes "free market" principles and deregulation of world trade, the desirability and, moreover, practicability of such venture is bound to meet with cynicism and opposition.

III. THE U.S. APPROACH TOWARDS DIVERSION

The U.S. adopted an explicit anti-circumvention provision only in the Omnibus Trade and Competitiveness Act of 1988. Prior to that, however, the U.S. in practice already used a variety of mechanisms to answer perceived diversion. Both these and the 1988 provision will be discussed in the following section.

A. *The 1974 MNC Provision*

Section 773(d) of the 1930 Tariff Act, as amended by the 1974 Trade Act,⁴⁶ provides a special rule for calculating normal value (foreign market value or FMV in U.S. terminology) in the case of multinational corporations:

44. Article 12 was reproduced from the Kennedy Round Code. See GATT, *supra* note 27, at 34.

45. See GATT, *supra* note 3, at 183. The addition seems to find its origin in the Second Report of the Group of Experts. See GATT, *Anti-Dumping and Countervailing Duties*, BISD, 9 Supp. 194, 198 (1961), where the Group stated the following:

In order to avoid any misunderstanding, the Group wished to stress that a third country, in order to justify a request to an importing country to impose measures against another country, should produce evidence that the dumping engaged in by the other country was causing material injury to its domestic industry and not only to the exports of the industry of that third country.

46. 19 U.S.C. § 1677b(d) (1988).

Special rule for certain multinational corporations

Whenever . . . the administering authority determines that —

(1) merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm, or corporation which also owns or controls, directly or indirectly, other facilities for the production of such or similar merchandise which are located in another country or countries;

(2) the sales of such or similar merchandise by the company concerned in the home market of the exporting country are nonexistent or inadequate as a basis for comparison with the sales of the merchandise to the United States; and

(3) the foreign market value of such or similar merchandise produced in one or more of the facilities outside the country of exportation is higher than the foreign market value of such or similar merchandise produced in the facilities located in the country of exportation, it shall determine the foreign market value of such merchandise by reference to the foreign market value at which such or similar merchandise is sold in substantial quantities by one or more facilities outside the country of exportation. The administering authority, in making any determination under this paragraph, shall make adjustments for the difference between the costs of production (including taxes, labor, materials, and overhead) of such or similar merchandise produced in facilities outside the country of exportation and costs of production of such or similar merchandise produced in the facilities in the country of exportation, if such differences are demonstrated to its satisfaction . . .⁴⁷

It has been reported⁴⁸ that this provision was the result of a grievance by the U.S. company Westinghouse that the Swiss firm Brown Boveri dumped electrical equipment into the U.S. from its Swiss plant. The Swiss plant had negligible home market sales and was allegedly being cross-subsidized by a West German plant.

The report of the Senate Finance Committee⁴⁹ sheds further light both on the rationale behind the provision⁵⁰ and on the necessity of its adoption. The explanation of the Committee for the provision's adop-

47. *Id.*

48. R. DALE, *ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER* 91 (1980).

49. S. REP. NO. 1298, 93rd Cong., 2d Sess. (1974).

50. The report explains:

The Antidumping Act of 1921, in its present form, cannot be applied to discriminatory pricing by a multinational corporation which sells products made in a plant in one foreign country at low prices to the United States, while the same company or its subsidiary in another foreign country subsidizes those low-priced sales with high-priced sales of the same product to customers in its own market. The factory in the country producing for export (country A) may make insignificant or no sales in its home market. On the other hand, the factories in countries which sell at higher prices (countries B and C) may be primarily engaged in selling to their home market, and the profitability of the overall operation may be largely derived from the home market sales. In such a case, the low-priced export sales are effectively being supported by the higher-priced sales of the affiliated factories in the home market, which is often highly protected from outside competition. This practice is a form of price discrimination which could severely injure domestic producers.

Id. at 174.

tion is reproduced *verbatim* below because it exposes that the provision was adopted on the basis of certain aspects *unique* to the U.S. antidumping law of 1974:

"Foreign market value" is measured by one of two alternative criteria:

The first and primary criterion is "the price . . . at which such or similar merchandise is sold . . . in the principal markets of the country from which exported . . . for home consumption. . . ." However, in the situation described above [see *supra* note 50], there are little or no home market sales being made.

The second criterion covers situations where there are no (or insufficient) home market sales, as is the case in the situation described above. In that situation, Section 205 of the Act looks to "the price at which [such or similar merchandise is] sold for exportation to countries other than the United States." . . . However, as indicated in the situation discussed above [see *supra* note 50], all exports of the merchandise produced in the factory in country A can be sold at uniformly low prices. The low-priced sales to U.S. customers are supported, not by higher-priced sales from the country A plant, but by higher-priced sales of the same products manufactured in the plants of the company which are located in other countries, B or C. . . . Thus under the second statutory criterion for ascertaining "foreign market value," an illusion of no dumping is produced by comparison of the multinational corporations' prices on exports to the United States with the low prices on its exports to other foreign countries. Nor can the Antidumping Act be applied effectively to a corporation's multinational operations through the use of "constructed value". . . . Under the provisions of Section 202, the U.S. price can be compared to "constructed" home market value only "in the absence of" foreign market value. Since the conglomerate exports its country A production to other foreign countries, as well as to the United States, technically there is a "foreign market value."⁵¹

It is clear from the above extract from the legislative history that the special MNC provision was adopted because, under the 1974 Trade Act, the Treasury Department could construct home market value only "*in the absence of home market or export sales.*"⁵² As there had normally been third country export sales, the administering authority was obligated under the law to use such sales (instead of constructed value) even though there was a likelihood that such third country export sales had also been "dumped."

While strong arguments can therefore be made that the MNC provision had become superfluous by 1979, as of the present day it still allows the Commerce Department under certain circumstances to use as normal value for merchandise produced in and exported from country X the price of the similar product sold in country Y by a related

51. *Id.* at 174-75.

52. The 1979 Trade Agreements Act abolished this statutory preference of third country exports over constructed value.

company. If we fill in, for example, Malaysia for country X and Germany for country Y, it does not require much imagination to realize that there is a likelihood of finding gigantic dumping margins depending on the extent to which allowances will be made for direct (and indirect?) cost differences. Rather, the situation which the MNC provision addresses is not diversion *stricto sensu* because there has never been a finding of injurious dumping. Thus, there is nothing to divert from. The provision could perhaps be qualified as a diversion-prevention instrument in that it allows the Commerce Department to take into account potential diversion in advance.

The Commerce Department requires petitioners to present adequate intelligence with respect to the applicability of the MNC provision. In particular, petitioners must demonstrate that there is "a basis for believing" that the following criteria exist:

- (1) Merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm or corporation which also owns or controls, directly or indirectly, other facilities for the production of such or similar merchandise which are located in another country or countries;
- (2) the sales of such or similar merchandise by the company concerned in the home market of the exporting country are non-existent or inadequate as a basis for comparison with the sales of the merchandise to the United States;
- (3) the FMV of such or similar merchandise produced in one or more of the facilities outside the country of exportation is higher than the foreign market value of such or similar merchandise produced in the facilities located in the country of exportation;
- (4) any observed differences in FMV are not solely attributable to physical differences in merchandise; and
- (5) any observed differences in value between the FMV of products produced outside the country of exportation and the FMV of products produced in the country of exportation are not solely attributable to differences in costs of production, pursuant to the final paragraph of the MNC provision.

If the Commerce Department finds that petitioners have presented sufficient evidence on these points and during the subsequent investigation has verified that all five conditions have been fulfilled, it calculates the FMV by reference to the FMV of similar merchandise produced by the related company located outside the country of exportation. In making this calculation, the Department will adjust for

differences between costs of production incurred in the country of exportation and the country where the related company is located.

An examination of relevant case law reveals that the Commerce Department has contemplated applying the MNC provision in only a handful of cases since 1974⁵³ and in only two instances has it actually invoked the rule.⁵⁴

The Commerce Department employed the MNC rule for the first time in *Steel Wire Nails from Korea*⁵⁵ with regard to a Korean nail producer, Korea Nippon Seisen, and sought to obtain the relevant information from the producer's Japanese parent, Nippon Seisen. Nippon Seisen refused to cooperate and so the authorities used the trigger prices for steel wire nails (as an application of the best information available rule) and made no adjustments to reflect differences in the cost of production between Japan and Korea. With respect to all remaining firms investigated, constructed values were used. The dumping margin imputed to Korea Nippon Seisen (26 percent) was substantially higher than the margins (ranging from zero to 13 percent) attributed to those companies where constructed values were used.

In *Business Telephone Systems from Taiwan*,⁵⁶ the Commerce Department invoked the MNC provision with respect to goods produced by one respondent, Taiwan Nitsuko, and computed Taiwan Nitsuko's dumping margin on the basis of a comparison of FMV of merchandise produced and sold in Japan by Nitsuko Japan with the U.S price of merchandise produced by Taiwan Nitsuko and sold in the U.S. (as an application of the best information available rule). Interestingly, all other respondents, with respect to whom the MNC provision was not applied, were found to have weighted average dumping margins of zero. In contrast, the dumping margin of Taiwan Nitsuko was calculated to be 130 percent.

In *Electrolytic Manganese Dioxide from Greece*⁵⁷ and *Ball Bear-*

53. Certain Steel Wire Nails from Korea, 47 Fed. Reg. 27,392 (1982) (final); Color Television Receivers from Taiwan, 53 Fed. Reg. 49,706 (1988) (final); Electrolytic Manganese Dioxide from Greece, 54 Fed. Reg. 8,771 (1989) (final); Ball Bearings and Parts thereof from Singapore, 54 Fed. Reg. 19,112 (1989) (final); Ball Bearings and Parts thereof from Thailand, 54 Fed. Reg. 19,117 (1989) (final); Industrial Belts and Components and Parts thereof from Singapore, 54 Fed. Reg. 25,315 (1989) (final); Certain Small Business Telephone Systems and Subassemblies thereof from Taiwan, 54 Fed. Reg. 31,987 (1989) (preliminary).

54. See Certain Steel Wire Nails from Korea, *supra* note 53; Certain Small Business Telephone Systems and Subassemblies thereof from Taiwan, *supra* note 53.

55. See *supra* note 53.

56. 54 Fed. Reg. 42,543 (1989) (final).

57. See Electrolytic Manganese Dioxide from Greece, *supra* note 53, at 8,772.

ings from Thailand,⁵⁸ the Commerce Department did not apply the MNC rule because the petitioners failed to satisfy the second criterion as home market sales in fact did provide an adequate basis for comparison. The U.S. authorities also declined to apply the MNC rule in instances where the third criterion was not satisfied. In these cases, the FMV of merchandise produced in a facility outside the country of exportation was not higher than the FMV of merchandise produced in the export country;⁵⁹ or the merchandise produced in the two countries was not similar enough to provide a basis for comparison.⁶⁰

It is worth mentioning that the U.S. provision represents a major departure from the existing Anti-Dumping Code and, indeed, from GATT article VI. GATT article VI and the Code currently provide that when there are no sales in the ordinary course of trade in the domestic market of the exporting country, the normal value shall be the comparable price of the products concerned when exported to a third country or the costs of production in the country of origin plus a reasonable addition for selling costs and profit. Neither the Code nor GATT article VI would therefore seem to allow the use of a price in a country other than that in which the merchandise was produced and/or from which it was exported for the establishment of normal value.

B. Scope Determinations: Inclusion of Newly-Developed or Altered Products, Subassemblies, Parts and Components Within the Scope of an Antidumping Duty Order on a (finished) Product

In the United States antidumping duties are imposed with respect to a "class or kind of merchandise." It may not always be clear either in the course of an investigation or thereafter whether certain products fall within such class. In the early eighties this problem came up a number of times with respect to *newly developed products*. In 1984-85 the same question arose with respect to *subassemblies, parts and components*. Administrative determinations of the Commerce Department and the jurisprudence of the Court of International Trade have established a certain framework for so-called scope determinations which formed the basis for the circumvention provisions later adopted. It is therefore relevant to review such case law.

58. See Ball Bearings and Parts thereof from Singapore, *supra* note 53.

59. See Color Television Receivers from Taiwan, *supra* note 53; Ball Bearings and Parts thereof from Thailand, *supra* note 53, at 18,998 (Appendix B); Ball Bearings and Parts thereof from Singapore, 53 Fed. Reg. 45,339 (1988).

60. See Industrial Belts and Components thereof from Singapore, 54 Fed. Reg. 15,489 (1989).

In *Royal Business Machines*,⁶¹ the question arose whether a certain typewriter was included in the scope of an antidumping duty order on *Portable Electric Typewriters from Japan*.⁶² On this point there appeared to be a conflict between the Customs Service and the Commerce Department. The Customs Service was of the opinion that the typewriter concerned was not portable and therefore should not be included. Commerce, on the other hand, felt that it should be included.⁶³ The Court of International Trade decided on this clash-of-powers question as follows:⁶⁴

The Court distinguishes between the authority of the Customs Service to classify according to tariff classifications . . . and the power of the agencies administering the antidumping law to determine a class or kind of merchandise. The determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules or may define or modify a known classification in a manner not contemplated or desired by the Customs Service. Within the context of an antidumping proceeding the administering agency, at the proper time, can define the class in its terms.⁶⁵

It was this decision that opened the Pandora's box of scope findings.

The next case was *Diversified Products Corporation*⁶⁶ in which an importer contested the inclusion of double-gear hub drive speedometers within the scope of an antidumping duty order on *Bicycle Speedometers from Japan*, on the ground that the former were mainly used on exercise machines while the latter were mainly used on bicycles.⁶⁷ The Court of International Trade confirmed its holding in *Royal Business Machines* and then went on to approve the test used by Commerce to determine whether the double-gear hub drive speedometers which had not yet been developed at the time of the original an-

61. *Royal Business Mach. v. United States*, 507 F.Supp. 1007, 2 I.T.R.D. (BNA) 1445 (Ct. Int'l Trade 1980), *aff'd* 669 F.2d 692, 3 I.T.R.D. (BNA) 1321 (C.C.P.A. 1982).

62. *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 18,416 (1980) (final); 45 Fed. Reg. 30,618 (1980) (codified at 19 C.F.R. § 353, 1989) (antidumping duty order).

63. *Diversified Prod. Corp. v. United States*, 572 F.Supp. 883, 887, 5 I.T.R.D. (BNA) 1263, (Ct. Int'l Trade 1983).

64. *Royal Business Mach.*, 507 F.Supp. at 1014 n.18, 2 I.T.R.D. (BNA) at 1451 n.18.

65. *Id.* In a later case involving the same portable electric typewriters, the Court of International Trade upheld a finding by the Commerce Department that portable electric typewriters incorporating calculators were within the scope of the 1980 antidumping duty order but remanded a Commerce finding that portable electric typewriters with text memories were not. *Smith Corona Corp. v. United States*, 698 F.Supp. 240, 10 I.T.R.D. (BNA) 2021 (Ct. Int'l Trade 1988). See also *Smith Corona Corp. v. United States*, 706 F.Supp. 908, 11 I.T.R.D. (BNA) 1077 (Ct. Int'l Trade 1989).

66. 572 F.Supp. 883, 5 I.T.R.D. (BNA) 1263 (Ct. Int'l Trade 1983).

67. *Bicycle Speedometers from Japan*, 47 Fed. Reg. 28,978 (1982) (final scope clarification).

tidumping proceeding in 1972 should be included within the scope of the order. This five-prong test consisted of the following elements:

- the general physical characteristics of the merchandise;
- the expectations of the ultimate purchasers;
- the channels of trade in which the merchandise moves;
- the ultimate use of the merchandise; and
- differences in cost between the two products.⁶⁸

The Court agreed with Commerce that application of this test justified inclusion of the double-gear hub drive speedometers.⁶⁹

Finally, in *Kyowa Gas Chemical Industry*⁷⁰ the applicant challenged the finding by Commerce that Kyowaglass-XA, a newly invented product, was within the scope of the antidumping determination on *Acrylic Sheet from Japan*.⁷¹ Commerce had not applied the five-prong test in this case because it was of the opinion that this test was necessary only if the product description was vague. The Court disagreed: Commerce ought to apply the test for all scope determinations.

Since 1984, a slightly different test has been applied for determining the appropriateness of including subassemblies and parts and components within the scope of an investigation and/or an antidumping duty order on the finished product⁷² in cases where there was a likeli-

68. The Court noted that Commerce had found that the cost difference between the two types of speedometers was 11 cents out of a total price of \$4.50 per unit (or 2.44 percent cost difference). *Diversified Prod. Corp.*, 572 F.Supp. at 889, 5 I.T.R.D. (BNA) at 1269.

69. The case should be distinguished from *Alsthom Atlantique v. United States*, 787 F.2d 565, 7 I.T.R.D. (BNA) 2071 (Fed. Cir. 1986), in which the Court of Appeals reversed a decision by the Court of International Trade, *Alsthom Atlantique v. United States*, 604 F.Supp. 1234, 6 I.T.R.D. (BNA) 1814 (Ct. Int'l Trade 1985), concerning a challenge to Commerce's determination that shunt reactors were included within the scope of an antidumping determination on *Large Power Transformers from France*, 47 Fed. Reg. 10,268 (1982) (final results of administrative review of antidumping finding). The Court of Appeals held that Commerce in a section 751 review of an antidumping determination of the Treasury Department is limited by the scope of the underlying finding. While Commerce had the power to determine whether an unclassified article is within the scope of an original Treasury antidumping finding, it could not change the scope of an underlying determination in which Treasury specifically included the article within the scope of the determination.

70. *Kyowa Gas Chem. Ind. v. United States*, 582 F.Supp. 887, 5 I.T.R.D. (BNA) 2131 (Ct. Int'l Trade 1984).

71. *Acrylic Sheet from Japan*, 48 Fed. Reg. 34,490 (1983) (final results of administrative review).

72. From a legal point of view, a distinction should be made between scope determinations on the one hand and cases in which either the U.S. industry brings a complaint against both the finished products and subassemblies and/or parts or the Commerce Department decides to include certain subassemblies and/or parts during the proceeding on the other hand. However, the distinction may sometimes become blurred in actual practice. A complaining industry is free to determine the scope of its complaint and there would not seem to be anything objectionable against a domestic industry alleging that both a finished product and its subassemblies (or parts) are dumped with injurious consequences. However, in the view of these authors, the domestic industry must also produce the subassemblies or parts, and the investigating authorities must

hood of diversion of the antidumping duty order on the finished product through imports of subassemblies, parts and components.⁷³

In *Kokusai Electric*⁷⁴ the plaintiff challenged both Commerce and ITC determinations including related subassemblies within the scope of an antidumping duty order on *Cell Site Transceivers and Related Subassemblies from Japan*,⁷⁵ because, in its opinion, the petition had not alleged dumping and resulting injury by reason of imports of subassemblies and, in fact, subassemblies had not been exported during the investigation period. The case was somewhat peculiar because the plaintiff had never raised the issue of inclusion before the Department of Commerce and therefore the Court understandably would not permit the plaintiff to raise the issue after Commerce closed the investiga-

determine that the subassemblies and/or parts are also dumped and causing injury to the domestic industry producing the parts. This is, however, not always the case in the practice of the Commerce Department and the International Trade Commission (nor in the practice of their Canadian equivalents, see *infra* notes 180-91 and accompanying text). It would seem that cases were brought against finished products and (certain) subassemblies in at least the following: Cell Site Receivers from Japan, 50 Fed. Reg. 307 (1985) (antidumping duty order); Cellular Mobile Telephones and Subassemblies thereof from Japan [hereinafter CMTs], 50 Fed. Reg. 12,599 (1985) (preliminary); 50 Fed. Reg. 45,447 (1985) (final); Erasable Programmable Read Only Memories (EPROMs) from Japan, 51 Fed. Reg. 9,087 (1986) (preliminary); 51 Fed. Reg. 39,680 (1986) (final); High Power Microwave Amplifiers and Components thereof from Japan, 51 Fed. Reg. 43,402 (1986) (final); Color Televisions Receivers from Korea, 52 Fed. Reg. 24,500 (1987) (final); Tapered Roller Bearings and Parts thereof from Japan, 52 Fed. Reg. 9,905 (1987) (preliminary); 52 Fed. Reg. 37,352 (1987) (final); Digital Readout Systems and Subassemblies thereof from Japan, 53 Fed. Reg. 35,222 (1988) (preliminary); 53 Fed. Reg. 47,844 (1988); Certain Small Business Telephone Systems and Subassemblies thereof from Japan, 54 Fed. Reg. 31,978 (1989) (preliminary); 54 Fed. Reg. 42,541 (1989) (final); Industrial Belts and Components and Parts thereof from Korea, 54 Fed. Reg. 5,116 (1989) (preliminary); 54 Fed. Reg. 15,487 (1989) (final); 3.5 inch Microdisks and Coated Media thereof from Japan, 53 Fed. Reg. 38,045 (1988) (preliminary); 54 Fed. Reg. 6,433 (1989) (final); Tapered Roller Bearings Four Inches or Less in Outside Diameter and Certain Components thereof from Japan, 54 Fed. Reg. 12,938 (1989) (final); Anti-friction Bearings and Parts thereof from West Germany, 53 Fed. Reg. 45,353 (1988) (preliminary); 54 Fed. Reg. 18,992 (1989) (final); Drafting Machines and Parts thereof from Japan, 54 Fed. Reg. 35,363 (1989) (preliminary); 54 Fed. Reg. 46,961 (1989) (final); Certain Residential Door Locks and Parts thereof from Taiwan, 54 Fed. Reg. 41,318 (1989) (preliminary). But in cases where the proceeding involved a variety of countries, e.g., in *Ball Bearings* and *Industrial Belts*, only an example has been given.

See, e.g., Kaplan & Varga, *Recent Developments in the Antidumping and Countervailing Duty Area*, in U.S. IMPORT RELIEF LAWS: CURRENT DEVELOPMENTS IN LAW AND POLICY (1985); Bello & Holmer, *The Scope of "Class or Kind of Merchandise" in Antidumping and Countervailing Duty Cases*, in THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS: KEY LEGAL AND POLICY ISSUES 175 (1987); E. VERMULST, ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND EUROPEAN COMMUNITIES: A COMPARATIVE ANALYSIS 40-41 (1987).

73. See, e.g., *Steel Jacks from Canada*, 50 Fed. Reg. 42,577 (1985) (final); Cellular Mobile Telephones and Subassemblies thereof from Japan, *supra* note 72; Erasable Programmable Road Only Memories (EPROMs) from Japan, *supra* note 72; Color Televisions Receivers from Korea, *supra* note 72.

74. *Kokusai Elec. Co. v. United States*, 632 F.Supp. 23, 7 I.T.R.D. (BNA) 2172 (Ct. Int'l Trade 1986).

75. *Cell Site Transceivers and Related Subassemblies from Japan*, 49 Fed. Reg. 3,100 (1984) (initiation); 49 Fed. Reg. 24,155 (1984) (preliminary); 49 Fed. Reg. 43,080 (1984) (final); 50 Fed. Reg. 307 (1985) (antidumping duty order), USITC Pub. 1618, Inv. No. 731-TA-163 (Dec. 1984).

tion. The Court therefore limited its analysis to review of Commerce's record and held in relevant part that:

[t]he allegations in the petition were sufficient and included subassemblies. Even if the petition were inadequate under the circumstances of this case Commerce had the power to self-initiate an investigation into related subassemblies. . . . The final determination of Commerce included subassemblies as the same class or kind of merchandise as cell site transceivers. . . . The record amply supports a determination of sales at less than fair value with respect to subassemblies since they were treated as one class or kind of merchandise throughout the investigation.⁷⁶

In *Cellular Mobile Telephones from Japan (CMTs)*,⁷⁷ Commerce went into more detail in order to determine whether subassemblies should be included within the scope of the investigation.⁷⁸ The Department first defined subassemblies as being "any completed or partially completed circuit modules, the value of which is equal to or greater than five dollars, and which are dedicated exclusively for use in CMT transceivers or control units."⁷⁹ The Department's second step was to determine that such subassemblies were the same "class or kind of merchandise" as the completed CMTs based on consideration of the following five factors:

- (1) general physical characteristics;
- (2) the expectations of the ultimate customers;
- (3) the channels of trade in which the product is sold;
- (4) the manner in which the product is advertised and displayed;
- and
- (5) the ultimate use of the merchandise.⁸⁰

76. *Kokusai*, 632 F.Supp. at 28-29, 7 I.T.R.D. (BNA) at 2177. The Court also upheld the ITC determination as the ITC, in its opinion, properly investigated injury to only one domestic industry, the industry producing cell site transceivers and related subassemblies.

77. See *CMTs*, *supra* note 72.

78. It should be noted that in the CMT case, 50 Fed. Reg. 45,447, respondents had argued that the petition of Motorola was aimed only at CMTs and CMT kits. The Commerce Department did not agree with this contention, but added that, anyway, it had the authority to include discrete subassemblies on the basis of diversion considerations and therefore was not dependent on what Motorola had alleged.

79. *Id.* at 45,448. The Department clarified that it used the five dollar benchmark for defining the scope since this represented a value that is equivalent to a "major" subassembly.

80. *Id.* The International Trade Commission in its injury analysis uses similar criteria to determine whether parts and finished products are "like products," to wit:

- the necessity for, and the costs of, further processing;
- the degree of interchangeability of articles at the different stages of production;
- whether the article at an earlier stage of production is dedicated to use in the finished article;
- whether there are significant independent uses or markets for the finished and unfinished articles; and
- whether the article at an earlier stage of production embodies or imparts to the finished article an essential characteristic or function.

See, e.g., *E. VERMULST*, *supra* note 72, at 523, and the following cases: *Certain Rail Passenger Cars and Components from Canada*, USITC Pub. 1277, Inv. No. 701-TA-182 (Aug. 1982) (preliminary); *Hot-rolled Stainless Steel Bar, Cold-formed Stainless Steel Bar and Stainless Steel*

It has been pointed out by one commentator that in the *CMTs* case this in practice led to inclusion of components which accounted for less than 0.5 percent of the value of the completed product.⁸¹

In *CMTs*, the Commerce Department took the position that it had the inherent authority to include subassemblies, parts and components—whether or not the petitioner specifically alleged dumping and resulting injury with respect to imports of subassemblies, parts and components.⁸² Commerce's decision to include discrete subassemblies (as opposed to completely knocked down kits) was upheld by the Court of International Trade in *Mitsubishi Electric Corporation*.⁸³ The Court found that it was clear from the record that the petitioner Motorola had "intended" to include discrete subassemblies within the scope of the investigation and suggested, it would seem, that special allowance ought to be made for the special character of the CMT industry:

The ITA has the authority to define and/or clarify what constitutes the subject merchandise to be investigated as set forth in the petition containing the intent of petitioner expressed in as specific and definite terms, descriptions, and language as reasonably expected of petitioner, taking into consideration such factors as the newness of the industry, the lack of available information due to such infancy, the shroud of secrecy a for-

Wire Rod from Spain, USITC Pub. 1333, Inv. Nos. 731-TA-176-178 (Dec. 1982) (final); Forged Undercarriage Components from Italy, USITC Pub. 1394, Inv. No. 731-TA-133 (June 1983) (preliminary); Certain Flat-rolled Carbon Steel Products from Brazil, USITC Pub. 1361, Inv. No. 731-TA-123 (Mar. 1983) (preliminary); Color Televisions from the Republic of Korea and Taiwan, USITC Pub. 1514, Inv. Nos. 731-TA-134-135 (Apr. 1984) (final); Oil Country Tubular Goods from Argentina, Brazil, Korea, Mexico and Spain, USITC Pub. 1555, Inv. Nos. 731-TA-191-95, 701-TA-215-217 (July 1984) (preliminary); Cellular Mobile Telephones and Subassemblies thereof from Japan, USITC Pub. 1786, Inv. No. 731-TA-207 (Dec. 1985) (final); 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 1735, Inv. No. 731-TA-270 (Aug. 1985) (final); Erasable Programmable Read Only Memories from Japan, USITC Pub. 1778, Inv. No. 731-TA-288, (Nov. 1985) (preliminary); Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, USITC Pub. 1803, Inv. No. 731-TA-300 (Jan. 1986) (preliminary); Certain Telephone Systems and Subassemblies thereof from Japan, Korea and Taiwan, USITC Pub. 2156, Inv. Nos. 731-TA-426-428 (Feb. 1989) (preliminary).

81. R. BIERWAGEN, GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTIDUMPING LAWS 37 (forthcoming 1990).

82. See *CMTs*, *supra* note 72, at 45,449. See also Kaplan & Varga, *supra* note 72, at 89, who state, "[T]he Department also concluded that, whether or not the petitioner specifically included subassemblies in its petition, the Department had the inherent authority to establish the parameters of an investigation in order to carry out its mandate to administer the law effectively and in accordance with its intent."

83. *Mitsubishi Elec. Corp. v. United States*, 700 F.Supp. 538, 10 I.T.R.D. (BNA) 2254 (Ct. Int'l Trade 1988), *aff'd* 898 F.2d 1577, 11 I.T.R.D. (BNA) 2521 (Fed. Cir. 1990). In the same case, the ITC had determined that subassemblies dedicated to the performance of each of the essential functions of a complete CMT constitute a separate like product. However, the ITC then applied the products line provision of section 771(4)(D) because "available data on the condition of these domestic industries exist only at the level of complete CMTs." See *Cellular Mobile Telephones and Subassemblies thereof from Japan*, *supra* note 80. On this point, the Court held that the ITC had failed to seek reasonably available data concerning subassembly production and therefore remanded the case to the ITC.

eign industry might hang over its methods of importation, and the known tactics of foreign industries attempting to avoid a countervailing duty order. This scope of investigation may be clarified by the ITA dependent upon such additional factors as petitioner's amendments to the petition, affirmative or negative in nature. . . . and additional information gathered in an investigation that adds further knowledge and content to the already scant or inadequate information available on such an infant industry. This comports with Congress' intent to allow the agency some discretion in determining such circumstances on a case by case basis.⁸⁴

In *Color Television Receivers from Korea*,⁸⁵ the Commerce Department had from the outset included complete and incomplete color television receivers within the scope of the order. An incomplete color television receiver was defined as a color picture tube *and* a printed circuit board. Following the issuance of the order, some Korean producers apparently began importing the color picture tubes (CPT) and the printed circuit boards (PCB) in separate shipments for assembly in the United States. The Department viewed this action as an attempt to circumvent the antidumping duty order on incomplete color television receivers and on October 17, 1986, issued a clarification of the scope of the order in which it expressly stated that "an incomplete television receiver would be viewed as such, regardless of the form in which its components were imported." This meant that even if the color picture tube and the printed circuit board were imported in different packages, they would still be considered as an incomplete color television receiver for purposes of the collection of antidumping duties. Commerce's scope decision was upheld in the *Gold Star* case where the Court of International Trade found that separately imported PCBs and CPTs subsequently assembled into color television receivers were of the class or kind of merchandise intended to be covered by the antidumping duty order.⁸⁶ Somewhat ponderously, the court added

84. *Mitsubishi Elec. Corp.*, 700 F.Supp. at 555-56, 10 I.T.R.D. (BNA) at 2268 (citations omitted).

85. *See supra* note 72.

86. *Gold Star Co. v. United States*, 692 F.Supp. 1382, 10 I.T.R.D. (BNA) 1850 (Ct. Int'l Trade 1988), *aff'd sub nom. Samsung Elec. Co. v. United States*, 873 F.2d. 1427 (Fed. Cir. 1989). In *Samsung*, Judge Nichols issued a strongly-worded dissent:

The result-oriented court decision may be less favored now than a few years ago, but doubtless never will become extinct. It is a temptation to which all of us must occasionally yield unless someone obnoxiously takes on himself the role of little boy in the "emperor has no clothes" fable. . . . There can be no doubt that the Koreans import CPTs and PCBs in entries separate from other components and from each other to distance them, legally, from the complete and incomplete television receivers which are the subjects of the proceeding, but there is no suggestion that this is evasion rather than avoidance of dumping duty. Until now there has been no challenge to the proposition that an importer enjoys the privilege of fashioning and packaging his goods for import in the form and manner that, absent deception, will obtain for him the most favorable tariff treatment. . . . It was doubtless a mistake to omit CPTs and PCBs, imported separately, from the 1983 proceeding respecting Korean color televisions. It was, mistake or not, a decision businessmen must have relied on in making

that:

[p]laintiffs cannot avoid the imposition of antidumping duties merely by bifurcating their shipments. The Court will not allow such a transgression upon the antidumping laws of this country. The object of the dumping laws is to protect domestic producers against imported merchandise which "is being, or is likely to be, sold in the United States at less than its fair value. . . ." The present merchandise is sold on the U.S. market not as a PCB nor as a CPT, but as a color television receiver; the object of the original antidumping duty order. If the Court were to allow separate importations of PCBs and CPTs (subsequently assembled together) to escape the purview of the CTV order, the domestic industry would continue to suffer the injurious consequences of dumped goods.⁸⁷

It should be noted that in *Steel Wheels from Brazil*,⁸⁸ the Commerce Department announced that it would no longer include parts and components within the scope of an antidumping duty order on the finished product on the basis of diversion concerns. The Department defined the scope of the investigation as including "steel wheels, assembled or unassembled, consisting of *both a disc and a rim*"⁸⁹ and rescinded its preliminary determination in which it had included "rims or discs, whether imported separately or together."⁹⁰ The Department found that discs had not been imported during the investigation period, that there was a separate market for rims,⁹¹ and that petitioners' "primary concern" for requesting inclusion of rims was diversion. The Department then held that:

[i]n past cases where petitioners have raised concerns about circumvention of any resulting order, the Department has specifically included parts in the scope of the investigation because of uncertainty as to the authority of the Department to include parts subsequent to the publication of an order where parts are imported to circumvent the order. . . . Now, however, Section 781 of the Omnibus Trade and Competitiveness Act . . . not only clarifies that the Department has such authority but sets forth the criteria for dealing with this type of circumvention. Therefore, notwithstanding pre-1988 Act administrative precedents, it is not necessary to include rims in the scope of the proceeding.⁹²

business decisions, and Commerce must live with it. It is a worse mistake, especially in light of the background, to impute to the original authors of the investigation an intent that they never expressed until 1986, and then in order to correct the mistake they made in 1983. Result-oriented jurisprudence could not find a worse place in which to raise its head.

87. *Gold Star*, 692 F.Supp. at 1385, 10 I.T.R.D. (BNA) at 1853 (citations omitted).

88. *Steel Wheels from Brazil*, 54 Fed. Reg. 21,456 (1989) (final).

89. 54 Fed. Reg. 21,457 (1989) (emphasis added).

90. *Id.*

91. The rims had been purchased by unrelated custom wheel manufacturers who combined the rims with non-Brazilian discs. Commerce noted that the disc and further processing added significant value to the customs wheel in which the Brazilian rim was only one component. *Id.*

92. 54 Fed. Reg. 21,457 (1989). In view of the description of the rim market, see *id.*, it seems

It therefore specifically excluded separately sold rims and discs from the scope of the investigation.

An interesting and still relevant question is whether Commerce investigated whether the subassemblies and/or parts were actually dumped and whether the ITC investigated whether imports of subassemblies and/or parts were causing injury to the U.S. industry producing the parts. Logically, one might assume that this was *not* the case. This is because scope rulings (as opposed to cases in which U.S. industry alleged from the beginning that both the finished product and subassemblies and/or parts were dumped with injurious consequences or in which Commerce decides during the investigation to include subassemblies and/or parts)⁹³ chronologically take place at the end of the proceeding, i.e., at a time when the ITC has already made its definitive injury determination and when Commerce has already completed its investigation into dumping.⁹⁴ One could therefore have argued that scope rulings were in violation of GATT article VI requiring findings of dumping and resulting injury. The counter-argument would be that Commerce's inclusion of subassemblies and/or parts is based on a finding that the complete product and its subassemblies/parts fall within the same "class or kind of merchandise" and that the Department may use sampling techniques to determine dumping margins.

improbable that Commerce — *ceteris paribus* — would find that circumvention was likely to take place in the context of a circumvention investigation.

It should be noted that this does not mean that the Commerce Department has discontinued its practice of issuing scope rulings. Indeed, in the recent case Television Receivers, Monochrome and Color, from Japan, Preliminary Scope Ruling, 55 Fed. Reg. 9,075 (1990), the Commerce Department decided to include liquid crystal display televisions of less than 6 inches within the scope of the 1971 antidumping duty order on television receivers, monochrome and color, from Japan. Commerce held that, as such inclusion was clear from the descriptions of the product concerned in the determinations of the Department itself and the ITC, it was not necessary to apply the five-prong test, discussed *supra*.

In A-588-802 Scope Review Public Document OADC: 2P (August 1990), the Commerce Department furthermore refused to exclude 3.5 inch barium ferrite microdisks from the scope of the antidumping duty order on 3.5 inch microdisks and coated media thereof from Japan on the ground that such disks did not represent a major technological breakthrough but rather a technical refinement. In making this determination, Commerce analyzed the general physical characteristics of the merchandise, the expectations of the ultimate customers, the ultimate use of the merchandise and the channels of trade. It should be noted that a general problem with the scope ruling is that until recently the grand majority were not published in the Federal Register, but only in the form of internal Commerce Department memoranda which were communicated to interested parties. This means that it was practically impossible to gain any insight into how many scope rulings there actually have been. Commerce Department officials estimate that there have been a "couple of dozen." The Commerce Department is presently in the process of going through its files and establishing a list of all scope rulings. This list will then be published in the Federal Register. Telephone conversations with Dick Moreland and David Mueller, Commerce Department, Sept. 13, 1990.

93. See cases cited in note 72, *supra*.

94. On the other hand, in the U.S. system, antidumping duties are levied only on the basis of the results obtained in the course of an annual review. Presumably, in the course of such reviews, margins are then calculated on shipments of parts and components.

This logic, in turn, could be rebutted on the basis that "class or kind of merchandise" is not a GATT term and that GATT's "like product" test presumably would not allow findings that discrete subassemblies and parts are products "like" the finished product.⁹⁵

C. Monitoring⁹⁶

U.S. law⁹⁷ explicitly authorizes the Commerce Department to self-initiate antidumping proceedings whenever it determines from the information available to it that a formal investigation is warranted into the question whether the elements necessary for the imposition of an antidumping duty exist.⁹⁸ The Trade and Tariff Act of 1984⁹⁹ and the Omnibus Trade and Competitiveness Act of 1988 essentially strengthened this authority by providing for certain forms of monitoring. Obviously, such monitoring enables the Commerce Department to gather evidence that might later be used to justify self-initiation.

Both forms of monitoring are linked to the existence of antidumping duty orders in effect with respect to related products and seem designed simultaneously to relieve U.S. industry from the burden of having to file additional complaints¹⁰⁰ and to provide speedy and effec-

95. This also has repercussions for the GATT-legality of the 1988 U.S. anti-circumvention provisions. See *infra* notes 247-59 and accompanying text.

96. Compare article 8(4) of the 1979 Anti-Dumping Code, *supra* note 3, at 180-81, and, in particular, the 1981 Understanding on Article 8(4) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade adopted on October 30, 1981, in GATT, BISD, 28 Supp. 52 (1982), in which the Committee on Anti-Dumping Practices agreed that:

such [special monitoring] schemes are not envisioned by Article VI of the GATT or the Agreement and it is of the view that they give cause for concern in that they could be used in a manner contrary to the spirit of the Agreement. The Committee agreed that such schemes shall not be used as a substitute for initiating and carrying out antidumping investigations in full conformity with all provisions of the Agreement. The Committee further agreed that, as monitoring schemes may have the effect of burdening and distorting trade, it is advisable that the effects of such monitoring schemes on international trade continue to be examined with, *inter alia*, a view to assessing the need for strengthening international discipline in this area.

97. Section 732(a) of the Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1673a(a) (1988)).

98. This authority has been used sparingly. See E. VERMULST, *supra* note 72, at 41.

99. For a discussion of the 1984 Act, see Bello & Holmer, *The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 INT'L LAW. 639 (1985); Palmeto, *The Trade and Tariff Act of 1984: From the Customs Treatment of Manhole Covers to the Return of Goods from Outer Space*, 11 SYRACUSE J. INT'L L. & COMM. 487 (1984).

100. This is clear, for example, from the House Report on the 1984 provision which provides in relevant part:

The Committee's concern over more effective monitoring of persistent injurious dumping allegations arises because several domestic producers have brought successful cases only to find that the source of dumped imports has shifted to additional supplier countries. The domestic producers do not always have the resources to pursue action against every foreign producer engaging in dumping activities, and the U.S. Government should share more of

tive relief in appropriate cases.¹⁰¹ But query whether the rather one-sided concern about the burdens (lack of "resources") of the domestic industry in filing a complaint is justified in view of the facts that the majority of antidumping cases are filed by resourceful industrial sectors such as the steel industry, the chemical industry and the consumer electronics industry, and that the burden of defending an antidumping case tends to be much heavier for foreign producers than the burden for domestic producers of filing a petition.¹⁰²

1. Monitoring in Cases of Persistent Injurious Dumping

Section 609 of the 1984 Act authorized Commerce to monitor imports for up to one year if:

- (1) there are at least two antidumping duty orders in effect with regard to the "class or kind of merchandise;"
- (2) Commerce determines that there is a reasonable basis to believe that an "extraordinary pattern of persistent injurious dumping" exists from one or more additional countries; and
- (3) Commerce determines that imports from these additional countries are causing a "serious commercial problem" for the U.S. industry producing the "class or kind of merchandise."¹⁰³

Since 1984, Commerce has received four requests for monitoring under this provision — two from Zenith Electronics Corporation, one from the U.S. Copper & Brass Fabricators Council¹⁰⁴ and one from the Torrington Company¹⁰⁵ — only one of which it has found (in part) meritorious¹⁰⁶: Zenith's request to monitor exports of color televi-

the burden of gathering information and initiating cases where appropriate if an industry has already demonstrated it has been injured from foreign dumping.

H. REP. NO. 725, 98th Cong., 2d Sess., at 24 (1984).

101. See also Garfinkel & Shea, *Some Recent Developments in the Administration of the Antidumping and Countervailing Duty Laws*, in TRADE LAW AND POLICY INSTITUTE 9, 27 (1989), where the authors state that "[t]he impetus behind this provision is clear — Congress was tired of watching U.S. industries obtain relief from unfairly traded imports only to face unfair competition from another country not covered by the antidumping order."

102. *Compare Options to Improve the Trade Remedy Laws: Hearings Before the Subcommittee on Trade of the House Ways & Means Committee*, 98th Cong., 1st Sess., 565 (1983) (statement of Gary N. Horlick, Dept. Asst. Sec'y of Comm. for Import Admin.); J. BHAGWATI, PROTECTIONISM 48 (1989), who notes that "the absence of penalties for frivolous complaints means that a plaintiff often incurs only small costs, whereas a defendant (who has much to lose) often must hire the most expensive lawyers."

103. Section 732(a) of the Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1673a(a) (Supp. I 1989)).

104. For an extensive description, see Garfinkel & Shea, *supra* note 101.

105. This request was dated April 20, 1990, and it concerns ball bearings and parts thereof from Austria, Spain, Yugoslavia, Brazil, Argentina, Mexico, Korea, Taiwan, Malaysia, Hong Kong, Hungary, Poland, Turkey and China. No decision on the request had been made as of May 11, 1990.

106. The request of the U.S. Copper & Brass Fabricators Council was rejected by Commerce

sions, color picture tubes and components from China, Hong Kong, Malaysia, Mexico, the Philippines, Singapore and Thailand,¹⁰⁷ resulted in establishment of a monitoring program with respect to exports from Mexico¹⁰⁸ and Malaysia. This was based on findings that antidumping duty orders were in effect with regard to color televisions from Korea and Taiwan and color picture tubes from Canada, Japan, Korea and Singapore; imports from Mexico and Malaysia had significantly increased since 1983; exports from Japan had significantly decreased; and a number of Japanese, Korean and Taiwanese companies had subsidiaries in either Malaysia or Mexico.

2. Downstream Product Monitoring

The 1988 Act provides authority for monitoring imported finished products (the downstream product) which contain a component (the upstream product) that was found to have been dumped in the previous five years.¹⁰⁹ The upstream product must — due to its inherent characteristics — be routinely used as a major part of the downstream product¹¹⁰ and the dumping margin found with respect to the upstream product must have been at least fifteen percent.

The U.S. industry producing the upstream product *or* the downstream product may request the Commerce Department to monitor if it can show that it has reason to believe that imports of the downstream product will increase. The Commerce Department must determine within fourteen days of receipt of such request whether there is a reasonable likelihood that imports of the downstream product will increase as an indirect result of any diversion with respect to the component. The Commerce Department must examine the request on the basis of the following criteria:

because it did not find an "extraordinary pattern of injurious dumping," imports from the additional countries (Argentina, Hungary, Mexico, Switzerland, U.K. and Yugoslavia) had not significantly increased since the 1987 imposition of antidumping duties on Brazil, Canada, France, FRG, Italy and Korea; and there was no evidence of related companies operating in and exporting from the additional countries.

See Garfinkel and Shea, *supra* note 101.

107. Zenith's second request concerning color television receivers, complete or incomplete, and assemblies therefor, including color picture tubes, from China, Hong Kong, Singapore, Thailand and the Philippines, was filed on February 28, 1990. No decision had been made as of May 11, 1990.

108. Presumably also covering Mexican exports of petitioner Zenith!

109. Omnibus Trade and Competitiveness Act of 1988, § 1320, (codified as 19 U.S.C. § 1677i (Supp. I 1989)).

110. See H. REP. NO. 576, 100th Cong., 2d Sess., at 598 (1988). See also Antidumping and Countervailing Duties, Interim Final Rule, 55 Fed. Reg. 9,046, 9,048 (Int'l Trade Admin., Dept. of Comm. 1990) (to be codified at 19 C.F.R. §§ 353, 355 (1990)).

the value of the component in relation to the value of the finished product;

the extent to which the component has been substantially transformed as a result of its incorporation into the finished product; and

the relationship between the producers of the component and the producers of the downstream product.

If Commerce determines that the monitoring is warranted, it will request the International Trade Commission to monitor trade in the downstream product and issue quarterly reports. It could then decide to initiate an antidumping proceeding, presumably if the information provided by the ITC were to indicate sufficient evidence of dumping and resulting injury. Thus far, this provision has not been used.

D. *The 1988 Circumvention Provision*

The United States in 1988 adopted a circumvention provision¹¹¹ which covers the following situations:

(1) importation of parts and components into the United States for assembly into a product of the same class or kind of merchandise as that which is subject to an antidumping duty order where the difference between the value of the finished product and the value of the exporting country parts is "small";

(2) assembly or completion of parts and components in a third country into a product of the same class or kind of merchandise as the product subject to an antidumping duty order¹¹² in the United States where the difference between the value of the finished product and the value of the exporting country parts is "small";¹¹³

(3) importation of products with minor alterations compared to the product subject to an antidumping duty order in the

111. The circumvention provisions are laid down in Section 1321 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, (codified as 19 U.S.C. § 1677j (Supp. I 1989)). For analysis, see Heilferty, Moreland & Shorin, *Current Issues in the Conduct of Inquiries into the Circumvention of Antidumping and Countervailing Duty Orders*, 1990 TRADE LAW AND POLICY INSTITUTE 25. See also *Antidumping and Countervailing Duties*, Interim Final Rule, *supra* note 110.

112. In fact, it would seem that the provision also covers the scenario where the part or component is the subject of an antidumping duty order or finding and such part or component is insufficiently processed in the third country before being exported to the United States. In such a case the difference between the value of the original component and the processed component presumably would have to be "small." It is therefore a third country variant on both the first and the third situation.

113. Cameron & Crawford, *An Overview of the Antidumping and Countervailing Duty Amendments: A New Protectionism*, 20 LAW & POL'Y INT'L BUS. 471, 476 (1989), report that the probable targets of this provision were the foreign television and semiconductor industries.

United States,¹¹⁴ and

(4) importation of newly developed products with the same basic characteristics as those subject to an antidumping duty order.¹¹⁵

The Commerce Department must ascertain in specific cases whether any of these situations arises and, if so, whether it constitutes circumvention.¹¹⁶

Apparently, both the Senate and the House deliberately abstained from delineating the term "small."¹¹⁷ The pertinent section in the Senate Report on the Act states:

The Committee has not attempted to develop a precise meaning for the term "small" as used in these sections, principally in recognition that different cases present different factual situations. The Committee does not, however, intend that the term "small" be interpreted as insignificant. While these subsections grant the Commerce Department substantial discretion in interpreting these terms, and invoking these measures, so as to allow it the flexibility to apply the provisions in an appropriate manner, the Committee expects the Commerce Department to use this authority to the fullest extent possible to combat diversion and circumvention of the antidumping and countervailing duty laws.¹¹⁸

Practical experience with the circumvention provisions in the U.S. is still limited. In *Certain Internal-combustion, Industrial Forklift Trucks from Japan*,¹¹⁹ the Commerce Department considered four factors — the first three of which were explicitly provided for in the Act — to determine whether assembly operations in the United States (the first situation) were made under circumstances such as to constitute circumvention:

114. Cameron & Crawford report that the amendment resulted from the *Portable Electric Typewriters from Japan* proceeding, discussed in notes 61-95, *supra*, and accompanying text. *Id.* at 477.

115. The Conference Report on the 1988 Act provides on this point that "[t]his provision is intended to clarify and codify current Commerce Department authority, which has been recognized by the courts. It is not intended, nor are any of the provisions in this section intended, to call into question past authority of the Commerce Department to make scope decisions." H.R. CONF. REP. NO. 576, 100th Cong., 2nd Sess. 601 (1988).

116. For general discussions of the 1988 Omnibus Trade and Competitiveness Act, including the diversion provisions, see Horlick & Oliver, *Antidumping and Countervailing Law Provisions of the Omnibus Trade and Competitiveness Act of 1988*, 23 J. WORLD TRADE 5-49 (June 1989); Holmer & Bello, *The 1988 Trade Bill: Saviour or Scourge of the International Trading System?* 23 INT'L LAW. 523 (1989); Cameron & Crawford, *supra* note 113.

117. According to Horlick & Oliver, *supra* note 116, at 26, the Senate Finance Committee explicitly rejected the EC sixty/forty percent value-of-parts test, which is discussed in more detail in notes 137-62 and accompanying text, *infra*.

118. S. REP. NO. 71, 100th Cong., 1st Sess., at 100 (1987).

119. 54 Fed. Reg. 50,260 (1989) (preliminary); 55 Fed. Reg. 6,028 (1990) (final). The final determination is discussed in 7 I.T.R.D. (BNA) 259 (1990).

- (1) the pattern of trade;¹²⁰
- (2) whether the manufacturer or exporter¹²¹ was related to the entity that assembles or completes the merchandise sold in the U.S.;
- (3) whether imports of the parts or components from the country with respect to which the antidumping duty order or finding applies had increased and imports of the completed product decreased after issuance of that order or finding; and
- (4) the nature of the production process in the U.S.¹²²

The Commerce Department determined that:

- (1) the patterns of trade for Japanese forklift trucks and forklift trucks produced in the U.S. by the companies under investigation were similar;
- (2) the U.S. assembly operations were related to the Japanese producers/exporters;
- (3) imports of Japanese parts and components had increased while imports of completed Japanese forklift trucks had decreased; and
- (4) "respondents' current U.S. operations, their investment in these facilities, and the expanding nature of their operations represent the substantial establishment of major U.S. production operations," rather than "completion or assembly operations established for the purpose of evading the antidumping duty order."¹²³

The Commerce Department furthermore ruled that the twenty-five to forty percent difference (plus or minus ten percent) between the value of forklift trucks completed and sold in the United States and the value of Japanese components used in the production of such forklift trucks was not "small" and that, consequently, production processes carried out under such circumstances did not constitute circumvention. Commerce *expressis verbis* rejected the view propagated by the

120. Commerce here examined the patterns of trade for the marketing of the Japanese forklift trucks and the forklift trucks produced in the United States by the respondents. Certain Internal-combustion, Industrial Forklift Trucks from Japan, 55 Fed. Reg. at 6,029 (1990).

121. In this context it should be noted that section 781(a)(2)(B) of the 1988 Act (codified at 19 U.S.C. § 1677j (Supp. I 1989)) explicitly provides that the relevant query is whether the manufacturer or exporter of the parts or components is related to the assembler of the merchandise sold in the United States from parts or components produced in the exporting country with respect to which the antidumping duty order or finding applies.

122. While this fourth factor is not explicitly mentioned in section 781(a)(2) of the Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1677j (Supp. I 1989)), Commerce considered it appropriate to examine the U.S. production process because of clear indications in the legislative history of the 1988 Act. See 54 Fed. Reg. at 50,261 (1989).

123. 54 Fed. Reg. 50,263 (1989).

U.S. industry that it compare the value of Japanese parts with the *U.S. value added* on the basis that "the anti-circumvention provision is not a local content law."¹²⁴

In *Electrical Conductor Aluminum Redraw Rod from Venezuela*, Commerce faced a complaint by the U.S. petitioner that the Venezuelan company Sural was circumventing antidumping and countervailing duty orders on electrical conductor aluminum redraw (ECAR) rod in performing a minor alteration (the third situation) by drawing it into .250 inch electrical conductor aluminum wire. Commerce closely tracked the following guidelines in the legislative history for determining whether circumvention through minor alterations occurs:

In applying this provision, the Commerce Department should apply practical measurements regarding minor alterations, so that circumvention can be dealt with effectively, even where such alterations to an article technically transform it into a differently designated article. The Commerce Department should consider such criteria as *the overall characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported product.*¹²⁵

It applied these five conditions as follows to the specifics of the case:

(1) *Physical characteristics of the products*: Commerce acknowledged that the original investigation concerned only ECAR rod and that both the TSUSA and HTS would classify the .250 inch wire as a wire product because it is less than .375 inch and in coils, but pointed out that this distinction was "largely one of tariff classification." By contrast, the only physical difference between the two was that the .250 wire had been passed once through a wire drawing mill. Both were intermediate products designed to be redrawn into aluminum wire and needed further processing.

(2) *Use of the merchandise*: Both .250 wire and rod are used for the same purpose: further drawing into electrical conductive strands of various sizes for use in manufacturing cable. Indeed, Sural had merely transferred the intermediate step (the passing through the wire drawing mill) from the U.S. to Venezuela.

(3) *Expectations of the ultimate consumer*: Consumers of both ECAR rod and .250 wire would normally use the products in the same way.

(4) *Marketing channels*: While the wire sales were made to a

124. 55 Fed. Reg. 6,029 (1990).

125. See *Electrical Conductor Redraw Rod from Venezuela*, 55 Fed. Reg. 3,435 (1990) (preliminary) (quoting S. REP. NO. 71, 100th Cong., 1st Sess., at 100 (1987))(emphasis added).

different — but related — party, Commerce noted that there was hardly any outside demand for the wire and that prior to the antidumping duty order there were no sales at all of .250 wire.

(5) *Cost of modification relative to the total value*: The Department calculated that the cost of modification (the value added to ECAR rod through the production of .250 wire) was less than 2.5 percent of the total value of the product.¹²⁶

Based on the above analysis, Commerce preliminarily decided to include .250 wire within the scope of the antidumping duty order on the rod. It should be noted that the Department characterized its determination as a “scope ruling” and — somewhat ambiguously — stated that “[o]ur determination does not reach any conclusion as to whether respondents were intentionally seeking to evade or circumvent these orders.”¹²⁷

E. *The 1988 Input Dumping Provision*

Section 1318 of the 1988 Act provides that where Commerce has reasonable grounds to believe that the cost of production of a major input produced by a party related to the party producing the finished

126. *Id.*

127. This language seems consistent with the statement in the Conference Report of the 1988 Act, quoted in note 115, *supra*, that the anti-circumvention legislation — or at least the minor alterations provision — embodies the authority which the Department has always possessed and routinely exercised to issue scope rulings as a means of clarifying whether particular merchandise is covered by the scope of an existing antidumping duty order.

In Preliminary Scope Ruling, Portable Electric Typewriters from Japan, 55 Fed. Reg. 32,107 (1990) (preliminary), Commerce had to decide whether typewriters to which were added LCD, LED or CRT display and expanded and/or removable text memory (essentially portable word processors) were excluded from the scope of the 1980 order on portable electric typewriters from Japan. As the product descriptions in the complaint and in the Commerce and ITC determinations were not dispositive, and as the allegations were that the products in question were *later developed products*, Commerce decided to apply the 1988 rules on later developed products. The Department determined that the storage ability and word processing capabilities of later developed PETs did not create a different set of expectations for the ultimate purchaser. As they still retained the primary function found in the 1980 PETs and could still be used as a traditional typewriter, they had also retained the same ultimate use as the 1980 PETs. Channels of trade and advertising and display were not dispositive because these characteristics were the same not only for PETs, PWP, PCs, but also for other consumer goods. Commerce then essentially included each known model if it met the following criteria:

- easily portable, with a handle and/or carrying case, or a similar mechanism to facilitate its portability;
- electric;
- comprised of a single, integrated unit;
- keyboard embedded in the chassis or frame of the machine;
- built-in printer;
- platen (roller) to accommodate paper;
- only accommodates its own dedicated or captive software.

The Commerce Department also determined that PWP represented a “significant technological advance and significant alteration” of the 1980 PETs so that the ITC had to be notified in accordance with Section 781(e) of the 1988 Act.

product is greater than the transfer price charged for such input, it may determine the (real) value on the "best evidence available regarding such costs of production"¹²⁸ when such costs are greater than the arm's length price.

The Conference Report adds two interesting points concerning Congress' envisaged application of this provision:

In relying on best evidence available, Commerce may use information developed during the course of a previous antidumping investigation of the particular material or component with regard to the "foreign market value." If Commerce uses information from a previous investigation, however, it must consider whether the information is still reliable, taking into account the period of time on which the information is based. It is not the intent of the conferees that foreign market value be based on constructed value solely for the purpose of using this provision to increase dumping margins. The conferees expect that constructed value shall be used . . . only when a price comparison using home market prices or third country sales price is inappropriate. Inappropriate situations could include the situation in which a component that accounts for a significant proportion of the value of the merchandise subject to investigation is purchased by a related party at a dumped price.¹²⁹

Prior to adoption of the provision, Commerce already had the authority to ignore the transfer price if sufficient evidence existed that this price did not reflect the market price. The Department therefore normally compared the transfer price with sales prices to unrelated suppliers.¹³⁰ The amendment now requires the Department to compare the transfer price not only with the arm's length price but also with the cost of production of the input, and then apply, it would seem, the higher of the two.

If this reading is correct, the amendment creates a tilt to the disadvantage of the foreign respondent: if the arm's length price is higher than the cost of production, the Department would use such price, while if the arm's length price is lower than the cost of production, the Department would use cost. Thus, if the market for the input is buoyant and high profits can be realized, the market price would be used. If, on the other hand, the market is depressed and the input is sold below cost, the market price could be ignored. This indirectly enables Commerce to counter input dumping even if the transfer price is equal to or higher than the market price (but below cost).

128. The Conference Report of the 1988 Act, *supra* note 115, at 595, clarifies that such cost should be fully allocated cost, including overheads, but not profit.

129. See *supra* note 115, at 595-96.

130. Only if there were no transactions with unrelated suppliers would the Commerce Department compare the transfer price with the cost of production.

F. The 1988 "Repeat Corporate Offenders" Provision

Section 1323 of the 1988 Act introduces certain special procedures to deal with repeat corporate offenders operating in short life cycle product sectors. The amendment consists of several elements.

In the first place, it authorizes domestic industries to petition the ITC to establish a "product category" consisting of certain short life cycle merchandise. The term "short life cycle merchandise" is defined as "[a]ny product that the Commission determines is likely to become outmoded within four years, by reason of technological advances, after the product is commercially available."¹³¹ The legislative history elucidates that the amendment is aimed in particular at semiconductors:

The conferees are concerned about the application of the antidumping law with respect to a number of industries, particularly the high-technology sectors, in which product life cycles are relatively short. A product can be displaced as a result of technological advances by a new generation of product with superior cost or performance characteristics very quickly. With the introduction of a new product, sales growth of the earlier product will slow, and demand will begin to decline, although some residual sales of the earlier product may continue to be made for many years. For example, in the case of semiconductors, a life cycle for a particular kind of semiconductor is often 2 to 3 years.¹³²

The second element is the introduction of the notion of repeat corporate offenders. The amendment defines repeat corporate offenders as manufacturers who have been found dumping (with a margin in excess of fifteen percent) during the eight previous years two or more times, with a distinction being made between second (two margins within eight years) and multiple offenders (three or more margins in eight years). Second and multiple offenders may be subjected to expedited antidumping investigations.

At its face value, the provision seems quite reasonable. Indeed, it merely provides for a fast track procedure, in which dumping and resulting injury again would have to be found, and it applies only to limited categories of products and can be used only against corporations which have been found dumping two or more times in the same product sector (and which therefore could be said to have built up a certain amount of expertise in responding). However, as two com-

131. The Conference Report of the 1988 Act, *supra* note 115, at 606, clarifies that "outmoded" means "a kind or style no longer state-of-the-art." It also specifies that the length of the life cycle "should not be determined by reference to the entire time period over which a product may be sold, but should be considered to end at the point at which the emergence on the market of a new product with superior cost or performance characteristics begins to affect adversely the sales of the earlier product."

132. See The Conference Report of the 1988 Act, *supra* note 115, at 606.

mentators¹³³ have aptly observed:

[s]ince unanswered questions commonly are resolved to the detriment of the responding foreign companies, it is very likely that the real impact of this provision will be the increased use of the best information available procedure. This, of course, appears to be the end result desired by the proponents of the bill.¹³⁴

G. *The 1988 Third Country Dumping Provision*

Section 1317 allows domestic industries to petition the U.S. Trade Representative to request¹³⁵ a third country to start an antidumping proceeding on the basis that products are dumped in such third country and are thereby causing injury to the U.S. industry manufacturing the like product.

IV. THE EC'S APPROACH TOWARDS DIVERSION¹³⁶

In the EC, different tests are applied for determining the occurrence of diversion through production within the EC and production in third countries. Only with respect to the former does a specific anti-circumvention provision exist. Other forms of diversion, including third country diversion, have thus far been dealt with under the existing rules (rules of origin and customs classification).

A. *Production in the EC: Parts Investigations*¹³⁷

In June 1987, the EC adopted a specific circumvention provision in the framework of its antidumping law¹³⁸ by incorporating an extra procedure for investigation of assembly operations in the EC.¹³⁹ As of the moment of writing, seven proceedings concerning assembly opera-

133. See Cameron & Crawford, *supra* note 113, at 492.

134. Horlick and Oliver, *supra* note 116, at 24-25, on the other hand, have pointed out that this may also backfire because the shortened deadlines "means less time for petitioner's counsel to analyze the exporter's data and point out any tricks being played."

135. The request is the carrot. The stick is that — if the third country were to refuse to initiate an investigation — USTR must consult with the domestic industry concerned to determine whether action under any other U.S. law would be appropriate.

136. See also Vermulst & Waer, *EC Rules of Origin as Commercial Policy Instruments?* (forthcoming 24 J. WORLD TRADE, June 1990).

137. See for more detail, including literature references, Vermulst & Waer, *supra* note 136.

138. Although the circumvention provision is an integral part of the EC's Antidumping Regulation, in GATT the EC has justified the adoption on the basis of GATT article XX(d).

139. *Council Regulation (EEC) No. 1761/87*, 30 O.J. EUR. COMM. (No. L 167) 9 (1987). The amendment was incorporated in the new *Antidumping Regulation (EEC) No. 2423/88*, 31 O.J. EUR. COMM. (No. L 209) 1 (1988). See Bellis, Vermulst & Waer, *Further Changes in the EEC Antidumping Regulation: A Codification of Controversial Methodologies*, 23 J. WORLD TRADE, 21-34 (Apr. 1989).

tions in the EC have been initiated,¹⁴⁰ all of them aimed at Japanese manufacturing operations in the Common Market.

Article 13(10) of the EC's Antidumping Regulation provides that antidumping duties may also be levied on products assembled within the EC, provided that three cumulative conditions have been fulfilled:

(1) The producer in the EC must have a relationship¹⁴¹ or association¹⁴² with an exporter of the like product subject to duties;¹⁴³

(2) the producer in the EC must have commenced or substantially increased its production after the commencement of an antidumping proceeding;¹⁴⁴ and

(3) more than 6 percent of the value¹⁴⁵ of parts or materials

140. *Electronic Typewriters*, 30 O.J. EUR. COMM. (No. C 235) 2 (1987) (assembly operations of Brother, Canon, Matsushita, TEC, Sharp and Silver Seiko); *Electronic Scales*, 30 O.J. EUR. COMM. (No. C 235) 3 (1987) (assembly operations of TEC Keylard and TEC U.K.); *Hydraulic Excavators*, 30 O.J. EUR. COMM. (No. C 285) 4 (1987) (assembly operation of Komatsu); *Photocopiers*, 31 O.J. EUR. COMM. (No. C 44) 3 (1988) (assembly operations of Canon, Konishiroku, Matsushita, Minolta, Ricoh, Sharp and Toshiba); *Ball Bearings*, 31 O.J. EUR. COMM. (No. C 150) 4 (1988) (assembly operations of Nippon Seiko and NTN Toyo Bearing); *Serial Impact Dot Matrix Printers* 31 O.J. EUR. COMM. (No. C 327) 8 (1988) (assembly operations of Brother, Citizen, Fujitsu, Juki, Matsushita, NEC, OKI, Seiko Epson, Seikosha, Star Micronics and TEC); *Video Cassette Recorders*, 32 O.J. EUR. COMM. (No. C 172) 2 (1989) (assembly operation of Orion).

141. In *Electronic Scales*, 31 O.J. EUR. COMM. (No. L 101) 1 (1988), TEC-Keylard was deemed to be related to TEC because it had substantial capital links and close economic and commercial relations with TEC Japan. In *Plain Paper Photocopiers*, 31 O.J. EUR. COMM. (No. L 284) 36, 37 (1988); 31 O.J. EUR. COMM. (No. L 284) 60, 61 (1988), a fifty percent plus one share holding was considered sufficient.

142. Although in *Electronic Typewriters*, 31 O.J. EUR. COMM. (No. L 101) 4, 5 (1988), assembly operations were in one case carried out by an independent company, the Council determined that this did not preclude application of the parts amendment:

One company, namely Silver Reed International (Europe) Ltd, claimed that it should not be included in this investigation because the assembly operation was not carried out by Silver Reed but by Astec Europe Ltd. However, the investigation revealed that Astec's activities in this context were limited to the mere assembly of all parts of electronic typewriters which were imported and delivered to it at its premises by Silver Reed. These assembled electronic typewriters were then exclusively sold on the Community market by the Silver Reed Group. This group bore all costs between importation of the parts and the sale of the finished products. An assembly fee was paid to Astec by the Silver Reed Group but this fee constituted only a small percentage of Silver Reed's total costs of sale. In these circumstances, this assembly operation should be considered as having been carried out by Silver Reed.

143. The mechanics of EC antidumping law under which antidumping duties are imposed on a country-wide basis (see *supra* notes 35-38 and accompanying text) imply that EC production facilities of companies which never exported the product concerned to the EC from the foreign country, can nevertheless be covered by a parts proceeding. See *Electronic Typewriters*, *supra* note 142, at 7, where typewriters produced by Matsushita in the United Kingdom were subjected to antidumping duties under the parts amendment even though Matsushita had never exported typewriters from Japan.

144. In *Ball Bearings*, 32 O.J. EUR. COMM. (No. L 25) 90 (1989), it was held that increases of, respectively, twenty-four percent in one year and forty percent in two years were substantial, in particular because they had followed a period of stability.

145. Value of parts and materials from the country of export is determined on an "into-EC-factory" basis. See, e.g., *Electronic Typewriters*, *supra* note 142, at 5; *Electronic Scales*, *supra* note

used in the EC manufacturing operation must originate in the exporting country subject to antidumping duties.¹⁴⁶

It is especially the third condition that in practice has given rise to problems because it necessitates decisions about the origin of the parts or materials. This may create problems especially for parts assembled in the EC or third countries from sub-parts because the question then arises whether such parts must be treated as single parts or whether they must be broken down into sub-parts. The reply to this inquiry is portentous because if they are considered single parts, the value added in the EC production process could perhaps be included in the value of the parts and counted as non-exporting country content. In certain instances, this may be conclusive for the origin of the whole parts. Origin of the whole parts hinges on where the last substantial transformation or process took place.¹⁴⁷

During the past three years, EC practice in determining origin, especially of parts or subassemblies manufactured in the EC, has altered significantly. In the first three cases, i.e., *Typewriters*,¹⁴⁸ *Scales*¹⁴⁹ and *Excavators*,¹⁵⁰ the Commission determined origin on different bases depending on the *status of the manufacturer* of the parts or subassemblies. Thus, if the parts/subassemblies were manufactured in the EC by the producer under investigation, or by a party related to such producer, the parts/subassemblies were broken down into their sub-parts (the *molecular approach*) and subassembly costs were always ostracized.¹⁵¹ If the parts/subassemblies were manufactured in the EC by

141, at 2; *Photocopiers*, *supra* note 141, at 38. This includes cost items such as freight in the exporting country, ocean freight and insurance, customs duties at the EC border, customs clearance costs and freight in the EC (from the border to the factory). In addition, as products shipped from the exporting country to the EC production facility involve transactions between related parties, the Commission will want to see evidence that the prices of such products are at arm's length. In other words, the Commission will look for evidence that price covers cost of manufacture; selling; administrative and general expenses (SGA); and a reasonable profit.

146. Article 13(10)(a). Besides these three operative conditions, "other circumstances" such as the variable costs incurred in the assembly or production operation, the research and development carried out and the technology applied within the Community should be considered. In practice, investigations have focused on the administratively convenient sixty/forty percent rule. It should be noted that, if the Community Institutions would have attached importance to these criteria, they might have been subjected to "local content" charges.

147. Within the context of the parts amendment, *subassembly* costs must be distinguished from *assembly* costs. *Assembly* costs, i.e., the costs of assembling the parts into the completed product, are never taken into account for the operation of the sixty/forty percent rule.

148. *Electronic Typewriters*, *supra* note 142.

149. *Electronic Scales*, *supra* note 141.

150. *Hydraulic Excavators*, 31 O.J. EUR. COMM. (No. L 101) 24 (1988).

151. *Electronic Scales*, *supra* note 141, at 29, in which the Commission stated:

TEC-Keylard requested that the "transformation costs" of some subassemblies incurred in its own factory should be included in the value of EEC parts. This request, however, cannot be granted because the 'transformation costs' are part of the total costs of assembly or production, they cannot be included in the value of parts or materials used in the assembly or

an independent producer, a further distinction was made: If the parts/subassemblies as assembled had acquired European origin, the whole parts/subassemblies would be treated as European even though they might have accommodated sub-parts from other countries.¹⁵² If, on the other hand, the parts/subassemblies had not acquired European origin in the production process, the Commission adopted a case-by-case approach whereby sometimes it broke down the subassemblies into sub-parts (the *molecular approach*).¹⁵³

These rules were revised spectacularly in the *Photocopiers* determinations.¹⁵⁴ In these determinations, the Community Institutions zeroed in on the nature of the *manufacturing process* rather than on that of the *producer*. Specifically, the authorities made a *distinction between subassemblies and parts*, based on the rule of thumb '*destruction theory*.' If a part could be taken apart without destroying any of the sub-parts (in other words, if the part typically was merely screwed together), it was considered to be a *subassembly*. Subassemblies were

production operation, but constitute a value added to these parts or materials in the assembly or production process.

In *Excavators*, *supra* note 150, at 25, it said:

Komatsu (UK) Ltd claimed [sic] that the direct manufacturing costs of an important part sub-assembled in its premises should be included in the Community parts value because the process of production was not simple assembly but a genuine manufacturing operation. This request, however, cannot be granted because the cost of assembly or production cannot be included in the value of parts or materials used in the assembly or production operations but constitutes a value added to these parts or materials in the assembly or production process.

152. *Electronic Scales*, *supra* note 141, at 29, which states:

TEC-Keylard claimed that some subassembled items used for some models were of Community origin. It was found that these items were assembled in the Community, from parts imported from Japan and from parts purchased in the Community, by an independent Community producer. On the basis of information received from two sources, one being the complainants carrying out virtually identical assembly operations themselves and the other being the company referred to above, it was concluded that these subassemblies did constitute a substantial transformation as required by Article 5 of Council Regulation (EEC) No. 802/68. The assembly operation and the manufacture of the components carried out in the Community was of a substantial nature. The item was thus of Community origin.

153. *Electronic Typewriters*, *supra* note 142, at 5, states:

Canon claimed that one sub-assembled item which was the most costly individual one used for some models was of Community origin. It was found, however, that this item was assembled in the Community, entirely from parts imported from Japan, by a subsidiary company of a Japanese producer which normally manufactures these products in Japan and supplies Canon's mother company there. On the basis of information received from two sources, one being an electronic typewriter producer carrying out a virtually identical assembly operation itself and the other being the company referred to above, it was concluded that this subassembly did not constitute a substantial process or operation as required by Article 5 of Regulation (EEC) 802/68. The simple assembly operation carried out in the Community was of a basic and unsubstantial nature compared with the manufacture of the components which was performed in Japan. The item was thus not of Community origin.

See also the similar discussion with respect to Sharp, *id.*, at 6, and the discussion with respect to Brother, *Typewriters*, 31 O.J. EUR. COMM. (No. L 101) 26 (1988). For the guidelines given by the Commission in this context, see Griffith, *Antidumping Duties on Parts in the EEC*, in ANTI-DUMPING LAW AND PRACTICE, *supra* note 4, at 317.

154. *Plain Paper Photocopiers*, *supra* note 141.

treated in the same way as before, with a distinction being made between subassembly in-house¹⁵⁵ or by a related supplier and subassembly by an independent supplier.¹⁵⁶ If, however, in disassembling a part, one or more of its sub-parts would be destroyed, it was treated as a *single part*, whether it was produced in-house, by a related producer or by an independent producer. The EC authorities determined that with respect to single parts it was fitting to include subassembly costs in the value of non-exporting country parts to the extent that the whole single part had acquired Community (or non-exporting-country) origin. This approach was also followed in the *Ball Bearings*¹⁵⁷ and the *Printers*¹⁵⁸ proceedings. In the *Printers*¹⁵⁹ proceeding, the Community Institutions pronounced explicitly that printed circuit boards (PCBs) constituted single parts.¹⁶⁰ The Institutions added that the origin of single parts was determined on the basis of the non-preferential origin rules of Regulation 802/68.¹⁶¹

155. *Id.* at 38 reads as follows:

A number of companies requested that the assembly costs of certain subassemblies, incurred in their own factory, should be included in the value of Community parts. This request, however, cannot be granted because the cost of assembly cannot be included in the value of parts or materials used in the assembly or production operations under Article 13 (10). . . .

156. *Id.*:

Several companies concerned claimed that certain subassembled items were of Community origin and that, in addition, they should be treated as parts within the meaning of Article 13 (10) It was found, however, that these items were merely assembled in the Community, mainly from parts imported from Japan, by independent suppliers. On the basis of information obtained from the companies making the claim, it was concluded that this assembly did not constitute a substantial process or operation as required by Article 5 The simple assembly operation carried out in the Community was of a basic and unsubstantial nature and was not sufficient to confer Community origin.

157. *Ball Bearings*, 32 O.J. EUR. COMM. (No. L 25) 90, 91 (1989).

158. *Serial-Impact Dot-Matrix Printers*, 32 O.J. EUR. COMM. (No. L 291) 52, 53 (1989); 32 O.J. EUR. COMM. (No. L 291) 57, 58 (1989).

159. *Id.*

160. See also *Plain Paper Photocopiers*, 33 O.J. EUR. COMM. (No. L 34) 28 (1990) (termination Ricoh Industrie France), where the Commission determined again that PCBs constitute single parts in view of "the nature of their structure."

161. Specifically for PCBs the Commission in practice — by analogy to the specific origin rules adopted with regard to radio and television receivers, *Commission Regulation (EEC) No. 2632/70 on Determining the Origin of Radio and Television Receivers*, 13 J.O. EUR. COMM. (No. L 279) 35 (1970), and tape recorders, *Commission Regulation (EEC) No. 861/71 on Determining the Origin of Tape Recorders*, 14 J.O. EUR. COMM. (No. L 95) 11 (1971) — has sometimes considered a PCB to be of EC origin if at least 45 percent value was added in the EC. This is one of the present sources of friction with the United States. While the assembly or "stuffing" of PCBs is very labor- or capital-intensive, it will in most cases not add enough value for the PCB to be considered as originating in the EC. Companies which are likely to be the target of a parts investigation will therefore scramble to source EC sub-parts, notably integrated circuits because they need to have the "last substantial process or operation" take place in one country other than the exporting country. As many integrated circuits (ICs) are manufactured exclusively in Japan, the sourcing of the remaining ICs becomes even more important. Of course, if a company were to decide to stuff its PCBs in the United States and use U.S. ICs, the resulting PCB would be likely to have U.S. origin. For an excellent discussion of these problems, see *EC Sends Conflicting Signals on Clarifying Technical Rules for Circuit Boards*, INSIDE U.S. TRADE 3, 4 (Oct. 27,

As far as relief is concerned, it must be added that article 13(10)(c) provides that "[t]he amount of duty collected shall be proportional to that resulting from the application of the rate of the antidumping duty applicable to the exporter of the complete product on the cif value of the parts or materials imported. . . ."¹⁶² Therefore, duties are levied only with respect to the parts and materials originating in the exporting country and not on parts and materials originating elsewhere.

B. *Production in Third Countries: Origin Investigations*

As far as manufacture of product x in third countries by subsidiaries of companies which have been found to have dumped the same product x from their manufacturing base in country X is concerned, the EC authorities have a choice.¹⁶³ They can wait until they receive a new complaint from the EC industry alleging that exports from country Y are entering the EC market at dumped prices with injurious consequences. The EC would then normally open a new antidumping proceeding and determine in the course of that proceeding whether imports from country Y actually had country Y's origin. This is what transpired in the *Ball Bearings from Thailand*¹⁶⁴ and *Electronic Typewriters from Taiwan*¹⁶⁵ cases. In these cases,¹⁶⁶ the Commission terminated antidumping proceedings it had initiated on the ground that the production processes carried out in such countries were not sufficient to confer Thai or Taiwanese origin, respectively, on the products manufactured in such countries. The practical consequence of these findings was that the products assembled in Thailand and Taiwan

1989). See also EC 1992: *An Update on U.S. Views: Hearings Before the House Comm. on Foreign Affairs*, 101st Cong., 2d Sess. (1990) (testimony of Peter Allgeier, Asst. USTR for Europe and the Mediterranean); EC 1992: *An Update on U.S. Views: Hearings Before the Subcommittee on Europe and the Middle East, and Subcommittee on International Economics, Policy and Trade, House Committee on Foreign Affairs*, 101st Cong., 2d Sess. (1990) (testimony of Eugene McCallister, Asst. Sec. of State for Econ. and Bus. Affairs).

162. *Antidumping Regulation No. 2423/88*, 31 O.J. EUR. COMM. (No. L 209) 1 (1988).

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

164. *Certain Ball Bearings from Thailand*, 28 O.J. EUR. COMM. (No. L 59) 30 (1985) (notice of termination).

165. *Electronic Typewriters from Taiwan*, 29 O.J. EUR. COMM. (No. L 140) 52 (1986) (notice of termination).

166. See Vermulst & Waer, *supra* note 136, for more detail.

continued to be of Japanese origin and therefore *de facto* subjected to the antidumping duties imposed with respect to such products originating in Japan.¹⁶⁷

The Taiwanese termination was indirectly challenged by Brother in *Brother International GmbH v. Hauptzollamt Giessen*.¹⁶⁸

The customs authorities in Germany had verified Brother in September 1986 and determined that the typewriters produced in Taiwan indeed could not be deemed to originate in Taiwan.¹⁶⁹ Brother appealed against this decision on the ground that the typewriters produced in Taiwan should be considered as originating in Taiwan on the basis of application of Regulation 802/68.¹⁷⁰ The European Court of Justice was summoned to apply the principles of articles 5 and 6 of Regulation 802/68 to the situation at hand.

The Court contrasted "simple" assembly operations and other types of assembly operations¹⁷¹: a simple assembly operation, defined as an operation which does not require a specially qualified labour force, precision machinery, or a specially equipped factory, could *not* confer origin. Other types of assembly *could* confer origin depending on fulfilment of one of two tests, in order of precedence:

an assembly process representing, from a technical point of view and having regard to the definition of the assembled product, the decisive stage of production in the course of which the parts are assembled into the finished product, and in the course of which the product acquires its specific material qualities; or

167. As an illustration: The proceeding against Brother was terminated on May 23, 1986. On June 5, 1986, the Commission sent a memorandum to all Member States advising them to apply the antidumping duty applicable to exports of typewriters from Japan also to Brother's typewriters coming from Taiwan. See *Brother Industries v. Commission*, 1987 E.C.R. 3757.

168. Judgment of December 13, 1989, not yet reported. Brother Taiwan and Brother UK had in first instance brought a direct action against this decision on the basis of article 173(2) of the Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, 298 U.N.T.S. 11. This direct action had been declared inadmissible by the Court in *Brother Industries v. Commission*, 1987 E.C.R. 3757, because the decision did not constitute an act which caused injury to Brother: the actual determination with regard to the origin of the typewriters produced by Brother in Taiwan was in the hands of the Member States.

169. As a result, such typewriters were deemed to originate in Japan and the antidumping duty applicable to Brother Japan of twenty-one percent *ad valorem* was applied to the typewriters exported from Taiwan with retroactive effect. The consequence was that the Hauptzollamt Giessen ordered Brother to pay 3,210,277.83 DM in antidumping duties.

170. *Council Regulation (EEC) No. 802/68 of 27 June 1968 on the Common Definition of the Concept of the Origin of Goods*, 11 J.O. EUR. COMM. (No. L 148) 1 (1968). For an extensive discussion, see Vermulst & Waer, *supra* note 136. Brother claimed that while most of the parts came from Japan, they were mounted and assembled in Taiwan in a fully equipped factory into ready-for-use typewriters. In the opinion of Brother, this was furthermore not a case of diversion because the factory had existed for a long time and typewriters produced there had been exported to the EC since 1982.

171. The Court alluded here to the third standard of Annex D.1. of the Kyoto Convention.

a considerable increase in the value added in the assembly process.

The Court underscored that the value added test can be contemplated as a *subsidiary* element *only* in cases where appraisal on the basis of a technical test is inconclusive.¹⁷²

The Court interpreted article 6 as not justifying a presumption of circumvention of antidumping duties in cases where the transfer of an assembly process from a country where the parts are manufactured to another country involves factories already in existence. However, according to the Court, an exception to this would be the situation where the entry into force of the regulation imposing the duties and the transfer of the assembly operations coincide; in such a situation the producer should prove that he had good reasons — other than circumventing the antidumping duties — for transferring his assembly process.

Rather than opening a new antidumping proceeding, the EC may alternatively dispute the origin of the products now coming from the third country and conduct an origin investigation. This is what befell the photocopier plants of Ricoh in California and Mita in Hong Kong.

Following an on-the-spot investigation in California by officials of Directorate-General I and Directorate-General XXI, the Commission took the view that the photocopiers produced by Ricoh in the United States should be denied U.S. origin. In the absence of a qualified majority on this matter within the Origin Committee and the Council, the Commission enacted Regulation (EEC) No. 207/89 on the origin of photocopiers¹⁷³ which — although couched in general terms — was essentially tailor-made for the *Ricoh* situation. This Regulation provides that the manufacture of photocopiers accompanied by the manufacture of the harness, drums, rollers, side plates, roller bearings, screws and nuts shall *not* confer origin.¹⁷⁴

172. The Court refrained from laying down a concrete positive percentage of value added sufficient to confer origin other than that it should be considerable (this, in turn, should be determined on a case-by-case basis). The Court confined itself to the statement that in a production process where only two countries are involved, a value added of less than ten percent in the assembly process is insufficient. The Court explicitly repudiated the view that a specific intellectual operation accompany the assembly in order to confer origin.

173. *Commission Regulation (EEC) No. 2971/89 of 11 July 1989 on Determining the Origin of Photocopying Apparatus*, 32 O.J. EUR. COMM. (No. L 196) 24 (1989). For background information, see Agence Europe No. 5057, at 7 (July 14, 1989); Agence Europe No. 5058 (July 15, 1989).

174. The *Ricoh* case well illustrates one difficulty with the application of the origin rules to determine whether third-country-diversion occurs: it does not allow the administering authorities to sculpt the nature and the level of the relief to the circumstances of the case. Thus, the finding that the photocopiers manufactured by Ricoh in the United States had not acquired U.S. origin — and continued to be of Japanese origin — meant that Ricoh's exports to the EC from its California plant could be subjected to the full antidumping duty of twenty percent imposed on

On the basis of an origin investigation conducted at Mita's Hong Kong premises, the Commission arrived at the conclusion that the photocopiers made by Mita in Hong Kong *did* possess Hong Kong origin and advised the members of the Origin Committee accordingly. As the members of the Origin Committee agreed unanimously with the conclusions of the Commission, the case was dealt with informally.¹⁷⁵

The above examples show that in the EC, third country assembly is essentially tested on the basis of application of origin rules. If a product assembled in third country Y has acquired the origin of country Y, the assembly will normally be considered genuine. If, on the other hand, the product has not acquired country Y origin in the assembly process, and continues to have the origin of country X, any antidumping duties applicable to the producer in country X will also be applied to the product now coming from country Y. The Court in *Brother* held that even if country Y origin is conferred in the assembly process, origin could still be denied if it was determined that the country Y assembly process was established with diversion considerations in mind, thereby stretching the framework for analyzing diversion even further. As will be discussed in more detail below,¹⁷⁶ these authors do not believe that origin rules, let alone even further-going rules based on some kind of "presumed intent" test, form an appropriate yardstick for deciding on diversion because such rules blur the crucial distinction between evasion and avoidance of antidumping duties.

C. *EC-Production and Third-Country-Production: When Does Production Constitute Diversion?*

We have seen that the EC applies different sets of rules to analyze whether production operations within the EC and production operations in third countries can be considered to constitute diversion operations. This may lead (and has in practice led) to the result that products which are manufactured in the EC and for which EC origin certificates have been obtained may nevertheless fail the 60/40 percent rule.¹⁷⁷ On the other hand, compared to origin investigations, parts

Ricoh in 1987 in the *Plain Paper Photocopiers* proceeding despite the fact that such photocopiers presumably included a substantial U.S. value added. In other words, antidumping duties could in part be levied on U.S. parts, materials and overheads.

175. See I. VAN BAEL & J.-F. BELLIS, *ANTIDUMPING AND OTHER TRADE PROTECTION LAWS OF THE EEC* 229 n.28 (1989).

176. See *infra* notes 259-81 and accompanying text.

177. As the origin test is less stringent than the parts test in terms of components value, foreign producers facing high antidumping duties may in fact be inspired to invest in third countries rather than in the EC. The cost savings of avoiding payment of CIF costs and customs duties on the finished products (but not on the parts) when establishing production within the EC

proceedings are relatively well regulated. Article 13(10)(d) of the Antidumping Regulation provides that the normal procedural guarantees for parties in antidumping proceedings also apply in parts investigations.¹⁷⁸ Such procedural guarantees are sadly lacking in the context of origin investigations conducted by the EC Commission.¹⁷⁹ The article 13(10) procedure is also preferable to the origin procedure in its possibilities for adapting the nature and the level of the relief to the modalities of the situation at hand.

V. AUSTRALIA AND CANADA

A. Canada

In Canada the question has arisen several times whether imported finished products *and* parts could cause injury to Canadian production of the finished product.¹⁸⁰ The answer of the Import Tribunal would seem to have been affirmative: imported finished and partly finished¹⁸¹ zippers are like Canadian-produced zippers, imported bicycles and bicycle parts are like Canadian-produced bicycles and imported paint brushes and paint brush heads are like Canadian-produced paint brushes. This expansive like product definition enabled the Tribunal to find injury to Canadian production of the finished product by reason of imports of the like finished product *and* its parts without going

may in some cases be easily recompensed by the lower production costs in third countries. A low cost of production in a third country, if combined with effective monitoring of costs and prices, may also place the producer in a better position to brave a conceivable new antidumping investigation initiated against this third country. While production within the EC manifestly curbs initiation of an EC case against such EC production, subsequent exports from EC production facilities might be subjected to antidumping cases in other jurisdictions. This cost/benefit analysis might change if third country assembly were to become actionable under GATT.

178. This means, *inter alia*, that parties have the rights to have access to non-confidential information submitted by other parties, to be heard, to have confrontation meetings with the other party (if the other party agrees) and to be informed of the essential facts and considerations on the basis of which it intends to take action.

179. In addition, by analogy to the jurisprudence of the European Court of Justice in the antidumping area, it seems incontestable that parties directly affected by the outcome of a parts proceeding can challenge the relevant Community determination directly before the Court on the basis of article 173(2) of the EEC Treaty. This is, again, in contrast to the situation in origin proceedings. See Vermulst & Waer, *supra* note 136.

180. See Magnus, *The Canadian Antidumping System*, in *ANTIDUMPING LAW AND PRACTICE*, *supra* note 4, at 206-08, and the cases cited therein.

181. In *Slide Fasteners or Zippers and Parts thereof Manufactured by Yoshida Kogyo KK, Tokyo, Japan* (Anti-Dumping Tribunal [hereinafter ADT] 1-74), partly finished zippers were defined as follows:

Parts . . . includes all articles and materials, whether finished or not and regardless of length, so advanced in manufacture as to commit them by their design or construction to intended end use as components of slide fasteners, e.g., without limiting the generality of the foregoing, chain or stinger of any length; interlocking elements of any length, whether in spiral, coil, ladder or other form; and tape of any length designed or constructed to have interlocking elements attached thereto.

into the separate question whether imports of the parts caused injury to Canadian production of the parts. Thus, in *Zippers*, for example, the Import Tribunal stated on this issue:

An issue of some importance which was raised was whether, when the preliminary determination includes components or parts of a product, each component or part is to be considered as an article of commerce and a case made to establish injury to the production in Canada *of that component or part*.

That proposition cannot hold in this case. The Deputy Minister has been extremely careful in stating that the parts he has determined were dumped were articles "so advanced in manufacture as to commit them by their design or construction to intended end use as components of slide fasteners." Granted that zipper chain, or sliders, can be sold separately and in that context considered articles of commerce, one cannot ignore the fact that all Yoshida exports of components are being sold to its wholly-owned subsidiary in Canada, and that the components which the Deputy Minister *says are being dumped are being assembled for the most part in Canada by the subsidiary for distribution and sale in Canada as finished zippers at prices, one can assume, which reflect the dumped prices of the components.*¹⁸²

Indeed, it would appear that in a number of Canadian cases, Canadian complainants themselves in fact relied (to a substantial degree) on foreign-produced parts. Thus, in *Single Row Tapered Roller Bearings and Parts thereof from Japan*,¹⁸³ the complainant Canadian Timken Ltd. imported the cups and the cones and only performed a simple assembly in Canada.¹⁸⁴ In *Color Television Receiving Sets from Korea*,¹⁸⁵ the Canadian Import Tribunal accepted the standing of the Canadian industry to file the complaint despite the following findings of fact:

For the most part, Canadian production of the subject goods is an assembly process with very little actual manufacturing of parts and components. The domestic manufacturers generally source the major television components (chassis, picture tube, tuner and cabinet) from related companies located in the Far East, the United States or Mexico. A significant exception to the rule is the sourcing of 20" picture tube requirements by some of the producers from Mitsubishi, which manufactures such tubes at its Midland, Ontario, plant (formerly owned by RCA)."¹⁸⁶

182. *Id.* (emphasis added).

183. ADT 8-75.

184. Written comments of Richard Gottlieb (May 9, 1990).

185. Canadian Import Tribunal [hereinafter CIT] 13-87.

186. In *Cars from Korea* (CIT-13-87), the scope of the proceeding was defined so as to cover "cars (including those in a semi knocked-down condition), with or without options such as automatic transmissions, produced by or on behalf of Hyundai . . ." Semi knocked-down cars, in turn, were defined as cars consisting of "most of the major parts and assemblies necessary to assemble the vehicle. Body components (floor pan, firewall, roof, rear quarter panels, and pillars)

On the other hand, in *Power Conversion Systems from Japan and France*,¹⁸⁷ the Import Tribunal determined that a dumped bid by the French producer Jeumont-Schneider had not caused material injury, *inter alia*, on the basis that if the Canadian complainant would have been awarded the contract, "a considerable portion of the subject goods would not have been produced in Canada in any event." This was because the Canadian complainant had entered into a joint venture agreement with the French producer Alsthom for purposes of tendering on the request for tenders under which the rectifier and the parts of the power conversion system would have been provided by Alsthom.¹⁸⁸

While Revenue Canada in all cases had defined the class of goods so as to include the parts,¹⁸⁹ apparently no separate dumping findings with regard to the parts were made.¹⁹⁰ It would appear¹⁹¹ that Revenue Canada has also occasionally applied antidumping duties applicable to country X to imports of the like product coming from country Y in cases where it considered the non-country-X value added insufficient.¹⁹²

B. *Australia*

The Australian Customs Service (ACS) has thus far interpreted the like product definition strictly.¹⁹³ Although the issue has apparently not actually arisen, one commentator has argued that:

Australian law would require the imported goods to be considered in the condition in which they are imported. The Australian industry producing "like goods" therefore would be a component manufacturer which may not also be the maker of the whole product, notwithstanding that

are assembled into a body shell and shipped in a white form, that is, not primed or otherwise painted." While there was evidence that the Canadian producers were not doing much more than performing similar assembly operations in Canada, in the end the Import Tribunal did not enter into the merits of such arguments because it found no injury on other grounds.

187. ADT 13-84.

188. The Tribunal noted that the parts to be supplied by Alsthom would have accounted for some thirty percent of all goods under investigation involved in the bid and that such parts would have to be excluded from the injury investigation anyway.

189. However, according to Gottlieb, Revenue Canada in practice sometimes has also applied antidumping duties to goods assembled in Canada from imported components where Canadian content was considered to be insufficient even when the description of the goods covered by the antidumping duty order did not include "parts." Written comments of Richard Gottlieb (May 9, 1990).

190. *Id.*

191. *Id.*

192. This seems comparable to the *Ricoh* case in the EC, discussed in notes 173-74 and accompanying text, *supra*.

193. See Steele, *The Australian Antidumping System*, in ANTIDUMPING LAW AND PRACTICE, *supra* note 4, at 263-65.

the imported components are subsequently assembled in Australia to make up the whole product.¹⁹⁴ It would seem therefore that the ACS would require dumping of the parts and resulting injury to the Australian industry producing the parts.

VI. THE GATT NEGOTIATIONS¹⁹⁵

As of the moment of writing, only the United States and the EC have put forward concrete proposals in GATT with regard to diversion. Other Code signatories thus far have limited their submissions on diversion to recognizing the problem and/or reacting to the U.S. and EC proposals.

A. *The United States Proposal*

The United States has tabled a shopping list of "diversionary practices" with regard to which it advocates multilateral action. More specifically, the U.S. proposes a three-track structure which represents a sliding scale of perceived seriousness of diversion. Track I focuses on instances of "clear circumvention." Track II covers several practices alleged to be "recurrent injurious dumping," while Track III addresses situations in which a foreign producer repeatedly dumps products within the same general category of merchandise ("corporate offenders").

1. Track I

Track I applies to production changes which are so minor that when diversion is determined to exist, a *de novo* investigation of dumping and injury is considered superfluous; rather, additional products could simply be included within the scope of the original antidumping duty order. This track identifies three (really four) types of circumvention:

(1) instances where parts and components are shipped from the country covered by the dumping finding to the importing country for assembly or completion into a product covered by the dumping finding, and the value of the parts and components imported from the country subject to the dumping finding is equal to or exceeds [X] percent of the total value of the assembled or finished product;¹⁹⁶

194. *Id.* at 265.

195. This analysis is based on the text of the various proposals, as published in the Nov. 24, 1989, Jan. 5, 1990, and Feb. 9, 1990, issues of *INSIDE U.S. TRADE*, and on statements made during the conference *The Reform of the GATT Anti-Dumping Code* (Brussels, Mar. 16-17, 1990).

196. It should be noted that the proposal differs in certain respects from the current U.S.

(2) instances where parts and components are shipped from the country covered by the dumping finding to a third country for assembly or completion into the product covered by the dumping finding, which is then exported to the importing country, and the value of the parts and components imported from the country subject to the dumping finding is equal to or exceeds [X] percent of the total value of the assembled or finished product;¹⁹⁷ and

(3) instances where producers in a supplier country covered by the dumping finding begin exporting to the importing country (a) altered or (b) later-developed products.¹⁹⁸

In deciding on Track I diversion, the United States suggests that investigating authorities consider:

(i) whether imports of the parts or components have increased since the entry into force of the antidumping measure;

(ii) the relationship between the exporter of the parts, the producer covered by the antidumping measure and the assembler in the importing country; and

(iii) whether the most significant parts or components are being shipped to the importing country for assembly or completion.¹⁹⁹

A similar analysis is proposed with respect to merchandise assembled or completed in a third country.²⁰⁰ In all three categories of di-

provision: thus, the present provision does not contain any percentage requirement. *See supra* notes 111-18 and accompanying text. The proposal may therefore be more restrictive — depending on the percentage requirement — than actual U.S. law. Section 781(a) of the Tariff Act of 1930 (codified as 19 U.S.C. § 1677j (Supp. I 1989)) also requires a consultation procedure between the Commerce Department and the International Trade Commission as to whether a “significant injury issue is presented by the proposed inclusion.” If so, the Commission must determine whether the inclusion would be inconsistent with its prior affirmative finding. In fact, the proposal goes further in requiring an injury review in *all* cases of alleged circumvention. The administering authorities would furthermore be required not to impose duties if such imposition would be inconsistent with the prior injury determination.

197. Compare sections 781(b) and (e) of the Tariff Act of 1930, codified as amended in 19 U.S.C. §§ 1677j(b), (e) (Supp. I 1989).

198. Products covered in this category include: merchandise which is altered slightly placing it outside the stated scope of the original measure; merchandise to which additional functions have been added that do not alter the primary function of the product; and later generations of the product subject to the original investigation.

199. It would appear that these conditions are not cumulative.

200. In particular, the proposal suggests examination of:

(i) whether shipments of the parts or components to the third country have increased since the entry into force of the antidumping measure;

(ii) whether exports to the importing country of the merchandise assembled or completed in the third country have increased since the entry into force of the antidumping measure;

(iii) the relationship between the exporter of the parts, the producer covered by the antidumping measure, and the assembler or finisher in the third country; and

(iv) whether the most significant parts or components are being shipped to the third country for assembly or completion.

version, the proposal would permit authorities to impose duties retroactively from the moment the diversion procedure is initiated — if circumvention has been determined to exist.

2. Track II

In contrast to Track I, Track II deals with situations where changes in the production of the product are more substantial, yet allegedly result in negating the relief afforded by the original antidumping measure. More specifically, Track II covers circumstances where a foreign producer undertakes actions beyond those which can be described as “classic circumvention” and which are dealt with under Track I. The U.S. proposal implicitly acknowledges that GATT article VI in such situations requires a showing of dumping and resulting injury.

Track II encompasses a ragbag of five different situations where:

(1) a producer subject to a dumping finding exports parts or components to the importing country for assembly or completion by a related party into a product covered by the dumping finding, and the value of the parts or components imported from the country subject to the dumping finding is less than [X] percent²⁰¹ of the total value of the assembled or finished product;

(2) a producer subject to a dumping finding exports parts or components to a third country for assembly or completion by a related party into a product covered by the dumping finding, which is then exported to the importing country, and the value of the parts or components imported from the country subject to the dumping finding is less than [X] percent of the assembled or finished product;

(3) a third country producer related to a producer subject to a dumping finding exports to the importing country the product subject to the dumping finding;

(4) within a single exporting country, a producer exports merchandise that incorporates as a major input²⁰² a product that is covered by a dumping finding in excess of [Y] percent, and the

Likewise, in cases involving exports of altered or later-developed products, investigating authorities are to consider whether such exports have increased since the entry into force of the original antidumping measures.

201. The proposal states that it may be appropriate to establish a “safe harbor” (i.e., a percentage threshold below which parties may be certain that Track II procedures will not be invoked).

202. The U.S. proposal does not define the term “major input.”

producer is also related to or is the producer of the input product; and

(5) a third country producer related to a producer of an input product subject to a dumping finding in excess of [Y] percent exports merchandise that incorporates that input as a major input. Analysis reveals that Track II basically covers three distinct types of situations. The first two can be seen as parallels of the situations described in the first two situations of Track I (and U.S. law). The third situation is a variation on the MNC provision, but without the safeguards. It effectively penalizes a multinational producer for deciding to shift production from one country to another following the imposition of antidumping duties. The fourth and fifth situation pertain to "input dumping."²⁰³ The label "recurrent injurious dumping" is therefore a misnomer because it does not really describe the type of problems addressed.

In Track II situations, the United States believes that — while it is necessary to determine through a full investigation whether dumping and injury have occurred — such an investigation should be conducted on an accelerated schedule and incorporate special rules and procedures that reflect the fact of the prior related dumping and injury determinations. As in Track I cases, retroactivity of duties is proposed.

3. Track III

While Tracks I and II focus on changes in the production of the product covered by the original antidumping measure, Track III deals with a foreign producer who repeatedly dumps merchandise within the same general category. To deter such behavior, the United States submits that continuous dumping by individual firms (although of different products) also be penalized under certain circumstances through the imposition of duties from the point of initiation of the antidumping investigation.

It is hard to gauge whether Track III is a serious proposal or a red herring. If the former, these authors believe that it is nonsensical because it singles out and discriminates without any apparent justification against companies which produce a limited product range. It also disregards the fact that certain product sectors (chemicals, steel, consumer electronics) have shown a high activity in filing antidumping

203. Compare section 780 of the Tariff Act of 1930, as amended in 1988 and section 773 (e) (3) of the Tariff Act of 1930, as codified at 19 U.S.C. §§ 1677i and 1677b(e)(3), respectively, concerning the calculation of major inputs between related parties, discussed in notes 111-127, *supra*, and accompanying text.

complaints without there being any empirical evidence that these types of products are dumped more frequently than others.

4. Analysis

The U.S. proposal is very similar to the present anti-diversion provisions in U.S. law. It goes, however, much further, both *ratione materiae* and in the type of sanctions considered appropriate²⁰⁴ where diversion has been found to take place.²⁰⁵

The main problem of the U.S. proposal, in the view of these authors, is its vagueness. More than anything, the proposal introduces a series of concepts. If the proposal were to be adopted as it stands, it would undoubtedly create enormous uncertainty. Surely, the actionable practices need to be defined in as much detail as possible so that companies know in advance where they stand. Even if that were done, certain aspects of the proposal, either alone or in combination with other elements, overshoot. Thus, for example, the withholding of appraisalment *ab initio* would appear justified only in the clearest cases of circumvention, and certainly not for Track II and Track III situations.

As far as the concrete proposals are concerned, most problematic is perhaps the United States Track II proposal relating to "input dumping." The operative amendment proposed by the United States would authorize the administering authorities in the importing country to include in the cost of production of the like product the cost of production of the major input product, provided that such cost is higher than what the value of the input would have been in an arm's length transaction.²⁰⁶ This amendment would therefore require the administering authorities to examine not only the cost of production of the input, but also its arm's length value and then apply the higher of the two. It therefore contains the same tilt as the present U.S. provision.²⁰⁷ In addition, the provision would also create heavy burdens not only on the producer/exporter concerned, but also on potential importers of the finished product who essentially would be required to examine the components' breakdown of the finished product in order to determine the product's potential liability to an accelerated procedure. Furthermore, the amendment's focus on the level of the dumping margin seems rather misplaced. It would perhaps have been more appropriate to focus on the value added in the production of the fin-

204. I.e., the withholding of appraisalment as of the moment the inquiry is instituted and the possible retroactive levy of antidumping duties as of that date.

205. It is possible, of course, that this a negotiating technique of the United States.

206. See proposed amendment to article 2(4) of the Code.

207. See *supra* notes 111-127 and accompanying text.

ished product. Thus, one could imagine a rule that, if substantial value is added in the production of the finished product which incorporates a dumped component, the presumption is that the finished product is not dumped unless the contrary is proven after a full and normal investigation.

B. *The EC Proposal*

The EC essentially advocates multilateral adoption of its parts amendment logic.²⁰⁸ In addition, the EC has made one other proposal which should be linked to diversion. It has proposed an amendment to the GATT Anti-Dumping Code which would authorize the administering authorities in the importing country to establish a special normal value in cases involving multinational corporations (hereinafter: the MNC proposal).

The EC would like to have an explicit provision in the Code "confirming"²⁰⁹

that in cases, where the products exported are produced by a subsidiary in a third country, and the parent company sells the same products on its own home market, and where there are no or insufficient sales of the subsidiary in the market of the third country, the prices of the parent corporation in its home market can be used to calculate normal value, taking account of all relevant differences in costs.

The EC explains its rationale for this provision as follows:

Experience has shown that the increasing globalization of production and trade provides corporations or groups, operating in more than one country, with the possibility of concealing certain price discrimination practices. Specifically, there are situations where such corporations export at low prices the products that are produced by a subsidiary in a third country while at the same time selling the same product at very high prices in its [sic] own home market. Thus, they subsidize low-price export sales with high profits made on the home market. Since normally, there are no sales made by the subsidiary in the exporting country the question arises as to how to establish normal value. In the majority of these cases reference cannot be made to the constructed value in the country of export since no data are available there on cost elements like research and development, depreciation, selling costs, overheads and profits. Indeed most of these costs are generally borne by the parent company. On the other hand reference can be made to prices on the domestic market of the parent company.²¹⁰

208. See *supra* notes 139-162 and accompanying text for discussion of the parts amendment.

209. The phrase "confirming" is misleading. The 1979 Code does not at all address this issue and adoption of any such provision would arguably contravene not only the Code, but also GATT article VI. See *supra* note 90 and accompanying text for more detail.

210. There is a crucial flaw in this logic. The EC proposal essentially equates *differences in prices* with *differences in profit margins*. The fact that prices in one market are higher than prices in another market is perfectly all right as long as such differences are the result of differences in

Although nowhere acknowledged in the EC proposal, the EC seems to have borrowed the idea for this separate provision for calculation of normal value for MNCs from the U.S. 1974 Trade Act provision.²¹¹

The question should be raised whether there is any need for this amendment. To date, the Commerce Department has used the 1974 provision only twice.²¹² Furthermore, the EC — when confronted with a subsidiary of a parent company located in country X, but producing in and exporting from country Y — has thus far been able to deal adequately with the situation by using its normal rules on constructed value. It has utilized in such cases the cost of manufacture of the subsidiary and added either the SGA of the subsidiary in question²¹³ or the SGA of other producers located in the same country which did sell in sufficient quantities on the domestic market.

The EC proposal would *in theory* have the same outcome because adjustments would have to be made for “all relevant differences in costs.” *In practice*, however, it seems likely that the EC would essentially use the prices or cost of the parent company located in country X for the determination of normal value for the subsidiary located in country Y and would require the subsidiary located in country Y to prove any and all cost differences. It would be extremely burdensome for the subsidiary located in country Y to evidence, for example, that the high distribution costs incurred on sales by the parent company in country X, would not have been incurred on sales of the same product in country Y. Typically, the subsidiary would not sell in country Y and therefore it would be practically impossible for it to prove that, if it had sold in country Y, it would not have incurred distribution costs, similar to those incurred by the parent company in country X. It

costs and not of differences in profit. This was the essential background for adoption of antidumping laws. Present EC (and to a lesser extent, U.S.) dumping margin calculation methodology, however, has in part departed from this basic rationale because only *direct* costs are deducted in cases involving domestic sales through related sales companies. For a more detailed discussion, see Vermulst & Waer, *Hof van Instittie der Europese Geemenschappen*, 7 Mei 1987, *Zaken 240/84 NTN Toyo Bearing Company*, 255/84 Nachi Fujikoshi Corporation, 216/84 Koyo Seiko, 258/84 Nippon Seiko KK, 260/84 Minebea Company Ltd. v. Raad, *Arrest van 7 Maart 1987*, 36 *TJDSCHRIFT VOOR EUROPEES EN ECONOMISCH RECHT* 106 (1988); Hindley, *Dumping and the Far East Trade of the European Community*, 11 *WORLD ECON.* 445 (1988). One may also wonder how the EC proposes to calculate *differences in costs* in view of the EC's very statement that the *cost* in the third country *cannot be calculated*.

211. This provision is discussed in notes 46-60, *supra*, and accompanying text.

212. *Id.*

213. See, e.g., *Certain Ball Bearings from Japan and Singapore*, 27 O.J. EUR. COMM. (No. L 79) 8 (1984), where the EC was confronted with a Minebea plant producing in and exporting from Singapore. The Minebea plant sold virtually no ball bearings on the Singapore market. The Commission therefore decided to use constructed value consisting of Minebea's total cost of materials and manufacture, including overheads, and a profit margin of 6 percent, apparently “considered to be reasonable in the light of the relevant industry's performance during a representative profitable period.”

should be noted that the above assumes that allowance would be made for *indirect* cost differences. It is not at all clear from the EC proposal whether the EC would in fact make such allowance.

3. Responses of the Other Major Contracting Parties

Korea rejects the incorporation of anti-diversion measures which would impose antidumping duties on additional products not subject to the original dumping investigation.²¹⁴ To this end, Korea proposes that the Code prohibit the imposition of duties on imports of components/parts based solely on findings of dumping of the finished product, unless the components/parts are found to be "like" finished product. Likewise, the Code should forbid the imposition of duties on a finished product based solely on a finding of dumping of the components or parts, unless it is determined that the two are like products. Moreover, Korea suggests that the Code expressly provide that a product produced in a third country from parts produced in, or exported from, a country whose exports of the product or its parts are subject to antidumping duties, shall not be subject to antidumping duties unless authorities determine that it too is being dumped and causing injury.

Japan rejects the imposition of antidumping duties on newly developed products on the basis of their similarity to products already subject to antidumping findings. Japan advocates the establishment of criteria that would identify under which circumstances new products may be included in scope of the original antidumping measure.²¹⁵

Australia acknowledges that diversion constitutes a problem which should be handled multilaterally. However, any anti-diversion measures should not hinder legitimate investments. The Nordic countries express a desire to examine the report of the "screwdriver panel" before making any specific proposals on this subject.

Finally, Canada proposes that the Code set forth the precise conditions under which an existing antidumping measure may be extended, based on the principle that diversion exists only where the value added in third country or domestic assembly is minimal and the conditions are such that domestic producers of the assembled good continue to be injured.²¹⁶ In formulating these guidelines, consideration should be

214. This proposal may have been the result of the U.S. *Gold Star* case, discussed in notes 86-87, *supra*, and accompanying text.

215. Japan's focus on newly-developed products may have been inspired by its experience in the *DRAM* and *EPRM* cases in the United States and the EC.

216. Canada is one of the main users of antidumping actions. On the other hand, it has also been the defendant in a substantial number of antidumping proceedings, especially in the United States. This may account for the balanced character of Canada's proposal.

given to:

- (1) whether the domestic producers of the assembled good also produce the parts;
- (2) whether domestic producers of the assembled good also import parts from the subject country; and
- (3) the extent to which there is a separate market for parts and components.²¹⁷

VII. THE GATT PANEL REPORT ON ARTICLE 13(10) OF COUNCIL REGULATION (EEC) No 2423/88

A. *The Findings of the GATT Panel*

In 1988, Japan requested the formation of a GATT Panel ["Panel"] to decide whether article 13(10) of Council Regulation (EEC) 2423/88²¹⁸ and the measures taken pursuant to that provision were contrary to GATT. In October 1988 a GATT Panel was established.²¹⁹ The GATT Panel officially communicated its findings to the GATT Contracting Parties on March 22, 1990.²²⁰ The arguments of the EC and Japan and the findings of the Panel are discussed below.²²¹

Japan argued that the duties imposed under article 13(10) (hereinafter anti-circumvention duties), the acceptance of undertakings under article 13(10) and the provisions of article 13(10) as such, are inconsistent with the EC's obligations under articles II and III of the GATT and cannot be justified by article VI of the GATT. The EC argued that both the application of article 13(10) and article 13(10) itself were justified by article XX(d) of the GATT.

Japan further argued that the administration of article 13(10) by the EC contravenes article X of the GATT concerning the publication and administration of trade regulations, among others, because the EC failed to publish the criteria for accepting undertakings and to determine the origin of parts in a uniform manner. The EC argued that it

217. The Canadian proposal on this point is very similar to the proposal made by the ECAT (Emergency Committee for American Trade) Group in the United States.

218. See *supra* notes 139-62 and accompanying text.

219. The panel was chaired by Joseph Greenwald, former U.S. ambassador to the European Community. The other members were Timothy Grosser (New Zealand) and Christopher Thomas (Canada). See *Trade Policy: The European Commission's Objections to the Conclusions of the GATT Panel on the "Screwdriver" Aspect of the Antidumping Policy*, Agence Europe No. 5235, at 7 (Apr. 13, 1990).

220. *EC Blocks GATT Adoption of Report on 'Screwdriver' Antidumping Case 1992— THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION* (BNA) 2 (1990).

221. Excerpts of the GATT Panel Report have been published in *INSIDE U.S. TRADE, Special Report*, at 2-7 (Mar. 30, 1990). The summary of the GATT panel's findings which follows is based on this publication, it being the only public source available at the time of writing of this article.

has acted in conformity with that provision.²²²

The GATT Panel examined, successively, the GATT compatibility of:

- (1) the imposition of duties under article 13(10);
- (2) the acceptance of undertakings under article 13(10);
- (3) article 13(10) itself; and
- (4) the non-publication of criteria for accepting parts undertakings and the administration of the rules of origin for parts and materials.

1. The Imposition of Duties Under Article 13(10)

The Panel stressed the importance of determining the exact nature of the EC anti-circumvention duties in view of the differences between articles II(1) and III(2).²²³ According to article II(1)(b) the imposition of "ordinary customs duties" for purposes of protection is allowed unless they exceed tariff bindings. All other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of products for which there are binding tariff schedules. By contrast, article III(2) provides that internal taxes that discriminate against imported products are prohibited, whether or not the products are bound by tariff schedules. The question therefore was whether the anti-circumvention duties qualified as "customs duties" or as "internal taxes." The Panel noted that the anti-circumvention duties are imposed, not on imported parts or materials, but on the finished products assembled or produced in the EC.²²⁴

The EC nevertheless argued that the anti-circumvention duties should be considered as customs duties imposed "in connection with importation" within the meaning of article II(1)(b). First, the *purpose* of these duties was to eliminate circumvention of antidumping duties on finished products and therefore these duties are by nature identical to antidumping duties. Second, the duties are collected by customs authorities under procedures identical to those applied for the collection of customs duties, similarly form part of the resources of the EC, and relate to parts and materials which were considered not to be "in free circulation" within the EC.²²⁵

222. See *id.* at 2.

223. In this respect Japan argued that the anti-circumvention duties could be considered to be *either* duties imposed on or in connection with importation within the meaning of Art. II(1)(B) *or* internal taxes within the meaning of article III(2). The EC argued that the anti-circumvention duties could not be considered to fall under article III(2). See INSIDE U.S. TRADE *supra* note 221, at 2.

224. See INSIDE U.S. TRADE, *supra* note 221, at 2.

225. See *id.* at 3.

The Panel disagreed. First, the Panel determined that since articles I, II, III and the Note to article III refer to charges "imposed on importation," "collected . . . at the time or point of importation" and applied "to an imported product and to the like domestic product," *the policy purpose of a charge is not relevant.*²²⁶ What matters is whether the charge is due on importation or at the time or point of importation or whether it is collected internally. The Panel also noted that the policy purpose of charges is frequently difficult to determine and therefore substantial legal uncertainty would be created if this factor were to be considered relevant.²²⁷

Second, the Panel ruled that the *mere description or categorization* of 1) a charge or 2) the product subject to a charge, under the domestic law of a Contracting Party equally cannot be decisive. If the Contracting Parties could establish the "connection with importation" by the mere description or categorization in their domestic law of the charge, or the product subject to a charge, and thus determine which GATT provisions apply, the basic objectives of articles II and III could not be achieved. The Contracting Parties could then impose charges on products after their importation simply by assigning the collection of these charges to their customs administration and allocating the revenue to their customs revenue.²²⁸ Thus, the Panel concluded that the anti-circumvention duties cannot be considered to be levied "on or in connection with importation" within the meaning of article II(1)(b).

The Panel then examined whether the anti-circumvention duties are contrary to article III(2), which provides that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."²²⁹ The Panel noted that the EC had applied anti-circumvention duties in accordance with article 13(10)(c) of Council Regulation (EEC) No. 2423/88 which provides that "[t]he amount of duty collected shall be proportional to that resulting from the application of the rate of the

226. The panel, quoted in particular, the GATT panel Report in *United States — Taxes on Petroleum and Certain Imported Substances (Superfund Taxes)*, where the GATT panel held that "[t]he tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products, they do not distinguish between taxes with different policy purposes." (emphasis in original). See GATT, BISD, 34 Supp. 136, 161 (1988). See also INSIDE U.S. TRADE *supra* note 221, at 3.

227. See INSIDE U.S. TRADE *supra* note 221, at 3.

228. See *id.*

229. See GATT, *supra* note 24.

antidumping duty applicable to the exporter of the complete product on the CIF value of the parts or materials imported." Hence, the Panel concluded that the anti-circumvention duties are inconsistent with article III(2).²³⁰

The Panel proceeded by examining whether the anti-circumvention duties could be justified under GATT article XX(d), which provides that "[n]othing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures: . . . (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement. . . ." The Panel identified the issue as being whether the anti-circumvention duties ("measures") could be considered necessary in order to secure compliance with the regulations imposing a definitive antidumping duty on the importation of the finished product ("laws or regulations"), which regulations, within the limits of its mandate and for purposes of this proceeding only, it decided to assume as being not inconsistent with GATT.²³¹

In this respect, the EC argued that the term "secure compliance with" should be broadly construed to cover not only the enforcement of laws and regulations *per se* but also the prevention of actions which have the effect of undermining the objectives of laws and regulations.

The Panel did not accept this broad interpretation. The Panel noted that the *text* of article XX(d) does not refer to objectives of laws or regulations but only to laws or regulations.²³² As for the *purpose* of article XX(d), the Panel found that acceptance of such a broad interpretation would mean that:

[w]henver the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement would then be justified under Article XX(d) on the grounds that this

230. See INSIDE U.S. TRADE *supra* note 221, at 3.

231. Although Japan had expressed doubts whether Council Regulation (EEC) No. 2423/88 and the regulations imposing definitive antidumping duties on finished products were "not inconsistent" with GATT, the Panel noted that its terms of reference and the submissions by both parties had been limited to the anti-circumvention provision and its application. See INSIDE U.S. TRADE, *supra* note 221, at 4.

232. The panel further stated:

The examples of the laws and regulations indicated in Article XX(d), namely "those relating to customs enforcement, the enforcement of monopolies . . . the protection of patents . . . and the prevention of deceptive practices" also suggest that Article XX(d) covers only measures designed to prevent actions that would be illegal under the laws or regulations. This conclusion is further supported by the fact that the provision corresponding to Article XX(d) in the 1946 Suggested Charter for an International Trade Organization used the terms "to induce compliance with" while Article XX(d) of the General Agreement uses the stricter language "to secure compliance with." (emphasis added).

See INSIDE U.S. TRADE, *supra* note 221, at 4.

secures compliance with the objectives of that law. This cannot, in the view of the Panel, be the purpose of Article XX(d): *each of the exceptions in the General Agreement — such as Article VI, XII or XIX — recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective.* These conditions would no longer be effective if it were possible to justify under Article XX(d) the enforcement of obligations that may not be imposed consistently with these exceptions on grounds that the objective recognized to be legitimate by the exception cannot be attained within the framework of the conditions set out in the exception.²³³

The Panel noted that only the individual EC regulations imposing definitive antidumping duties give rise to obligations that require enforcement, namely the obligation to pay a specific amount of antidumping duties, and that the anti-circumvention duties do not serve to enforce the payment of antidumping duties. Therefore, the Panel concluded that the anti-circumvention duties do not “secure compliance with” obligations under the EC’s Antidumping Regulation and cannot be justified under article XX(d).²³⁴

2. The Acceptance of Undertakings Under Article 13(10)

Japan argued that the acceptance of undertakings within the framework of article 13(10) of the Code to limit the use of imported parts and materials constituted a “requirement” contrary to GATT article III(4) which provides in relevant part that:

[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The Panel accepted Japan’s argument:

The Panel considered that the comprehensive coverage (in Article III(4)) of *all* laws, regulations or requirements *affecting* “the internal sale etc. of imported parts suggests that not only requirements which an enterprise is legally bound to carry . . . but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute “requirements” within the meaning of that provision.” The Panel noted that the EEC made the grant of an advantage, namely the suspension of proceedings under the anti-circumvention provision, dependent on undertakings to accord treatment to imported products less favourable than that accorded to like products of national origin in respect of their internal use. The Panel therefore concluded that the decisions of the EEC to suspend proceedings under Article 13(10) conditional on un-

233. *See id.* (emphasis added).

234. *See id.* at 5.

dertakings by enterprises in the EEC to limit the use of parts or materials originating in Japan in their assembly or production operations are inconsistent with Article III(4).²³⁵

3. Article 13(10) Itself

Japan argued that not only the measures taken under article 13(10) but also article 13(10) itself constituted a violation of GATT. The Panel noted that article 13(10) does not mandate the imposition of anti-circumvention duties or other measures by the Community authorities; it merely authorizes the Commission and Council to take certain actions. The Panel held that the GATT provisions which Japan invoked impose upon Contracting Parties the obligation to avoid certain measures, but not an obligation to avoid legislation under which the executive authorities may possibly impose such measures.²³⁶ Hence, the Panel concluded that, although it would be desirable if the EC were to withdraw article 13(10), the mere existence of article 13(10) was not inconsistent with the EC's obligations under GATT.²³⁷

4. The Publication of Criteria for the Acceptance of Parts Undertakings and the Administration of the Rules of Origin for Parts and Materials

The Panel held that in view of its ruling that the anti-circumvention duties and the acceptance of parts undertakings are contrary to article III(2) and (4), the issue whether the administration of the anti-circumvention provision is contrary to article X is no longer relevant.²³⁸

B. *The First Reaction of the EC*

When the news of the GATT panel's findings leaked, the panel report was announced in the press as a major victory for Japan.²³⁹

235. *See id.* (emphasis added).

236. The panel referred again in particular to the GATT panel report in *United States - Taxes on Petroleum and Certain Imported Substances (Superfund Taxes)*, where the GATT panel had stated:

[F]rom the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement.

GATT, BISD, 34 Supp. 136, 163 (1988). *See* INSIDE U.S. TRADE, *supra* note 221, at 6.

237. *See* INSIDE U.S. TRADE, *supra* note 221, at 6.

238. *See id.*

239. *See Dispute Panel Finds in Favor of Japan on Complaint about EC 'Screwdriver' Law*, 7 Int'l Trade Rep. (BNA) 367 (Mar. 14, 1990); *Japanese Win GATT Dispute over EC 'Screwdriver' Law*, 1992 THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION (BNA) 5 (Mar. 23, 1990). *See*

This was the first time Japan had resorted to a GATT dispute settlement proceeding, and the positive result obtained in this proceeding by Japan was seen as inductive to Japan bringing more cases and playing a more assertive role in GATT.²⁴⁰

The EC initially declined to comment on the panel's findings.²⁴¹ However, in a press release of March 29, 1990, the EC stated:

The report has now been issued in definitive form to Contracting Parties to the GATT. The findings do not appear to condemn the principle of the taking of measures to prevent circumvention of antidumping duties by assembly of the product concerned in the Community, and indeed, do not address the question of the compatibility of the Community's legislation with the provisions of the GATT in general. The panel appears to limit itself to an extremely narrow interpretation of Article III and Article XX(d) of the GATT.

The result has been that the Panel has found the Community's application of its anti-circumvention legislation not to be in conformity with these Articles.

The Community is now examining the Report in detail and, following this examination, it will decide what further attitudes or steps it should take.²⁴²

Behind the scenes, in an unusual, though not unprecedented, move, the EC had contested the reasoning of the findings in a letter to the panel, asking it to reconsider its conclusions. The panel had refused to do so and in an equally unusual move responded by defending its findings in a special statement to the GATT Council.²⁴³

When the panel report was up for adoption at the GATT Council meeting of April 3, 1990, the EC blocked the adoption stating that it had not yet finalized its position. The United States and Canada stated that they needed more time to study the report. Japan, Australia, South Korea and the ASEAN countries had urged the GATT

also Buchan, *GATT Upholds Japanese Complaint Against EC*, Financial Times, Mar. 10, 1990, at 2, col. 2; Thomson, *Japan Hopes GATT Ruling Ends EC 'Discrimination'*, Financial Times, Mar. 13, 1990, at 9, col. 1; Dullforce, *Japan Scores Victory Over EC on Duties*, Financial Times, Mar. 29, 1990, at 24, col. 1.

240. Indeed, the *Wall Street Journal* reported on April 25, 1990, that Japan was considering lodging a complaint in GATT against the U.S.' "Super 301" if it were to be named an unfair trader under that provision. See *Japan Says It May Take U.S. to GATT Over Super 301*, Wall St. J., Apr. 25, 1990.

241. *EC Mum on Press Report That It Lost GATT Case*, Wall St. J., Mar. 12, 1990.

242. Commission of the European Communities, Press Release (Mar. 29, 1990).

243. Dullforce, *Brussels at Odds with GATT over Judgment*, Financial Times, Apr. 4, 1990, at 4, col. 1. The panel is reported to have stated that it is unrealistic to believe that the current review body, the GATT Council, can substantially amend the findings of the panel. The Council could only decide either to adopt the conclusions or to block them, with all the resulting political consequences. See *Trade Policy: The European Commission's Objections to the Conclusions of the GATT Panel on the 'Screwdriver' Aspects of the Antidumping Policy*, Agence Europe No. 5235, at 7 (Apr. 13, 1990).

Council to accept the Panel's findings.²⁴⁴

Since then, the EC's criticism of the GATT panel report has become even more outspoken.²⁴⁵ However, in the GATT Council meeting of May 16, 1990, the EC lifted its objections to the adoption of the report, thereby paving the way for the Council to adopt it officially.²⁴⁶

C. *The Implications of the Panel Report for the Anti-Diversion Debate*

It should be noted that the GATT panel did not rule on the question whether the anti-circumvention duties under article 13(10) of the Code would be allowed under article VI(6)(a).²⁴⁷ In view of the fact

244. Nullis, *Some EC Duties Are Again Ruled to be Unlawful*, Wall St. J., Apr. 4, 1990; *EC Blocks GATT Adoption of Report on 'Screwdriver' Antidumping Case, 1992—THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION (BNA) 1* (Apr. 6, 1990). India, Brazil and Pakistan also said to need more time to study the report although they were in favor of the basic position taken by the panel.

245. Mr. Christoph Bail, the EC delegate to GATT reportedly stated that "[a]t this preliminary stage, the report gives us cause for serious concern and a series of questions," and "[i]f the adoption of panel reports by the Council has any meaning beyond a blind rubber stamp, then I am sure we can expect serious consideration of these concerns and questions." In particular, Mr. Bail criticized the panel for not satisfactorily addressing the distinction between a duty levied in connection with importation and an internal tax. Furthermore, Mr. Bail reportedly stated that the panel seemed to "fundamentally misrepresent the very nature of GATT and ignore the well-established principles of interpretation of international agreements," and "[t]he panel's reasoning seems to amount to saying that since the GATT does not provide for measures to counter the circumvention of the purposes of GATT norms, such measures cannot validly be taken." See *EC Blocks GATT Adoption of Report on 'Screwdriver' Antidumping Case, 1992—THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION (BNA) (Apr. 6, 1990)*. Mr. Bail's first statement is reminiscent of the EC's (solitary) position during the Tokyo Round negotiations where the EC reportedly made a proposal that panels discuss their findings with the disputants. See Patterson, *The European Community as a Threat to the System*, in *TRADE POLICY IN THE 1980s* 223, 239 (Cline ed. 1983), who states:

Another EC proposal others found particularly worrisome was that before finalizing its findings and recommendations, the panel be required to "discuss" them with the disputants so that, it was argued, the panel not make a serious mistake, because it had overlooked some important piece of evidence or argument, had misinterpreted the GATT, or had unwittingly ignored an important precedent. This proposal immediately ran into strong opposition on the grounds that it amounted to reopening the case after all the agreed procedures had been gone through and that it would subject the panel to intolerable pressure - especially if a large trading country or entity was involved. This proposal was, in the event, not pressed.

Mr. Bail's second statement seems to ignore the panel reports in the *Canadian FIRA legislation case*, GATT, BISD, 30 Supp. 140 (1984) and the *Section 337 case* (not yet reported).

246. See Dullforce, *EC Defers to Screwdriver Ruling*, Financial Times, May 17, 1990, at 4, col. 7. It should be noted that the EC has reportedly stated that it will not amend its circumvention rules "until it has seen the outcome of the talks on dumping and circumvention in the Uruguay Round trade talks." *Id.*

247. The EC had not defended its anti-circumvention duties under article VI but relied solely on article XX(d). The Panel noted:

The United States, as an interested third party, had argued that Article VI of the General Agreement provided to a certain extent a legal basis for measures to prevent what it considered to be circumvention of antidumping duties. At one point in the proceeding the EEC stated that, if the Panel were to find that anti-circumvention duties were justifiable under Article VI, "it would not disagree" with such an approach. However, the EEC presented no arguments in support of a justification of its measures under Article VI, on the contrary, in

that article VI(6)(a)²⁴⁸ requires a positive finding of dumping and resulting injury, it seems improbable that the anti-circumvention duties levied on the imports of parts under article 13(10) would be compatible with article VI, in the absence of any findings that the parts are actually dumped and causing injury to the domestic industry producing the parts.

At first blush, a way out might be finding that the finished product on the one hand, and subassemblies respectively parts thereof on the other hand, are to be considered as "like products."²⁴⁹ Hence, if dumping and injury are found with regard to imports of the finished product, this determination could be stretched to cover subassemblies and parts without violation of article VI. However, such a solution runs into problems with the "like product" definition.²⁵⁰ In article VI, the term "like product" is only alluded to in article VI(1), dealing with the definition of dumping. With regard to injury, article VI(6)(a) stipulates that injury should be caused to the "domestic industry," without specifying that it should be the domestic industry of the "like product." Moreover, article VI does not define the term "like product."

In a report adopted by a Group of Experts on May 13, 1959, on the interpretation of article VI, however, these gaps were filled. The Group agreed that the term "like product":

should be interpreted as a product which is identical in physical characteristics subject, however, to such variations in the presentation which are due to the need to adapt the product to special conditions in the market of the importing country (i.e, to accommodate different tastes or to meet specific legal or statutory requirements).²⁵¹

With regard to the term "industry" in relation to the concept of injury the same Group of Experts concurred that:

[e]ven though individual cases would obviously give rise to particular problems, as a general guiding principle judgements of material injury

the subsequent proceedings the EEC continued to present various arguments to the effect that measures under Article 13(10) were "necessary" within the meaning of Article XX(d) because Article VI did *not* provide a basis for the application of measures to prevent circumvention of antidumping duties. In conformity with the practice of panels not to examine exceptions under the General Agreement which have not been invoked by the contracting party complained against . . . and not to examine issues brought only by third parties . . . the Panel decided not to examine whether the anti-circumvention duties could be justified under Article VI of the General Agreement.

See INSIDE U.S. TRADE, *supra* note 221, at 3.

248. Technically, the combination of article VI(1), VI(2) and VI(6)(a). See *supra* note 22.

249. This seems to be the approach taken by the Commerce Department. See *supra* notes 61-95 and accompanying text.

250. For a somewhat different perspective, see Baker, "Like" Product and Commercial Reality, in ANTIDUMPING LAW AND PRACTICE, *supra* note 4, at 287-94.

251. See GATT, *supra* note 24, at 149. See also E. VERMULST, *supra* note 72, at 509-10.

should be related to total national output of the *like* commodity concerned or a significant part thereof.²⁵²

In view of this report of the Group of Experts, it became commonly accepted²⁵³ that article VI should be construed as requiring a determination of dumping and injury with regard to the domestic industry producing the "like product" thus defined. This view was corroborated by the Kennedy Round²⁵⁴ and Tokyo Round²⁵⁵ GATT Anti-Dumping Codes.

We have seen above²⁵⁶ that the "like product" definition given in article 2(2) of the current GATT Anti-Dumping Code is very narrow. Under this definition, it seems futile to contend, for example, that a computer printer and a transformer, employed as a part or subassembly in a computer printer, are "like products." Indeed, a computer printer and a transformer are neither identical nor have closely resembling characteristics. This is so even if the transformer is dedicated exclusively for use in the computer printer.

In view of the positive requirement of article VI(6)(a) and the later-adopted "like product" and "domestic industry" definitions, findings of dumping and resulting injury with regard to a finished product therefore cannot be extended to its parts and subassemblies, without there having been a separate determination that the parts are actually dumped and thereby have caused injury to the domestic production of the "like product," i.e., the parts, in the importing country.²⁵⁷

252. See GATT, *supra* note 24, at 150 (emphasis added).

253. See R. DALE, *supra* note 48, at 79.

254. See GATT, *supra* note 27, at arts. 2(a), 2(b), 3(d).

255. See GATT, *supra* note 3, at arts. 2(1), 2(2), 3(5).

256. See *supra* notes 6-18 and accompanying text.

257. GATT case law, specifically the *U.S. Wine* and the *Canadian Beef* cases, confirms this. In the *U.S. Wine* case, the EC challenged the 1984 U.S. Wine Equity Act which required the ITC to include, by way of exception to the normal definition of 'domestic industry,' the U.S. producers of the principal raw agricultural product, i.e., the grapes, used in the production of the finished product, i.e., the wine, in the definition of the domestic industry for purposes of antidumping and countervailing duty proceedings. GATT, *United States — Definition of Industry Concerning Wine and Grape Products*, SCM/71 (Mar. 24, 1986). In the *Canadian Beef* case, the EC attacked the twin determinations of the Canadian Import Tribunal that Canadian cattlemen were allowed to bring a countervailing duty case against European boneless beef producers and that Canadian cow-calf and feedlot operators were producers of a product "like" the imported European boneless beef. GATT, *Canada — Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, SCM/85 (Oct. 13, 1987). In both cases, GATT panels have agreed with the views of the EC that such interpretations violate article 6(5) and footnote 18 to article 6(1) of the Subsidies Code. GATT, BISD, 26 Supp. 56 (1980). In other words, even though grapes and 'cows' are the main inputs for the production of wine and beef, respectively, and even though in economic terms domestic cattlemen and grape growers may suffer injury as a result of imports of wine and beef, this does not authorize assimilation of the two distinct like products and the two distinct industries, simply because the legal definitions in GATT article VI and the Anti-Dumping and Subsidies Codes do not allow it. An important rationale for the

The Panel's reasoning that "each of the *exceptions* in the General agreement — such as articles VI, XII or XIX — recognizes the legitimacy of a policy but at the same time *sets out conditions* as to the obligations which may be imposed to secure the attainment of that objective"²⁵⁸ would appear to imply that the Panel would have been unlikely to disregard the clear positive requirements in article VI(6)(a) about the establishment of dumping and resulting injury or allow for the adoption of certain "presumptions" of dumping and resulting injury in anti-diversion cases. In this respect, the Panel report seems to have broader implications for the debate on anti-diversion rules and seems to unquestionably go beyond a condemnation of the EC anti-circumvention rules on mere "technicalities." Finally, the Panel's ruling that article XX(d) cannot be construed as an escape clause under which Contracting Parties can by-pass the conditions set forth in article VI in order to achieve the "policy objectives" recognized by article VI, precludes an "easy way out."

The above discussion leads to two final remarks. First, the panel ruling justifies profound doubts as to whether under current GATT rules and GATT interpretations, the U.S. 1988 anti-circumvention provision would survive GATT scrutiny. Second, the fact that article VI only refers to "like product" in article VI(1) and does not clearly define the term, implies that — if the Contracting Parties would feel the need to introduce short-cut anti-diversion rules concerning the importation of parts and subassemblies — one possibility of avoiding an amendment of article VI would be to redefine the term "like product."²⁵⁹

VIII. CONCLUSIONS AND RECOMMENDATIONS

In the opinion of these authors, it is preferable that an agreement on diversion be reached within the Uruguay Round to prevent signatories from adopting unilateral methods of dealing with diversion. This means that it is recognized that some forms of diversion *do* constitute a problem. On the other hand, the attention that diversion receives

panels' decisions in both cases would seem to have been that the Subsidies and Anti-Dumping Codes provide very precise definitions of both 'like product' and 'domestic industry' and that article VI itself (and therefore the whole Code) is essentially an exception to the GATT tariff binding and most-favored-nation principles.

258. See INSIDE U.S. TRADE, *supra* note 221, at 4 (emphasis added).

259. Compare Vermulst, *The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become A Problem in International Trade?*, in ANTIDUMPING LAW AND PRACTICE, *supra* note 4, at 464. From the EC's point of view, this might not be a desirable option because it would expose the EC's exports of processed agricultural products to antidumping complaints by growers, as was the case already in the U.S. *Wine* and the *Canadian Beef* cases, discussed in note 257, *supra*.

from certain industry lobbies and the administering authorities in countries such as the U.S. and in the EC seems to warrant certain preliminary remarks before tackling the question whether new rules are necessary.

A. Preliminary Remarks

1. The Two Sides of the Coin as Regards the Interests of the Domestic Industry in the Importing Country

Recent proposals for more rigorous antidumping laws and more stringent anti-diversion measures would seem to be inspired by disappointment of domestic industries in the importing countries, apparently mainly in the United States and the EC, about the effectiveness of the relief offered by a successful antidumping action and frustration in the face of continuing competition by the sanctioned producers. However, it should be recalled that the basic sanction envisaged by current antidumping law is to offset injurious dumping, once it is established, through the imposition of antidumping duties. The fact that antidumping laws do not grant damages for injury suffered²⁶⁰ (and, indeed, do not even prohibit dumping as such),²⁶¹ means that the complainants in an antidumping action can only rightfully expect that bringing a meritorious action will stop the imports from being "injuriously dumped." They cannot exact any real compensation nor any protection from these competing imports altogether in the form of effective exclusion of offending exporters from the market.

Inherent in the current GATT system, aimed at free world trade, is that "fair imports" cannot be stopped.²⁶² The commercial reality

260. An exception to this would be section 801 of the American Revenue Act of 1916 (codified at 15 U.S.C. § 72 (1988)) authorizing imposition of fines on foreign producers (and award of treble damages to the plaintiff) which sold their products at lower prices in the United States than in their domestic market with the intent to destroy or injure a U.S. industry or restrain its development. The Act has never been successfully invoked. For discussions of the 1916 Act, see Almstedt, *International Price Discrimination and the 1916 Act: Are Amendments in Order?*, 13 LAW & POL'Y INT'L BUS. 747 (1981); Hiscocks, *International Price Discrimination: The Rediscovery of the Predatory Dumping Act of 1916*, 11 INT'L LAW. 227 (1977); Neville, *The Antidumping Act of 1916: A War-Time Legacy*, 26 N.Y.L. SCH. L. REV. 535 (1981); Sidak, *A Framework for Administering the 1916 Antidumping Act: Lessons from Antitrust Economics*, 18 STAN. J. INT'L L. 377 (1982). The 1916 Act is grandfathered under GATT. See Hansen & Vermulst, *The GATT Protocol of Provisional Application: A Dying Grandfather?*, 27 COLUM. J. TRANSNAT'L L. 263, 304-305 (1989).

261. See Jackson, *Dumping in International Trade: Its Meaning and Context*, in ANTIDUMPING LAW AND PRACTICE, *supra* note 4, at 8-9.

262. Except for actions conducted in conformity with GATT article XIX. See, e.g., R. QUICK, EXPORT-SELBSTBESCHRAENKUNGEN UND ARTIKEL XIX GATT (1983); M.C.E.J. BRONCKERS, SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL TRADE RELATIONS (1985); Koulen, *The Non-Discriminatory Application of GATT Article XIX.1: A Reply*, 2 LEGAL ISSUES EUR. INTEGRATION 87 (1983); Petersmann, *Economic, Legal and Political Functions of the Principle of Non-Discrimination*, 9 WORLD ECON. 113 (1986).

will often be that exporters subject to antidumping measures will try to maintain their presence on the market while avoiding actionable unfair trade. As free world trade is universally perceived to be in the ultimate interest of domestic industries of all GATT Contracting Parties, any exceptions to the basic GATT principles, such as article VI, should be interpreted restrictively. Domestic industries in the importing countries should recognize, beyond the frustrations of a particular antidumping case, that they also stand to gain from GATT. The multilateral nature of GATT also means that the domestic industry, complainant in a case today, could become a defendant in a case tomorrow.²⁶³ It would seem that few, if any, industries would be happy to see the same stringent rules the application of which they advocate with respect to others, applied to themselves. The potential of certain measures backfiring does not always seem altogether realized in the heat of the debate. Preserving elementary procedural safeguards and avoiding short-sighted protectionist tendencies in antidumping laws is therefore in the long term interest of all industries.

2. The Interests of a State in an Increasingly Globalized and Interdependent World Economy

To delineate national trade interests in a globalized world economy is not an easy task.²⁶⁴ Antidumping laws emerged at a time where the problem at stake typically was to protect a locally-owned domestic industry against unfair imports from foreign-owned producers firmly located in another country.

However, the increasing globalization of the world economy and the existence of multinational corporations as the main players on the international trade scene have precipitated profound changes in the nature of the issues at stake. First, in more and more cases, foreign-owned "domestic" producers could start acting as complainants.²⁶⁵ Where it is easy for a State to identify its interests with locally-owned domestic industries, there still remains a natural political bias towards favoring "local capital" above "local production" in case of conflicts between the two. This is especially the case where the foreign exporters, defendants in an antidumping action, at the same time have local

263. See E. VERMULST, *supra* note 72, at 465-66.

264. See, e.g., Ehrenhaft, *An Administrator's Look at Antidumping Duty Laws in United States Trade Policy*, in ANTIDUMPING LAW, POLICY AND IMPLEMENTATION 97, 100 (1979) (regional meeting of the Amer. Soc. Int'l L.).

265. Rank Xerox, for example, was a major complainant in the EC proceeding concerning *Photocopiers from Japan*. For a discussion about this and other cases raising similar issues, see Vermulst & Waer, *supra* note 136.

production facilities in the importing country. Moreover, locally-owned producers often also have production facilities in third countries, so that it is not always obvious whether granting antidumping protection to these producers will indeed result in an increased production in the importing country, or in paving the way for imports by these locally-owned industries from their third country production subsidiaries. Second, the production process is becoming increasingly mobile. Multinational corporations aim at optimally utilizing the comparative advantages in different countries. In more and more cases intricate questions regarding the origin of products arise.²⁶⁶ At the same time, the difficulty in pinning down multinational corporations makes their penalization as offenders of the antidumping laws more problematic. In fact, it is the country against which the case is brought that effectively will be castigated, because multinational corporations are likely to shift production to other countries in order to face lower or no antidumping duty barriers. Paradoxically, one of the acclaimed achievements of firmer antidumping and anti-diversion policies is a boost in foreign investment in the importing countries by targeted foreign producers,²⁶⁷ rather than the restoration of fair trading conditions for the domestic industries. To some extent, current antidumping policies effectively amount to a battle between States for "local production" by multinational corporations.

These realities cannot be ignored in the anti-diversion debate. As far as the establishment of production facilities is concerned, aggressive antidumping policies will cause a shift of production either towards "low normal value" countries or towards the importing country. Where these production migrations result in the avoidance of "injurious dumping," the antidumping action should be deemed to have spawned the desired outcome. There especially should be no bias in favoring production in the importing country above production in third countries.

3. U.S. and EC Anti-Diversion Mechanisms Compared²⁶⁸

The U.S. and the EC have taken distinctive roads to counter the

266. See *id.* for more detail.

267. See de Clercq, *Fair Practice, Not Protectionism*, Financial Times, Nov. 21, 1988, at 29, col. 1:

The Community's main concern . . . was to guard against the flagrant circumvention of antidumping duties while ensuring that the provisions did not deter genuine investment. This aim seems to have been achieved. Direct investment from Japan into Europe increased by about 90 percent in the year following the introduction of the [screwdriver] provisions.

268. Holmer & Bello, *supra* note 116, at 531, have observed that the U.S. circumvention provision is "quite conservative compared to, for example, recently adopted and implemented antidumping practices of the EEC with respect to 'screwdriver assembly' operations within the

classic diversion situations.²⁶⁹ The U.S. has stretched the “like product” definition,²⁷⁰ arguably beyond the limits set by GATT and the 1979 Code²⁷¹ in order to enable it — under certain circumstances — to bring imports of subassemblies, parts and components, imports of a similar product now coming from country Y, or imports of slightly altered or later-developed products within the scope of an antidumping duty order on product x coming from country X.

The EC, “hemmed in by its strict like product rule,”²⁷² has set up a special procedure to act against diversion through establishment of screwdriver plants in the EC. Third country assembly, on the other hand, is appraised in the EC on the basis of application of origin rules. Following the ruling of the GATT panel, the EC is presently re-thinking its position. It is possible that the EC will go in the U.S. direction. This begs the question whether — for the international trading system — the U.S. approach is any better.

On the one hand, the focus of the United States on value added seems preferable to the EC’s value-of-parts test (although it is less predictable). On the other hand, the U.S. provision *ratione materiae* reaches much further than the EC’s. Moreover, it would seem that “relationship” is not a prerequisite for a finding of diversion in the U.S.²⁷³ Third, and perhaps most importantly, one should question whether the U.S. system can simply be “transplanted” in the EC (or in other systems) without a radical overhaul of certain other elements of the EC system. This is because the systems for levying antidumping duties are different in the two jurisdictions. In the United States, the original antidumping investigation culminating in issuance of an antidumping duty order, amounts only to an estimate of antidumping duties to be paid. Actual antidumping duties are then taxed in the

EEC.” In the view of these authors this statement is incorrect. First of all, the U.S. circumvention provision goes much further than the EC’s *ratione materiae* (although it is correct that the operative test for determining third country and importing country circumvention arguably goes less far than the EC’s application of rules of origin to determine the former and of article 13(10) to determine the latter). The statement is also slightly misleading because it does not take into account the variety of other mechanisms the United States has installed over time to counter various forms of diversion, discussed at *supra* notes 46-134 and accompanying text, none of which have equivalents in the EC.

269. Compare Koulen, *supra* note 4, at 372.

270. *Id.*

271. See E. VERMULST, *supra* note 72, at 518-526.

272. See Baker, *supra* note 250, at 290. Baker seems to ignore, however, that the EC’s “strict” like product definition follows directly and necessarily from GATT.

273. Indeed, the U.S. position would seem to be that circumvention can also occur between two technically unrelated parties. See, e.g., Steel Jacks from Canada, *supra* note 73. Query whether there is any difference of substance between the U.S. and the EC anti-circumvention provisions on this point in view of the rather broad definition used by the EC Commission to define relationship or association.

course of an annual review on the basis of actual dumping margins on transactions made during the preceding year. This would seem to indicate that dumping calculations will be made also with regard to sub-assemblies, parts and components or the finished product now coming from country Y before antidumping duties are actually levied.²⁷⁴

In the EC, however, antidumping duties are assessed prospectively.²⁷⁵ Transplantation of the U.S.-type scope rulings in the EC would therefore mean that the scope of application of an antidumping duty on product x originating in country X would be enlarged to cover subassemblies, parts and components of product x or product x coming from country Y, without there ever having been a finding of dumping and resulting injury and that antidumping duties would actually be assessed on that basis.

B. *To What Extent Does the Current Legislative Framework (minus anti-diversion provisions) Offer Adequate Solutions to Handle the Diversion Problem?*

Antidumping law in theory would seem to suggest that all forms of "diversion" can be handled within the existing framework:

If producer x sets up a manufacturing base within the importing country in which he uses exporting country parts, the domestic industry in the importing country can bring a complaint against imports of such parts.²⁷⁶

If producer x sets up a plant in country Y, the domestic industry can bring a complaint against country Y.

Constructed value could be used in cases where there is a likelihood that the merchandise produced by producer x in country Y is exported to all sources at uniformly low prices because of cross-subsidization by producer x's plant in country X.²⁷⁷

If producer x uses a dumped input purchased from a related supplier, the domestic industry of the downstream product can bring a complaint against the downstream product in which the cost of the dumped input could be construed.

If producer x slightly alters the product or develops a later generation of the same product, an adequate product description

274. Therefore, the argument that antidumping duties are imposed without findings of dumping is to a certain extent invalidated *ex post facto*.

275. The refund procedure is supposed to offer relief, but it has many practical defects. See E. VERMULST, *supra* note 72, at 252-54.

276. This may, however, run into major practical problems.

277. This refers to the MNC situation, discussed in notes 46-60 and 209-214, *supra*.

adopted in the course of the proceeding might alleviate many of the potential problems.

Imposition of antidumping duties is conditional on the twin findings that imports of product x, produced and/or exported by producer x have been made at dumped prices and have caused material injury to the domestic industry manufacturing product x. As GATT article VI is by its very nature an exception to the crucial GATT principles of tariff bindings and most-favored-nation treatment, it must be construed narrowly.²⁷⁸

The diversion approaches suggested by the United States and the EC essentially assume that the shifting of production facilities or processes by producer x combined with a certain continued reliance on parts originating in country X may substitute findings of dumping and resulting injury with regard to the parts shipped by producer x from country X or the finished product now coming from country Y, later-developed or altered products. This assumption changes the nature of the objectionable behavior from injurious dumping to certain globalization strategies or to the inherent characteristics of certain product sectors.²⁷⁹ It is submitted that this assumption is an extraordinary jump in logic which should be taken with more caution than thus far has been the case.

On the other hand, it must be recognized that the on-going and ever-increasing globalization and specialization of the world economy pose certain practical problems to the effective enforcement of antidumping law that — proceeding on the assumption that there is demand for an antidumping law as such²⁸⁰ — need to be addressed.

If, for example, following imposition of antidumping duties, producer x of product x sets up a manufacturing base for product x within the importing country in which he uses a very substantial portion of exporting country parts, and the parts are manufactured only cap­tively in the industry concerned, both the determination of dumping (how does one calculate normal value and export price?) and the determination of injury (how does one calculate injury to domestic production of parts for which there is no open market?) become rather complicated. Such practical problems are compounded if the product concerned is comprised of a multitude of parts.

278. Compare Messerlin, *Antidumping Above All 2* (Feb. 20, 1990) (unpublished manuscript).

279. In certain industrial sectors, e.g., consumer electronics, it seems rather normal for products to have a short life cycle. Therefore, frequent product changes and product innovations are a matter of course.

280. Not everybody agrees with this assumption. See, e.g., Davey, *Antidumping Laws: A Time for Restriction*, in the 1988 proceedings of the FORDHAM CORPORATE LAW INSTITUTE, EUROPEAN/AMERICAN ANTITRUST AND TRADE LAW § VIII 1-41 (Hawk ed. 1989).

More principally, if, for example, — following imposition of antidumping duties on product x manufactured by producer x in country X — producer x sets up a subsidiary in the importing country in which he assembles product x with 100 percent country-X components with negligible importing-country-value added, the reasonable presumption of circumvention created by such behavior might be a ground for establishment of a special expedited procedure. The expedited anti-diversion procedure would be designed to serve as a shortcut to replace findings of dumping and resulting injury with regard to the parts coming from country X.²⁸¹ This would alleviate the burden both for the domestic industry of filing a new complaint and waiting at least a year for relief and for the administering authorities in performing its investigative functions.

From a GATT-legal point of view, the suggested approach would necessitate a redefinition of the like product to include — for purposes of assessing diversion²⁸² — parts and components within the definition of the like product provided that minimal value is added in the importing country.

An expedited procedure might also be warranted in cases where producer x's exports from country X are subject to antidumping duties and producer x then starts producing the like product in and exporting it from country Y, again with minimal third-country-value added. From a GATT-legal point of view, such third-country assembly could be captured under the transshipment problem. An interpretive note could be adopted to the transshipment provision clarifying that marginal production activities in a third country justify invocation of the transshipment clause. This would authorize administering authorities in the importing country to base normal value on either country of origin (i.e., country X) or country of export (i.e., country Y).

In both situations, the clear *circumvention* (i.e., the nature of the offense) justifies the adoption of special procedures to maintain the interface function of the antidumping instrument. In all other cases, special procedures risk becoming short-circuits in the world trading system.

281. This assumes that adequate review and refund proceedings are in place to grant the foreign producer immediate and effective relief justifying the *de facto* shift in burden of proof.

282. An unqualified broadening of the "like product" definition might also have repercussions for other areas of antidumping law, especially the investigation of injury in the context of a "normal" antidumping investigation.