行政院及所屬各機關出國報告

（出國類別：研究）

「歐盟平衡稅及反傾銷稅案件公共利益調查實務」之研究

出國報告書

服務機關：經濟部貿易調查委員會

出 國 人 職　　稱：專員

姓　　名：林馨山

出國地區：比利時

出國期間：92 年 11 月 16 日至 11 月 26 日

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內容摘要：(二百至三百字)

歐盟推動公共利益條款之主要目的係為使反傾銷及平衡稅措施得以順利執行，有關法規為歐盟反傾銷法（第 21 條）及平衡稅法（第 31 條），其原則為除非利害關係人能提出不利歐盟整體利益之強烈理由，否則一旦傾銷（或補貼）損害之要件成立，即當課徵反傾銷稅（或平衡稅）。公共利益調查與損害調查為同一團隊，每案承辦人數大約在 2-5 人，傾銷（或補貼）、損害及公共利益同時展開調查，調查報告亦同時做成。公共利益之利害關係人包括歐盟產業、下游使用者、進口商、消費者，所有評論均有義務提出立論證明，否則歐盟執委會得不採信。

歐盟在反傾銷或平衡稅案中對公共利益之調查有其特殊背景，與我國國情不同，我國如擬比照歐盟調查方式對公共利益進行調查，似乎宜將我國反傾銷及平衡稅制度同時修改，以有充分時間進行程序。

目　錄

「歐盟平衡稅及反傾銷稅案件公共利益調查實務之研究」出國報告書

壹、研究目的

我國雖於「平衡稅及反傾銷稅課徵實施辦法」第十六條已規定財政部關稅稅率委員會審議是否課徵平衡稅及反傾銷稅時得斟酌案件對國家整體經濟利益（以下稱公共利益）之影響。惟對於如何進行公共利益調查評估（如調查方法、調查程序、調查範圍、調查內容、具體評估方式）未有規定，鑒於歐盟係世界上少數將公共利益考量列為反傾銷及平衡稅案件必要條件之 WTO 會員，爰擬藉由研究其實務經驗作為我國辦理案件之參考。

本研究主要藉由拜訪歐盟執委會負責反傾銷及平衡稅案件調查中主管公共利益之官員、律師及業者，了解其案件進行中有關公共利益調查評估實務，復由相關案例研究印證歐盟如何進行公共利益調查，最後提出我國處理此類案件之建議。

貳、研究過程

本次出國研究之行程如下：

92 年 11 月 17 日由我國駐歐盟兼比利時台北經濟文化辦事處經濟組許秘書莉美陪同，拜會該處魏副代表可銘，就本次拜訪行程及內容交換意見。

92 年 11 月 18 日由我國駐歐盟兼比利時台北經濟文化辦事處經濟組許秘書莉美陪同，拜會歐盟執委會貿易總署官員 Markoa LATTI、Moumen HAMDOUCH 及 Maria Dolores FERNANDEZ GOMES，就歐盟反傾銷及平衡稅案件公共利益考量之細節進行瞭解。

92 年 11 月 20 日拜會 Van Bael & Bellis 律師事務所 Philippe De Baere 律師，就歐盟反傾銷及平衡稅案件公共利益考量之細節交換意見。

92 年 11 月 21 日由我國駐歐盟兼比利時台北經濟文化辦事處經濟組范莎娜小姐陪同，拜會歐盟鋼鐵公會(EUROFER) Jean-Louis Moray(Director)，就歐盟反

傾銷及平衡稅案件公共利益考量之業者觀點進行瞭解。

92 年 11 月 24 日續與歐盟執委會貿易總署官員 Moumen HAMDOUCH，進一步就歐盟反傾銷及平衡稅案件公共利益考量之問題進行討論。

參、研究內容

一、與歐盟各代表訪談結論

（一）相關法規

1、歐盟有關公共利益之法律規定，在其反傾銷法(Council Regulation(EC) No 384/96）之第 21 條及平衡稅法（Council Regulation （EC） No 2026/97）之第 31 條。（該二法最新修訂日期為 2002 年 11 月，詳如附件一、二）。此二法有關公共利益之規定完全相同。其重點為：

（1）評估公共利益時，應特別考量消除有損害之傾銷（或補貼）所造成的貿易扭曲效果及回復有效競爭環境之需要。若有證據可明確判定不符合歐盟整體利益時，即使傾銷（或補貼）及損害成立，亦可判定不採取措施。

（2）申請者、進口商及其所屬公會使用者代表及消費團體代表可於展開反傾銷或平衡稅調查之公告中指定期間內，主動通知執委會並提供資料。其他利害關係人有權獲知該資料或適當之摘要，及就此資料表達意見。

（3）利害關係人有權要求舉行聽證。

（4）利害關係人有權對臨時措施表示意見。

（5）執委會應對利害關係人所提之資料，調查其代表性並進行分析，並將其分析結果與書面審查之意見一併提交諮詢委員會，依諮詢委員會意見作成是否課徵反傾銷稅或平衡稅之建議。

（6）利害關係人有權要求獲知最後可能認定結果之事實及考量之資訊。

2、有關作業規範或指導原則部分，歐盟表示並無另訂其他作業規範或指

導原則。

（二）調查機關及其分工

歐盟執委會處理反傾銷及平衡稅案件單位現為貿易總署 B 處，公共利益調查與損害調查為同一團隊，視案件之複雜程度而配置人力，每案承辦人數不同，大約在 2-5 人（依涉案廠商多寡、產業廠商數目、牽涉多少會員國等）。

（三）調查時程

傾銷（或補貼）、損害及公共利益同時展開調查，調查報告亦同時做成，初步調查報告大約在九個月左右完成，最後調查報告在十二個月完成，最遲不超過十五個月。歐盟於展開調查公告將會摘要申請案情，並請對歐盟利益有評論者，在一定期間內登記，以便寄發問卷。在傾銷（或補貼）、損害之要件成立下，始考量公共利益。

（四）調查範圍

公共利益之利害關係人包括歐盟產業、下游使用者、進口商、消費者，惟利害關係人須說明其與涉案產品之關聯性及其於各團體之代表性。上游產業利益雖未明列為公共利益考量之對象，但實務上如其有提交意見，執委會亦會考量。

（五）調查方法及內容

主要依個別案情設計查問卷，請各利害關係人分別就課稅與不課稅所可能帶來影響表示意見，調查內容依個案案情不同而有不同調查重點，並無一定格式。惟所有評論均有義務提出立論證明，否則歐盟執委會得不採信。

（六）調查報告

歐盟利益係連同傾銷（或補貼）、損害部分由執委會起草調查報告，經諮詢委員會（Advisory committee）確認後，最後提理事會（Council）通過執行。調查報告草案可能被諮詢委員會數度退回修改，最後如獲諮詢委員會通過，在理事會也一定會通過，因二者成員均來自會員國，立場理當相同。有關歐盟整體利益與傾銷（或補貼）、

損害存在之權衡，除非利害關係人能提出不利歐盟整體利益之強烈理由，否則一旦傾銷（或補貼）、損害之要件成立，即當課稅。

二、案例研析（詳如附件三）

歐盟公共利益通常即為歐盟產業之利益，歐盟官員表示除非利害關係人能提出不利歐盟整體利益之強烈理由，否則一旦傾銷（或補貼）、損害之要件成立，即當課徵反傾銷稅。綜觀歐盟之反傾銷或平衡稅案例，僅有極少數案例係因公共利益之考量而不予課稅。執委會除考量是否因公共利益而不予課稅外，亦會影響救濟程度，如在未加工鎳（Unwrought Nickel）案中，執委會認為如反傾銷稅稅率超過7%，將使俄國進口貨為其他國家低價進口貨所取代，故稅率應不超過7%。此與歐盟曾於2001年4月反傾銷協定執行專案小組中稱其公共利益考量僅於決定是否課稅而不影響稅率之高低，似不盡相同。以下列舉歐盟執委會處理公共利益之案例，說明考量重點：

（一）歐盟產業之利益：

在確定歐盟產業因傾銷（或補貼）影響而受損害，進而評估課稅是否符合歐盟產業利益時，於許多案例中常有下列標準陳述：

「歐盟產業已盡力改善其生產力，降低生產成本，提高其競爭力，並進行合理化措施之努力。」

然後歐盟執委會通常結論如不課稅，將對歐盟產業產生進一步惡化之影響。

在有些案例中執委會更進一步闡述及強調維持歐盟產品以維持工作機會，避免依賴進口貨品，保護環境及持續維持技術引進之必要，課稅符合歐盟整體經濟利益。

然而執委會亦有其他理由說明課稅係符合歐盟之公共利益，如在溴化鉀（Potassium Permanganate）案中執委會認為如不採行措施將嚴重影響在德國之國營企業民營化進程。

以下是以歐盟產業利益為由而停止調查之案例：

在打字機（Typewriters）案中，歐盟法庭否決執委會有關保護無

效率產業不符歐盟利益之論述。

在大西洋養殖鮭魚（Farmed Atlantic Salmon） 案中，執委會認為課徵反傾銷稅僅會造成歐盟市場之鮭魚價格上漲，此僅會將財富轉移至未被課徵反傾銷稅之其他國家生產者或出口商，遠較歐盟產業為多，因此課徵反傾銷稅不符合歐盟產業利益。

（二）消費者利益

與歐盟產業利益相較，消費者利益顯得不重要，執委會通常以「消費者或其團體未表示意見，顯示反傾銷或平衡稅措施之影響並不受其重視」作為結論。

在卡式錄音機（Video Cassette Recorders）案中， 執委會認為無人能確保消費者將持續自不公平競爭中獲得價格利益，而且課徵反傾銷稅致價格上漲對消費者之不利益將被保障國內產業就業及維持此一重要產業生存等利益取代。

在彩色電視機接收器（Colour Television Receivers）案中，執委會表示因歐盟市場中仍有大量競爭生產者及大量產品，且此一產品處於高度價格競爭，繼續課徵反傾銷稅將不違反消費者利益。

在壓縮磁碟片（Compact Disks）案中，執委會雖承認歐盟現有及未來產能均無法滿足其市場需求，但認為此無法矯正台灣之傷害性行為，執委會仍決定對台灣產品課徵反傾銷稅。

因消費者利益而停止調查之案例如下：

在相簿（Photo Albums）案中，執委會認為在較為便宜之非裝訂相簿類別2、3，歐盟產業之供應不足，如採行措施將會造成短缺，因此消費者利益較產業利益為重。

在雷射光學讀寫頭（Laser Optical Reading Systems）案中，執委會認為課徵反傾銷稅將嚴重限制消費者選擇權利，且歐盟產業於短期間內無法滿足消費者所需型號。

（三）使用者利益

與歐盟產業利益相較，使用者利益亦較不重要，因而執委會拒絕以不符歐盟公共利益為由而不予課徵反傾銷稅或平衡稅之請求。通常執委會認為「使用者並未積極合作，顯示課稅對其成本影響不大」。在大多數案例中執委會認為課稅致價格上漲對使用者之衝擊並不顯著(因其占成本比例有限)、或維持國內產業則使用者不致過度依賴外貨來源、或有數種規格無法從其他國家獲得，因此課稅對使用者利益並無顯著不利影響。

然而仍有下列案例執委會以使用者利益為由而停止調查：

在矽鋼板(Ferro-Silicon)落日檢討案中，執委會認為雖以年度來看，課徵反傾銷稅對使用者成本影響有限，但其累積量應加以考慮，因此無須再給予五年保護措施。

因使用者利益而停止調查案例，另有未加工鈦（Wrought Titanium）及松香膠（Gum Rosin）案，惟執委會並未詳細敘明停止調查之理由。

在鎢酸化合物（Tungstic Oxide and Acid ）案中，執委會認為課徵反傾銷稅可能導致使用者轉向其他供應者，歐盟產業所受損害並無法立即消失。

（四）對進口商或銷售者之影響

通常執委會認為「進口商之產品係來自多元系統，故課稅之衝擊，應不致使進口商陷於嚴重風險中」。

在壓縮磁碟片（Compact Disks）案中，執委會甚至認為由三家進口商於2000年所受損失應可證明1999年獲利乃因其價格較高，故高價格水準對進口商有利。

在列表機案（Printer）案中，雖外國製造商聲稱他們給予歐盟市場大量銷售工作機會，如課徵反傾銷稅將嚴重損害工作機會，但執委會認為維持歐盟產業製造部門之工作機會，更符合歐盟之利益。

（五）對市場競爭之影響

課稅是否將減低市場競爭性或造成寡占狀態，一直備受爭議，執委

會通常以「市場仍有其他許多來源及課稅程度並非要阻止對該國進口」回覆。

在打字機色帶（Typewriter Ribbon Fabrics）案中，因僅有一家中國製造商及一家歐盟產業生產者，執委會認為僅有一家供應者不符合歐盟利益，保護措施應避免中國製造商退出歐盟市場或減低其市場競爭性，因此價格具結被認為較為適當。

在氯化鉀（Potassium Chloride）落日檢討中，執委會認為特定稅率及價格具結消滅了進口來源，妨礙歐盟市場之競爭性，因此改變原救濟措施之形式。

在不銹鋼棒（Stainless Steel Bars）案中，歐盟第一法庭歐盟否決執委會課徵平衡稅之決定，第一法庭認為執委會應考量產品之價格結構，且應接受課徵平衡稅將對產品價格衝擊之意見。

在不銹鋼厚板（Stainless Steel Heavy Plates）案中，有出口商指稱歐盟產業所受損害其實是肇因於歐盟產業本身之反競爭行為，特別是歐盟產業之四家廠商中有三家曾於1998年因其聯合定價行為被執委會罰款，最後歐盟鋼鐵公會撤案。

在無縫鋼管（Seamless Pipes and Tubes）案中，執委會認為在案件進行前，歐盟產業雖曾有反競爭行為，但無理由認定目前課徵反傾銷稅後未來將對該市場競爭有衝擊。

（六）與其他國家之貿易關係

在尿素（Urea）案中，曾有對馬來西亞課徵反傾銷稅將可能使東南亞國協（ASEAN）國家重新考慮其對歐盟肥料部門開放政策之爭論，惟執委會認為雖然與ASEAN國家維持良好關係符合歐盟利益，但此一關係應係雙方互惠才有意義，此意味著馬來西亞不該有傾銷行為。

肆、結論及建議

一、國內學者曾於研究中指出，「在實務上，執委會並未制定任何標準以協商商業使用者、消費者及生產者相衝突之利益。歐盟從未認為有建立衡量

標準之必要，蓋其他團體之利益從未認真被考量，其實執委會仍以保護歐盟產業為決定反傾銷案件之最高指導原則，從未對歐盟市場競爭狀態做過認真及詳盡之評估，以評估使用者及消費者所受之衝擊。」[1]，由觀察歐盟反傾銷或平衡稅法規及案例中，確實未見其衡量標準及詳盡之評估，絕大多數案例仍以保護歐盟產業為優先考量，可見公共利益並非執委會處理案件之考量重點。

二、有關歐盟利益調查形成背景，雖歐盟執委會表示歐盟係以高於世界貿易組織（WTO）協定規範自我要求，希望在反傾銷或平衡稅案件調查中成為公共利益調查之領導者，惟 Van Bael & Bellis 律師事務所 Philippe 律師卻認為歐盟會員國對反傾銷或平衡稅案件之調查常持不同看法，如棉花產品類，南方之法、德等生產原物料國家支持反傾銷或平衡稅措施，而北方如英國、瑞典之原物料使用者則反對，因而形成南北兩大集團彼此利益衝突，導致反傾銷或平衡稅措施無法順利執行。於是歐盟執委會為使反傾銷或平衡稅措施得以順利執行，爰推動歐盟利益條款，要求會員要以歐盟整體利益取代各會員利益為出發點，除非能提出不利歐盟整體利益之強烈理由，否則不得以其國家利益而反對反傾銷或平衡稅措施之採行。此一條款主要目的是在迫使會員國難以因本國利益而反對執行反傾銷或平衡稅措施，其為充滿政治協商之結果。在實務上，僅有極少數案件因不利歐盟整體利益之理由而不予課稅或終止調查。

三、歐盟在反傾銷或平衡稅案公共利益調查中，雖未見其具體衡量標準及詳盡評估方式，惟其反傾銷或平衡稅案件進行時，代表各會員國之諮詢委員可對執委會調查報告多次提出修改意見，因此各會員國之不同利益已可充分表達，且執委會負責傾銷（或補貼）、損害及公共利益調查之單位同為貿易總署 B 處，在考量是否因公共利益不課稅時，權責清楚。因此，歐盟在反傾銷或平衡稅案中對公共利益調查之特殊背景，與我國國情及制度極為不同，故我國主管機關處理此類案件是否須效法歐盟仍有討論空間。且由於我國反傾銷及平衡稅制度原係師法美國，如擬比照歐盟調查方式對公共利益進行調查，似乎宜將我國反傾銷及平衡稅制度同時修改，以有充分時間進行程序，使調查得以完備。

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[1] 林彩瑜，論國內反傾銷程序其公共利益條款之訂定，進口救濟論叢 11，139 頁，中華民國全國工業總會

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COUNCIL REGULATION (EC) No 384/96

of 22 December 1995

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

(OJ L 56, 6.3.1996, p. 1)

Amended by:

		Official Journal		
		No	page	date
►M1	Council Regulation (EC) No 2331/96 of 2 December 1996	L 317	1	6.12.1996
►M2	Council Regulation (EC) No 905/98 of 27 April 1998	L 128	18	30.4.1998
►M3	Council Regulation (EC) No 2238/2000 of 9 October 2000	L 257	2	11.10.2000
►M4	Council Regulation (EC) No 1972/2002 of 5 November 2002	L 305	1	7.11.2002

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COUNCIL REGULATION (EC) No 384/96

of 22 December 1995

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

THE COUNCIL OF THE EUROPEAN UNION,

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

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

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

(1) Whereas, by Regulation (EC) No 2423/88 (3), the Council adopted common rules for protection against dumped or subsidized imports from countries which are not members of the European Community;

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

(3) Whereas the multilateral trade negotiations concluded in 1994 have led to new Agreements on the implementation of Article VI of GATT and it is therefore appropriate to amend the Community rules in the light of these new Agreements; whereas is it also desirable, in the light of the different nature of the new rules for dumping and subsidies respectively, to have a separate body of Community rules in each of those two areas; whereas, consequently, the new rules on protection against subsidies and countervailing duties are contained in a separate Regulation;

(4) Whereas, in applying the rules it is essential, in order to maintain the balance of rights and obligations which the GATT Agreement establishes, that the Community take account of how they are interpreted by the Community's major trading partners;

(5) Whereas the new agreement on dumping, namely, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as 'the 1994 Anti-Dumping Agreement'), contains new and detailed rules, relating in particular to the calculation of dumping, procedures for initiating and pursuing an investigation, including the establishment and treatment of the facts, the imposition of provisional measures, the imposition and collection of anti-dumping duties, the duration and review of anti-dumping measures and the public disclosure of information relating to anti-dumping investigations; whereas, in view of the extent of the changes and to ensure a proper and transparent application of the new

(1) OJ No C 319, 30. 11. 1995.
(2) OJ No C 17, 22. 1. 1996.
(3) OJ No L 209, 2. 8. 1988, p. 1, as last amended by Regulation (EC) No 522/94 (OJ No L 66, 10. 3. 1994, p. 10).

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rules, the language of the new agreements should be brought into Community legislation as far as possible;

(6) Whereas it is desirable to lay down clear and detailed rules on the calculation of normal value; whereas in particular such value should in all cases be based on representative sales in the ordinary course of trade in the exporting country; whereas, it is expedient to define the circumstances in which domestic sales may be considered to be made at a loss and may be disregarded, and in which recourse may be had to remaining sales, or to constructed normal value, or to sales to a third country; whereas it is also desirable to provide for a proper allocation of costs, even in start-up situations; whereas it is also appropriate to lay down guidance as to definition of start-up and the extent and method of allocation; whereas it is also necessary, when constructing normal value, to indicate the methodology that is to be applied in determining the amounts for selling, general and administrative costs and the profit margin that should be included in such value;

(7) Whereas when determining normal value for non-market economy countries, it appears prudent to set out rules for choosing the appropriate market-economy third country that is to be used for such purpose and, where it is not possible to find a suitable third country, to provide that normal value may be established on any other reasonable basis;

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

(9) Whereas, for the purpose of ensuring a fair comparison between export price and normal value, it is advisable to list the factors which may affect prices and price comparability and to lay down specific rules as to when and how the adjustments should be made, including the fact that any duplication of adjustments should be avoided; whereas it is also necessary to provide that comparison may be made using average prices although individual export prices may be compared to an average normal value where the former vary by customer, region or time period;

(10) Whereas it is desirable to lay down clear and detailed guidance as to the factors which may be relevant for the determination of whether the dumped imports have caused material injury or are threatening to cause injury; whereas, in demonstrating that the volume and price levels of the imports concerned are responsible for injury sustained by a Community industry, attention should be given to the effect of other factors and in particular prevailing market conditions in the Community;

(11) Whereas it is advisable to define the term 'Community industry' and to provide that parties related to exporters may be excluded from such industry and to define the term 'related'; whereas, it is also necessary to provide for anti-dumping action to be taken on behalf of producers in a region of the Community and to lay down guidelines on the definition of such region;

(12) Whereas it is necessary to lay down who may lodge an anti-dumping complaint, including the extent to which it should be supported by the Community industry, and the information on dumping, injury and causation which such complaint should contain; whereas it is also expedient to specify the procedures for the rejection of complaints or the initiation of proceedings;

(13) Whereas it is necessary to lay down the manner in which interested parties should be given notice of the information which the authorities require, and should have ample opportunity to present all relevant evidence and to defend their interests; whereas it is also desirable to set out clearly the rules and procedures to be followed during the investigation, in particular the rules whereby interested parties are to make themselves known, present their views and submit information within specified time limits, if

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such views and information are to be taken into account; whereas it is also appropriate to set out the conditions under which an interested party may have access to, and comment on, information presented by other interested parties; whereas there should also be cooperation between the Member States and the Commission in the collection of information;

(14) Whereas it is necessary to lay down the conditions under which provisional duties may be imposed, including the condition that they may be imposed no earlier than 60 days from initiation and not later than nine months thereafter; whereas, for administrative reasons, it is also necessary to provide that such duties may in all cases be imposed by the Commission, either directly for a nine-month period or in two stages of six and three months;

(15) Whereas it is necessary to specify procedures for accepting undertakings which eliminate dumping and injury instead of imposing provisional or definitive duties; whereas it is also appropriate to lay down the consequences of breach or withdrawal of undertakings and that provisional duties may be imposed in cases of suspected violation or where further investigation is necessary to supplement the findings; whereas, in accepting undertakings, care should be taken that the proposed undertakings, and their enforcement, do not lead to anti-competitive behaviour;

(16) Whereas it is necessary to provide that the termination of cases should, irrespective of whether definitive measures are adopted or not, normally take place within 12 months, and in no case later than 15 months, from the initiation of the investigation; whereas investigations or proceedings should be terminated where the dumping is *de minimis* or the injury is negligible, and it is appropriate to define those terms; whereas, where measures are to be imposed, it is necessary to provide for the termination of investigations and to lay down that measures should be less than the margin of dumping if such lesser amount would remove the injury, as well as to specify the method of calculating the level of measures in cases of sampling;

(17) Whereas it is necessary to provide for retroactive collection of provisional duties if that is deemed appropriate and to define the circumstances which may trigger the retroactive application of duties to avoid the undermining of the definitive measures to be applied; whereas it is also necessary to provide that duties may be applied retroactively in cases of breach or withdrawal of undertakings;

(18) Whereas it is necessary to provide that measures are to lapse after five years unless a review indicates that they should be maintained; whereas it is also necessary to provide, in cases where sufficient evidence is submitted of changed circumstances, for interim reviews or for investigations to determine whether refunds of anti-dumping duties are warranted; whereas it is also appropriate to lay down that in any recalculation of dumping which necessitates a reconstruction of export prices, duties are not to be treated as a cost incurred between importation and resale where the said duty is being reflected in the prices of the products subject to measures in the Community;

(19) Whereas it is necessary to provide specifically for the reassessment of export prices and dumping margins where the duty is being absorbed by the exporter through a form of compensatory arrangement and the measures are not being reflected in the prices of the products subject to measures in the Community;

(20) Whereas the 1994 Anti-Dumping Agreement does not contain provisions regarding the circumvention of anti-dumping measures, though a separate GATT Ministerial Decision recognizes circumvention as a problem and has referred it to the GATT Anti-dumping Committee for resolution; whereas given the failure of the multilateral negotiations so far and pending the outcome of the referral to the GATT Anti-Dumping

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Committee, it is necessary to introduce new provisions into Community legislation to deal with practices, including mere assembly of goods in the Community or a third country, which have as their main aim the circumvention of anti-dumping measures;

(21) Whereas it is expedient to permit suspension of anti-dumping measures where there is a temporary change in market conditions which makes the continued imposition of such measures temporarily inappropriate;

(22) Whereas it is necessary to provide that imports under investigation may be made subject to registration upon importation in order to enable measures to be applied subsequently against such imports;

(23) Whereas in order to ensure proper enforcement of measures, it is necessary that Member States monitor, and report to the Commission, the import trade of products subject to investigation or subject to measures, and also the amount of duties collected under this Regulation;

(24) Whereas it is necessary to provide for consultation of an Advisory Committee at regular and specified stages of the investigation; whereas, the Committee should consist of representatives of Member States with a representative of the Commission as chairman;

(25) Whereas it is expedient to provide for verification visits to check information submitted on dumping and injury, such visits being, however, conditional on proper replies to questionnaires being received;

(26) Whereas it is essential to provide for sampling in cases where the number of parties or transactions is large in order to permit completion of investigations within the appointed time limits;

(27) Whereas it is necessary to provide that where parties do not cooperate satisfactorily other information may be used to establish findings and that such information may be less favourable to the parties than if they had cooperated;

(28) Whereas provision should be made for the treatment of confidential information so that business secrets are not divulged;

(29) Whereas it is essential that provision be made for proper disclosure of essential facts and considerations to parties which qualify for such treatment and that such disclosure be made, with due regard to the decision-making process in the Community, within a time period which permits parties to defend their interests;

(30) Whereas it is prudent to provide for an administrative system under which arguments can be presented as to whether measures are in the Community interest, including the consumers' interest, and to lay down the time periods within which such information has to be presented as well as the disclosure rights of the parties concerned;

(31) Whereas, by Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community [1], the Council repealed Regulation (EEC) No 2423/88 and instituted a new common system of defence against dumped imports from countries not members of the European Community;

(32) Whereas significant errors in the text of Regulation (EC) No 3283/94 became apparent on publication;

(33) Whereas, moreover, that Regulation has already been twice amended;

[1] OJ No L 349, 31. 12. 1994, p. 1. Regulation as last amended by Regulation (EC) No 1251/95 (OJ No L 122, 2. 6. 1995, p. 1).

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(34) Whereas, in the interests of clarity, transparency and legal certainty, that Regulation should therefore be repealed and replaced, without prejudice to the anti-dumping proceedings already initiated under it or under Regulation (EEC) No 2423/88,

HAS ADOPTED THIS REGULATION:

Article 1

Principles

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

2. A product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.

3. The exporting country shall normally be the country of origin. However, it may be an intermediate country, except where, for example, the products are merely transhipped through that country, or the products concerned are not produced in that country, or there is no comparable price for them in that country.

4. For the purpose of this Regulation, the term 'like product' shall be interpreted to mean a product which is identical, that is to say, 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.

Article 2

Determination of dumping

A. NORMAL VALUE

1. The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.

Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.

▼M4

In order to determine whether two parties are associated account may be taken of the definition of related parties set out in Article 143 of Commission Regulation (EEC) 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [1].

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2. Sales of the like product intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5 % or more of the sales volume of the product under consideration to the Community. However, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned.

3. When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal

[1] OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Commission Regulation (EC) No 444/2002 (OJ L 68, 12.3.2002, p. 11).

▼B

value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative. ►M4 A particular market situation for the product concerned within the meaning of the preceding sentence may be deemed to exist, *inter alia*, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements. ◄

4. Sales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining normal value, only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

The extended period of time shall normally be one year but shall in no case be less than six months, and sales below unit cost shall be considered to be made in substantial quantities within such a period when it is established that the weighted average selling price is below the weighted average unit cost, or that the volume of sales below unit cost is not less than 20 % of sales being used to determine normal value.

5. Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration. ►M4 If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets. ◄

Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilized. In the absence of a more appropriate method, preference shall be given to the allocation of costs on the basis of turnover. Unless already reflected in the cost allocations under this subparagraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production.

Where the costs for part of the period for cost recovery are affected by the use of new production facilities requiring substantial additional investment and by low capacity utilization rates, which are the result of start-up operations which take place within or during part of the investigation period, the average costs for the start-up phase shall be those applicable, under the abovementioned allocation rules, at the end of such a phase, and shall be included at that level, for the period concerned, in the weighted average costs referred to in the second subparagraph of paragraph 4. The length of a start-up phase shall be determined in relation to the circumstances of the producer or exporter concerned, but shall not exceed an appropriate initial portion of the period for cost recovery. For this adjustment to costs applicable during the investigation period, information relating to a start-up phase which extends beyond that period shall be taken into account where it is submitted prior to verification visits and within three months of the initiation of the investigation.

6. The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and

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sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(b) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;

(c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

▼M2

7. (a) In the case of imports from non-market economy countries ►M3 (1) ◄, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.

▼M3

(b) In anti-dumping investigations concerning imports from ►M4 ———— ◄ the People's Republic of China, the Ukraine, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, normal value will be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c) that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

▼M2

(c) A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

(1) Including Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Turkmenistan, Uzbekistan.

▼M2

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

— the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

— the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

— exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.

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B. EXPORT PRICE

8. The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.

9. In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

In these cases, adjustment for all costs, including duties and taxes, incurred between importation and resale, and for profits accruing, shall be made so as to establish a reliable export price, at the Community frontier level.

The items for which adjustment shall be made shall include those normally borne by an importer but paid by any party, either inside or outside the Community, which appears to be associated or to have a compensatory arrangement with the importer or exporter, including usual transport, insurance, handling, loading and ancillary costs; customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods; and a reasonable margin for selling, general and administrative costs and profit.

C. COMPARISON

10. A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed as follows:

(a) *Physical characteristics*

An adjustment shall be made for differences in the physical characteristics of the product concerned. The amount of the adjustment shall correspond to a reasonable estimate of the market value of the difference.

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(b) *Import charges and indirect taxes*

An adjustment shall be made to normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the exporting country and not collected or refunded in respect of the product exported to the Community.

(c) *Discounts, rebates and quantities*

An adjustment shall be made for differences in discounts and rebates, including those given for differences in quantities, if these are properly quantified and are directly linked to the sales under consideration. An adjustment may also be made for deferred discounts and rebates if the claim is based on consistent practice in prior periods, including compliance with the conditions required to qualify for the discount or rebates.

▼M1

(d) *Level of trade*

(i) An adjustment for differences in levels of trade, including any differences which may arise in OEM (Original Equipment Manufacturer) sales, shall be made where, in relation to the distribution chain in both markets, it is shown that the export price, including a constructed export price, is at a different level of trade from the normal value and the difference has affected price comparability which is demonstrated by consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. The amount of the adjustment shall be based on the market value of the difference.

(ii) However, in circumstances not envisaged under (i), when an existing difference in level of trade cannot be quantified because of the absence of the relevant levels on the domestic market of the exporting countries, or where certain functions are shown clearly to relate to levels of trade other than the one which is to be used in the comparison, a special adjustment may be granted.

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(e) *Transport, insurance, handling, loading and ancillary costs*

An adjustment shall be made for differences in the directly related costs incurred for conveying the product concerned from the premises of the exporter to an independent buyer, where such costs are included in the prices charged. Those costs shall include transport, insurance, handling, loading and ancillary costs.

(f) *Packing*

An adjustment shall be made for differences in the directly related packing costs for the product concerned.

(g) *Credit*

An adjustment shall be made for differences in the cost of any credit granted for the sales under consideration, provided that it is a factor taken into account in the determination of the prices charged.

(h) *After-sales costs*

An adjustment shall be made for differences in the direct costs of providing warranties, guarantees, technical assistance and services, as provided for by law and/or in the sales contract.

(i) *Commissions*

An adjustment shall be made for differences in commissions paid in respect of the sales under consideration. ►M4 The term 'commissions' shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis. ◄

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(j) *Currency conversions*

When the price comparison requires a conversion of currencies, such conversion shall be made using the rate of exchange on the date of sale, except that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Normally, the date of sale shall be the date of invoice but the date of contract, purchase order or order confirmation may be used if these more appropriately establish the material terms of sale. Fluctuations in exchange rates shall be ignored and exporters shall be granted 60 days to reflect a sustained movement in exchange rates during the investigation period.

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(k) *Other factors*

An adjustment may also be made for differences in other factors not provided for under subparagraphs (a) to (j) if it is demonstrated that they affect price comparability as required under this paragraph, in particular that customers consistently pay different prices on the domestic market because of the difference in such factors.

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D. DUMPING MARGIN

11. Subject to the relevant provisions governing fair comparison, the existence of margins of dumping during the investigation period shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community, or by a comparison of individual normal values and individual export prices to the Community on a transaction-to-transaction basis. However, a normal value established on a weighted average basis may be compared to prices of all individual export transactions to the Community, if there is a pattern of export prices which differs significantly among different purchasers, regions or time periods, and if the methods specified in the first sentence of this paragraph would not reflect the full degree of dumping being practised. This paragraph shall not preclude the use of sampling in accordance with Article 17.

12. The dumping margin shall be the amount by which the normal value exceeds the export price. Where dumping margins vary, a weighted average dumping margin may be established.

Article 3

Determination of injury

1. Pursuant to this Regulation, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.

3. With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of these factors can necessarily give decisive guidance.

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4. Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the effects of such imports shall be cumulatively assessed only if it is determined that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in Article 9 (3) and that the volume of imports from each country is not negligible; and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

5. The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidization, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilization of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

7. Known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.

8. The effect of the dumped imports shall be assessed in relation to the production of the Community industry of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

9. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

In making a determination regarding the existence of a threat of material injury, consideration should be given to such factors as:

(a) a significant rate of increase of dumped imports into the Community market indicating the likelihood of substantially increased imports;

(b) sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the Community, account being taken of the availability of other export markets to absorb any additional exports;

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(c) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports; and

(d) inventories of the product being investigated.

No one of the factors listed above by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury will occur.

Article 4

Definition of Community industry

1. For the purposes of this Regulation, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5 (4), of the total Community production of those products, except that:

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

(b) in exceptional circumstances the territory of the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (i) the producers within such a market sell all or almost all of their production of the product in question in that market; and (ii) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community. In such circumstances, injury may be found to exist even where a major portion of the total Community industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such a market.

2. For the purpose of paragraph 1, producers shall be considered to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

3. Where the Community industry has been interpreted as referring to the producers in a certain region, the exporters shall be given an opportunity to offer undertakings pursuant to Article 8 in respect of the region concerned. In such cases, when evaluating the Community interest of the measures, special account shall be taken of the interest of the region. If an adequate undertaking is not offered promptly or the situations set out in Article 8 (9) and (10) apply, a provisional or definitive duty may be imposed in respect of the Community as a whole. In such cases, the duties may, if practicable, be limited to specific producers or exporters.

4. The provisions of Article 3 (8) shall be applicable to this Article.

Article 5

Initiation of proceedings

1. Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be

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initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

The complaint may be submitted to the Commission, or to a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives. The complaint shall be deemed to have been lodged on the first working day following its delivery to the Commission by registered mail or the issuing of an acknowledgement of receipt by the Commission.

Where, in the absence of any complaint, a Member State is in possession of sufficient evidence of dumping and of resultant injury to the Community industry, it shall immediately communicate such evidence to the Commission.

2. A complaint under paragraph 1 shall include evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury. The complaint shall contain such information as is reasonably available to the complainant on the following:

(a) identity of the complainant and a description of the volume and value of the Community production of the like product by the complainant. Where a written complaint is made on behalf of the Community industry, the complaint shall identify the industry on behalf of which the complaint is made by a list of all known Community producers of the like product (or associations of Community producers of the like product) and, to the extent possible, a description of the volume and value of Community production of the like product accounted for by such producers;

(b) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(c) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the Community;

(d) information on changes in the volume of the allegedly dumped imports, the effect of those imports on prices of the like product on the Community market and the consequent impact of the imports on the Community industry, as demonstrated by relevant factors and indices having a bearing on the state of the Community industry, such as those listed in Article 3 (3) and (5).

3. The Commission shall, as far as possible, examine the accuracy and adequacy of the evidence provided in the complaint to determine whether there is sufficient evidence to justify the initiation of an investigation.

4. An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 % of total production of the like product produced by the Community industry.

5. The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the complaint seeking the initiation of an investigation. However, after receipt of a properly docu-

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mented complaint and before proceeding to initiate an investigation, the government of the exporting country concerned shall be notified.

6. If in special circumstances, it is decided to initiate an investigation without having received a written complaint by or on behalf of the Community industry for the initiation of such investigation, this shall be done on the basis of sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify such initiation.

7. The evidence of both dumping and injury shall be considered simultaneously in the decision on whether or not to initiate an investigation. A complaint shall be rejected where there is insufficient evidence of either dumping or of injury to justify proceeding with the case. Proceedings shall not be initiated against countries whose imports represent a market share of below 1 %, unless such countries collectively account for 3 % or more of Community consumption.

8. The complaint may be withdrawn prior to initiation, in which case it shall be considered not to have been lodged.

9. Where, after consultation, it is apparent that there is sufficient evidence to justify initiating a proceeding, the Commission shall do so within 45 days of the lodging of the complaint and shall publish a notice in the *Official Journal of the European Communities*. Where insufficient evidence has been presented, the complainant shall, after consultation, be so informed within 45 days of the date on which the complaint is lodged with the Commission.

10. The notice of initiation of the proceedings shall announce the initiation of an investigation, indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the periods within which interested parties may make themselves known, present their views in writing and submit information if such views and information are to be taken into account during the investigation; it shall also state the period within which interested parties may apply to be heard by the Commission in accordance with Article 6 (5).

11. The Commission shall advise the exporters, importers and representative associations of importers or exporters known to it to be concerned, as well as representatives of the exporting country and the complainants, of the initiation of the proceedings and, with due regard to the protection of confidential information, provide the full text of the written complaint received pursuant to paragraph 1 to the known exporters and to the authorities of the exporting country, and make it available upon request to other interested parties involved. Where the number of exporters involved is particularly high, the full text of the written complaint may instead be provided only to the authorities of the exporting country or to the relevant trade association.

12. An anti-dumping investigation shall not hinder the procedures of customs clearance.

Article 6

The investigation

1. Following the initiation of the proceeding, the Commission, acting in cooperation with the Member States, shall commence an investigation at Community level. Such investigation shall cover both dumping and injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of not less than six months immediately prior to the initiation of the proceeding. Information relating to a period subsequent to the investigation period shall, normally, not be taken into account.

2. Parties receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days to reply. The time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the day on which it was sent to the exporter or transmitted

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to the appropriate diplomatic representative of the exporting country. An extension to the 30 day period may be granted, due account being taken of the time limits of the investigation, provided that the party shows due cause for such extension, in terms of its particular circumstances.

3. The Commission may request Member States to supply information, and Member States shall take whatever steps are necessary in order to give effect to such requests. They shall send to the Commission the information requested together within the results of all inspections, checks or investigations carried out. Where this information is of general interest or where its transmission has been requested by a Member State, the Commission shall forward it to the Member States, provided it is not confidential, in which case a non-confidential summary shall be forwarded.

4. The Commission may request Member States to carry out all necessary checks and inspections, particularly amongst importers, traders and Community producers, and to carry out investigations in third countries, provided that the firms concerned give their consent and that the government of the country in question has been officially notified and raises no objection. Member States shall take whatever steps are necessary in order to give effect to such requests from the Commission. Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.

5. The interested parties which have made themselves known in accordance with Article 5 (10) shall be heard if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard.

6. Opportunities shall, on request, be provided for the importers, exporters, representatives of the government of the exporting country and the complainants, which have made themselves known in accordance with Article 5 (10), to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Oral information provided under this paragraph shall be taken into account in so far as it is subsequently confirmed in writing.

7. The complainants, importers and exporters and their representative associations, users and consumer organizations, which have made themselves known in accordance with Article 5 (10), as well as the representatives of the exporting country may, upon written request, inspect all information made available by any party to an investigation, as distinct from internal documents prepared by the authorities of the Community or its Member States, which is relevant to the presentation of their cases and not confidential within the meaning of Article 19, and that it is used in the investigation. Such parties may respond to such information and their comments shall be taken into consideration, wherever they are sufficiently substantiated in the response.

8. Except in the circumstances provided for in Article 18, the information which is supplied by interested parties and upon which findings are based shall be examined for accuracy as far as possible.

9. For proceedings initiated pursuant to Article 5 (9), an investigation shall, whenever possible, be concluded within one year. In any event, such investigations shall in all cases be concluded within 15 months of initiation, in accordance with the findings made pursuant to Article 8 for undertakings or the findings made pursuant to Article 9 for definitive action.

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Article 7

Provisional measures

1. Provisional duties may be imposed if proceedings have been initiated in accordance with Article 5, if a notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments in accordance with Article 5 (10), if a provisional affirmative determination has been made of dumping and consequent injury to the Community industry, and if the Community interest calls for intervention to prevent such injury. The provisional duties shall be imposed no earlier than 60 days from the initiation of the proceedings but not later than nine months from the initiation of the proceedings.

2. The amount of the provisional anti-dumping duty shall not exceed the margin of dumping as provisionally established, but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.

3. Provisional duties shall be secured by a guarantee, and the release of the products concerned for free circulation in the Community shall be conditional upon the provision of such guarantee.

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

5. Where a Member State requests immediate intervention by the Commission and where the conditions in paragraph 1 are met, the Commission shall within a maximum of five working days of receipt of the request, decide whether a provisional anti-dumping duty shall be imposed.

6. The Commission shall forthwith inform the Council and the Member States of any decision taken under paragraphs 1 to 5. The Council, acting by a qualified majority, may decide differently.

7. Provisional duties may be imposed for six months and extended for a further three months or they may be imposed for nine months. However, they may only be extended, or imposed for a nine-month period, where exporters representing a significant percentage of the trade involved so request or do not object upon notification by the Commission.

Article 8

Undertakings

1. Investigations may be terminated without the imposition of provisional or definitive duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices, so that the Commission, after consultation, is satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping and they should be less than the margin of dumping if such increases would be adequate to remove the injury to the Community industry.

2. Undertakings may be suggested by the Commission, but no exporter shall be obliged to enter into such an undertaking. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice consideration of the case. However, it may be determined that a threat of injury is more likely to be realized if the dumped imports continue. Undertakings shall not be sought or accepted from exporters unless a provisional affirmative determination of dumping and injury caused by such dumping has been made. Save in exceptional circumstances, undertakings may not be offered later than the end of the period during which representations may be made pursuant to Article 20 (5).

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3. Undertakings offered need not be accepted if their acceptance is considered impractical, if such as where the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. The exporter concerned may be provided with the reasons for which it is proposed to reject the offer of an undertaking and may be given an opportunity to make comments thereon. The reasons for rejection shall be set out in the definitive decision.

4. Parties which offer an undertaking shall be required to provide a non-confidential version of such undertaking, so that it may be made available to interested parties to the investigation.

5. Where undertakings are, after consultation, accepted and where there is no objection raised within the Advisory Committee, the investigation shall be terminated. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the investigation be terminated. The investigation shall be deemed terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

6. If the undertakings are accepted, the investigation of dumping and injury shall normally be completed. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases it may be required that an undertaking be maintained for a reasonable period. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Regulation.

7. The Commission shall require any exporter from which an undertaking has been accepted to provide, periodically, information relevant to the fulfilment of such undertaking, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a breach of the undertaking.

8. Where undertakings are accepted from certain exporters during the course of an investigation, they shall, for the purpose of Article 11, be deemed to take effect from the date on which the investigation is concluded for the exporting country.

9. In case of breach or withdrawal of undertakings by any party, a definitive duty shall be imposed in accordance with Article 9, on the basis of the facts established within the context of the investigation which led to the undertaking, provided that such investigation was concluded with a final determination as to dumping and injury and that the exporter concerned has, except where he himself has withdrawn the undertaking, been given an opportunity to comment.

10. A provisional duty may, after consultation, be imposed in accordance with Article 7 on the basis of the best information available, where there is reason to believe that an undertaking is being breached, or in case of breach or withdrawal of an undertaking where the investigation which led to the undertaking has not been concluded.

Article 9

Termination without measures; imposition of definitive duties

1. Where the complaint is withdrawn, the proceeding may be terminated unless such termination would not be in the Community interest.

2. Where, after consultation, protective measures are unnecessary and there is no objection raised within the Advisory Committee, the investigation or proceeding shall be terminated. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the proceeding be terminated. The proceeding shall be deemed terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

3. For a proceeding initiated pursuant to Article 5 (9), injury shall normally be regarded as negligible where the imports concerned repre-

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sent less than the volumes set out in Article 5 (7). For the same proceeding, there shall be immediate termination where it is determined that the margin of dumping is less than 2 %, expressed as a percentage of the export price, provided that it is only the investigation that shall be terminated where the margin is below 2 % for individual exporters and they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11.

4. Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting by simple majority on a proposal submitted by the Commission after consultation of the Advisory Committee. Where provisional duties are in force, a proposal for definitive action shall be submitted to the Council not later than one month before the expiry of such duties. The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.

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5. An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned.

Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:

(a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;

(b) export prices and quantities, and conditions and terms of sale are freely determined;

(c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

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6. When the Commission has limited its examination in accordance with Article 17, any anti-dumping duty applied to imports from exporters or producers which have made themselves known in accordance with Article 17 but were not included in the examination shall not exceed the weighted average margin of dumping established for the parties in the sample. For the purpose of this paragraph, the Commission shall disregard any zero and *de minimis* margins, and margins established in the circumstances referred to in Article 18. Individual duties shall be applied to imports from any exporter or producer which is granted individual treatment, as provided for in Article 17.

Article 10

Retroactivity

1. Provisional measures and definitive anti-dumping duties shall only be applied to products which enter free circulation after the time when the decision taken pursuant to Articles 7 (1) or 9 (4), as the case may be, enters into force, subject to the exceptions set out in this Regulation.

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2. Where a provisional duty has been applied and the facts as finally established show that there is dumping and injury, the Council shall decide, irrespective of whether a definitive anti-dumping duty is to be imposed, what proportion of the provisional duty is to be definitively collected. For this purpose, 'injury' shall not include material retardation of the establishment of a Community industry, nor threat of material injury, except where it is found that this would, in the absence of provisional measures, have developed into material injury. In all other cases involving such threat or retardation, any provisional amounts shall be released and definitive duties can only be imposed from the date that a final determination of threat or material retardation is made.

3. If the definitive anti-dumping duty is higher than the provisional duty, the difference shall not be collected. If the definitive duty is lower than the provisional duty, the duty shall be recalculated. Where a final determination is negative, the provisional duty shall not be confirmed.

4. A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures but not prior to the initiation of the investigation, provided that imports have been registered in accordance with Article 14 (5), the Commission has allowed the importers concerned an opportunity to comment, and:

(a) there is, for the product in question, a history of dumping over an extended period, or the importer was aware of, or should have been aware of, the dumping as regards the extent of the dumping and the injury alleged or found; and

(b) in addition to the level of imports which caused injury during the investigation period, there is a further substantial rise in imports which, in the light of its timing and volume and other circumstances, is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied.

5. In cases of breach or withdrawal of undertakings, definitive duties may be levied on goods entered for free circulation not more than 90 days before the application of provisional measures, provided that imports have been registered in accordance with Article 14 (5), and that any such retroactive assessment shall not apply to imports entered before the breach or withdrawal of the undertaking.

Article 11

Duration, reviews and refunds

1. An anti-dumping measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury.

2. A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon request made by or on behalf of Community producers, and the measure shall remain in force pending the outcome of such review.

An expiry review shall be initiated where the request contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Such a likelihood may, for example, be indicated by evidence of continued dumping and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious dumping.

In carrying out investigations under this paragraph, the exporters, importers, the representatives of the exporting country and the Community producers shall be provided with the opportunity to amplify, rebut

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or comment on the matters set out in the review request, and conclusions shall be reached with due account taken of all relevant and duly documented evidence presented in relation to the question as to whether the expiry of measures would be likely, or unlikely, to lead to the continuation or recurrence of dumping and injury.

A notice of impending expiry shall be published in the *Official Journal of the European Communities* at an appropriate time in the final year of the period of application of the measures as defined in this paragraph. Thereafter, the Community producers shall, no later than three months before the end of the five-year period, be entitled to lodge a review request in accordance with the second sub-paragraph. A notice announcing the actual expiry of measures pursuant to this paragraph shall also be published.

3. The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter or importer or by the Community producers which contains sufficient evidence substantiating the need for such an interim review.

An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.

In carrying out investigations pursuant to this paragraph, the Commission may, *inter alia*, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 3. In these respects, account shall be taken in the final determination of all relevant and duly documented evidence.

4. A review shall also be carried out for the purpose of determining individual margins of dumping for new exporters in the exporting country in question which have not exported the product during the period of investigation on which the measures were based.

The review shall be initiated where a new exporter or producer can show that it is not related to any of the exporters or producers in the exporting country which are subject to the anti-dumping measures on the product, and that it has actually exported to the Community following the abovementioned investigation period, or where it can demonstrate that it has entered into an irrevocable contractual obligation to export a significant quantity to the Community.

A review for a new exporter shall be initiated, and carried out on an accelerated basis, after consultation of the Advisory Committee and after Community producers have been given an opportunity to comment. The Commission Regulation initiating a review shall repeal the duty in force with regard to the new exporter concerned by amending the Regulation which has imposed such duty, and by making imports subject to registration in accordance with Article 14 (5) in order to ensure that, should the review result in a determination of dumping in respect of such an exporter, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

The provisions of this paragraph shall not apply where duties have been imposed under Article 9 (6).

5. The relevant provisions of this Regulation with regard to procedures and the conduct of investigations, excluding those relating to time limits, shall apply to any review carried out pursuant to paragraphs 2, 3 and 4. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

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6. Reviews pursuant to this Article shall be initiated by the Commission after consultation of the Advisory Committee. Where warranted by reviews, measures shall be repealed or maintained pursuant to paragraph 2, or repealed, maintained or amended pursuant to paragraphs 3 and 4, by the Community institution responsible for their introduction. Where measures are repealed for individual exporters, but not for the country as a whole, such exporters shall remain subject to the proceeding and may, automatically, be reinvestigated in any subsequent review carried out for that country pursuant to this Article.

7. Where a review of measures pursuant to paragraph 3 is in progress at the end of the period of application of measures as defined in paragraph 2, such review shall also cover the circumstances set out in paragraph 2.

8. Notwithstanding paragraph 2, an importer may request reimbursement of duties collected where it is shown that the dumping margin, on the basis of which duties were paid, has been eliminated, or reduced to a level which is below the level of the duty in force.

In requesting a refund of anti-dumping duties, the importer shall submit an application to the Commission. The application shall be submitted via the Member State of the territory in which the products were released for free circulation, within six months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty. Member States shall forward the request to the Commission forthwith.

An application for refund shall only be considered to be duly supported by evidence where it contains precise information on the amount of refund of anti-dumping duties claimed and all customs documentation relating to the calculation and payment of such amount. It shall also include evidence, for a representative period, of normal values and export prices to the Community for the exporter or producer to which the duty applies. In cases where the importer is not associate with the exporter or producer concerned and such information is not immediately available, or where the exporter or producer is unwilling to release it to the importer, the application shall contain a statement from the exporter or producer that the dumping margin has been reduced or eliminated, as specified in this Article, and that the relevant supporting evidence will be provided to the Commission. Where such evidence is not forthcoming from the exporter or producer within a reasonable period of time the application shall be rejected.

The Commission shall, after consultation of the Advisory Committee, decide whether and to what extent the application should be granted, or it may decide at any time to initiate an interim review, whereupon the information and findings from such review carried out in accordance with the provisions applicable for such reviews, shall be used to determine whether and to what extent a refund is justified. Refunds of duties shall normally take place within 12 months, and in no circumstances more than 18 months after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The payment of any refund authorized should normally be made by Member States within 90 day of the abovementioned decision.

9. In all review or refund investigations carried out pursuant to this Article, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Article 2, and in particular paragraphs 11 and 12 thereof, and of Article 17.

10. In any investigation carried our pursuant to this Article, the Commission shall examine the reliability of export prices in accordance with Article 2. However, where it is decided to construct the export price in accordance with Article 2 (9), it shall calculate it with no deduction for the amount of anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community.

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Article 12

1. Where the Community industry submits sufficient information showing that measures have led to no movement, or insufficient movement, in resale prices or subsequent selling prices in the Community, the investigation may, after consultation, be reopened to examine whether the measure has had effects on the abovementioned prices.

2. During a reinvestigation pursuant to this Article, exporters, importers and Community producers shall be provided with an opportunity to clarify the situation with regard to resale prices and subsequent selling prices: if it is concluded that the measure should have led to movements in such prices, then, in order to remove the injury previously established in accordance with Article 3, export prices shall be reassessed in accordance with Article 2 and dumping margins shall be recalculated to take account of the reassessed export prices. Where it is considered that a lack of movement in the prices in the Community is due to a fall in export prices which has occurred prior to or following the imposition of measures, dumping margins may be recalculated to take account of such lower export prices.

3. Where a reinvestigation pursuant to this Article shows increased dumping the measures in force shall be amended by the Council, by simple majority on a proposal from the Commission, in accordance with the new findings on export prices.

4. The relevant provisions of Articles 5 and 6 shall apply to any review carried out pursuant to this Article, except that such review shall be carried out expeditiously and shall normally be concluded within six months of the date of initiation of the reinvestigation.

5. Alleged changes in normal value shall only be taken into account under this Article where complete information on revised normal values, duly substantiated by evidence, is made available to the Commission within the time limits set out in the notice of initiation of an investigation. Where an investigation involves a re-examination of normal values, imports may be made subject to registration in accordance with Article 14 (5) pending the outcome of the reinvestigation.

Article 13

Circumvention

1. Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries of like products, or parts thereof, when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

2. An assembly operation in the Community or a third country shall be considered to circumvent the measures in force where:

(a) the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation and the parts concerned are from the country subject to measures; and

(b) the parts constitute 60 % or more of the total value of the parts of the assembled product, except that in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25 % of the manufacturing cost, and

(c) the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the assembled like product and there is evidence of dumping in relation to the normal values previously established for the like or similar products.

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3. Investigations shall be initiated pursuant to this Article where the request contains sufficient evidence regarding the factors set out in paragraph 1. Initiations shall be made, after consultation of the Advisory Committee, by Commission Regulation which shall also instruct the customs authorities to make imports subject to registration in accordance with Article 14 (5) or to request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities and shall be concluded within nine months. When the facts as finally ascertained justify the extension of measures, this shall be done by the Council, acting by simple majority and on a proposal from the Commission, from the date on which registration was imposed pursuant to Article 14 (5) or on which guarantees were requested. The relevant procedural provisions of this Regulation with regard to initiations and the conduct of investigations shall apply pursuant to this Article.

4. Products shall not be subject to registration pursuant to Article 14 (5) or measures where they are accompanied by a customs certificate declaring that the importation of the goods does not constitute circumvention. These certificates may be issued to importers, upon written application following authorization by decision of the Commission after consultation of the Advisory Committee or decision of the Council imposing measures and they shall remain valid for the period, and under the conditions, set down therein.

5. Nothing in this Article shall preclude the normal application of the provisions in force concerning customs duties.

Article 14

General provisions

1. Provisional or definitive anti-dumping duties shall be imposed by Regulation, and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the Regulation imposing such duties. Such duties shall also be collected independently of the customs duties, taxes and other charges normally imposed on imports. No product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from export subsidization.

2. Regulations imposing provisional or definitive anti-dumping duties, and Regulations or Decisions accepting undertakings or terminating investigations or proceedings, shall be published in the *Official Journal of the European Communities*. Such Regulations or Decisions shall contain in particular and with due regard to the protection of confidential information, the names of the exporters, if possible, or of the countries involved, a description of the product and a summary of the material facts and considerations relevant to the dumping and injury determinations. In each case, a copy of the Regulation or Decision shall be sent to known interested parties. The provisions of this paragraph shall apply *mutatis mutandis* to reviews.

3. Special provisions, in particular with regard to the common definition of the concept of origin, as contained in Council Regulation (EEC) No 2913/92 [1], may be adopted pursuant to this Regulation.

4. In the Community interest, measures imposed pursuant to this Regulation may, after consultation of the Advisory Committee, be suspended by a decision of the Commission for a period of nine months. The suspension may be extended for a further period, not exceeding one year, if the Council so decides, acting by simple majority on a proposal from the Commission. Measures may only be suspended where market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension, and provided that the Community industry has been given an opportunity to comment and these comments have been taken into

[1] OJ No L 302, 19. 10. 1992, p. 1.

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account. Measures may, at any time and after consultation, be reinstated if the reason for suspension is no longer applicable.

5. The Commission may, after consultation of the Advisory Committee, direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently be applied against those imports from the date of such registration. Imports may be made subject to registration following a request from the Community industry which contains sufficient evidence to justify such action. Registration shall be introduced by Regulation which shall specify the purpose of the action and, if appropriate, the estimated amount of possible future liability. Imports shall not be made subject to registration for a period longer than nine months.

6. Member States shall report to the Commission every month, on the import trade in products subject to investigation and to measures, and on the amount of duties collected pursuant to this Regulation.

Article 15

Consultations

1. Any consultations provided for in this Regulation shall take place within an Advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately at the request of a Member State or on the initiative of the Commission and in any event within a period of time which allows the time limits set by this Regulation to be adhered to.

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

3. Where necessary, consultation may be in writing only; in that event, the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation which the chairman shall arrange, provided that such oral consultation can be held within a period of time which allows the time limits set by this Regulation to be adhered to.

4. Consultation shall cover, in particular:

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

(b) the existence and extent of injury;

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

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

Article 16

Verification visits

1. The Commission shall, where it considers it appropriate, carry out visits to examine the records of importers, exporters, traders, agents, producers, trade associations and organizations and to verify information provided on dumping and injury. In the absence of a proper and timely reply, a verification visit may not be carried out.

2. The Commission may carry out investigations in third countries as required, provided that it obtains the agreement of the firms concerned, that it notifies the representatives of the government of the country in question and that the latter does not object to the investigation. As soon as the agreement of the firms concerned has been obtained the Commission should notify the authorities of the exporting country of the names and addresses of the firms to be visited and the dates agreed.

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3. The firms concerned shall be advised of the nature of the information to be verified during verification visits and of any further information which needs to be provided during such visits, though this should not preclude requests made during the verification for further details to be provided in the light of information obtained.

4. In investigations carried out pursuant to paragraphs 1, 2 and 3, the Commission shall be assisted by officials of those Member States who so request.

Article 17

Sampling

1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available.

2. The final selection of parties, types of products or transactions made under these sampling provisions shall rest with the Commission, though preference shall be given to choosing a sample in consultation with, and with the consent of, the parties concerned, provided such parties make themselves known and make sufficient information available, within three weeks of initiation of the investigation, to enable a representative sample to be chosen.

3. In cases where the examination has been limited in accordance with this Article, an individual margin of dumping shall, nevertheless, be calculated for any exporter or producer not initially selected who submits the necessary information within the time limits provided for in this Regulation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time.

4. Where it is decided to sample and there is a degree of non-cooperation by some or all of the parties selected which is likely to materially affect the outcome of the investigation, a new sample may be selected. However, if a material degree of non-cooperation persists or there is insufficient time to select a new sample, the relevant provisions of Article 18 shall apply.

Article 18

Non-cooperation

1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of facts available. Interested parties should be made aware of the consequences of non-cooperation.

2. Failure to give a computerized response shall not be deemed to constitute non-cooperation, provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost.

3. Where the information submitted by an interested party is not ideal in all respects it should nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.

4. If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons therefor and shall be granted an opportunity to provide further explanations within the time limit

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specified. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.

5. If determinations, including those regarding normal value, are based on the provisions of paragraph 1, including the information supplied in the complaint, it shall, where practicable and with due regard to the time limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation. ►M4 Such information may include relevant data pertaining to the world market or other representative markets, where appropriate. ◄

6. If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than if it had cooperated.

Article 19

Confidentiality

1. Any information which is by nature confidential, (for example, because its disclosure would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom he has acquired the information) or which is provided on a confidential basis by parties to an investigation shall, if good cause is shown, be treated as such by the authorities.

2. Interested parties providing confidential information shall be required to furnish non-confidential summaries thereof. Those summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

3. If it is considered that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information available or to authorize its disclosure in generalized or summary form, such information may be disregarded unless it can be satisfactorily demonstrated from appropriate sources that the information is correct. Requests for confidentiality shall not be arbitrarily rejected.

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

5. The Council, the Commission and Member States, or the officials of any of these, shall not reveal any information received pursuant to this Regulation for which confidential treatment has been requested by its supplier, without specific permission from the supplier. Exchanges of information between the Commission and Member States, or any information relating to consultations made pursuant to Article 15, or any internal documents prepared by the authorities of the Community or its Member States, shall not be divulged except as specifically provided for in this Regulation.

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

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Article 20

Disclosure

1. The complainants, importers and exporters and their representative associations, and representatives of the exporting country, may request disclosure of the details underlying the essential facts and considerations on the basis of which provisional measures have been imposed. Requests for such disclosure shall be made in writing immediately following the imposition of provisional measures, and the disclosure shall be made in writing as soon as possible thereafter.

2. The parties mentioned in paragraph 1 may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.

3. Requests for final disclosure, as defined in paragraph 2, shall be addressed to the Commission in writing and be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty. Where a provisional duty has not been applied, parties shall be provided with an opportunity to request final disclosure within time limits set by the Commission.

4. Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.

5. Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.

Article 21

Community interest

1. A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.

2. In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organizations may, within the time limits specified in the notice of initiation of the anti-dumping investigation, make themselves known and provide information to the Commission. Such information, or appropriate summaries thereof, shall be made available to the other parties specified in this Article, and they shall be entitled to respond to such information.

3. The parties which have acted in conformity with paragraph 2 may request a hearing. Such requests shall be granted when they are

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submitted within the time limits set in paragraph 2, and when they set out the reasons, in terms of the Community interest, why the parties should be heard.

4. The parties which have acted in conformity with paragraph 2 may provide comments on the application of any provisional duties imposed. Such comments shall be received within one month of the application of such measures if they are to be taken into account and they, or appropriate summaries thereof, shall be made available to other parties who shall be entitled to respond to such comments.

5. The Commission shall examine the information which is properly submitted and the extent to which it is representative and the results of such analysis, together with an opinion on its merits, shall be transmitted to the Advisory Committee. The balance of views expressed in the Committee shall be taken into account by the Commission in any proposal made pursuant to Article 9.

6. The parties which have acted in conformity with paragraph 2 may request the facts and considerations on which final decisions are likely to be taken to be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission or the Council.

7. Information shall only be taken into account where it is supported by actual evidence which substantiates its validity.

Article 22

Final provisions

This Regulation shall not preclude the application of:

(a) any special rules laid down in agreements concluded between the Community and third countries;

(b) the Community Regulations in the agricultural sector and Council Regulations (EC) No 3448/93 [1], (EEC) No 2730/75 [2] and (EEC) No 2783/75 [3]; this Regulation shall operate by way of complement to those Regulations and in derogation from any provisions thereof which preclude the application of anti-dumping duties;

(c) special measures, provided that such action does not run counter to obligations pursuant to the GATT.

Article 23

Repeal of existing legislation and transitional measures

Regulation (EC) No 3283/94 is hereby repealed, with the exception of the first paragraph of Article 23 thereof.

However, the repeal of Regulation (EC) No 3283/94 shall not prejudice the validity of proceedings initiated thereunder.

References to Regulation (EEC) No 2423/88 and to Regulation (EC) No 3283/94 shall be construed as references to this Regulation, where appropriate.

Article 24

Entry into force

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

However, the time limits provided for in Articles 5 (9), 6 (9) and 7 (1) shall apply to complaints lodged under Article 5 (9) as from 1

(1) OJ No L 318, 20. 12. 1993, p. 18.
(2) OJ No L 281, 1. 11. 1975, p. 20. Regulation as amended by Commission Regulation (EEC) No 222/88 (OJ No L 28, 1. 2. 1988, p. 1).
(3) OJ No L 282, 1. 11. 1975, p. 104. Regulation as last amended by Regulation (EEC) No 3290/94 (OJ No L 349, 31. 12. 1994, p. 105).

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September 1995 and investigations initiated pursuant to such complaints.

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

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COUNCIL REGULATION (EC) No 2026/97

of 6 October 1997

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

(OJ L 288, 21.10.1997, p. 1)

Amended by:

		Official Journal		
		No	page	date
►M1	Council Regulation (EC) No 1973/2002 of 5 November 2002	L 305	4	7.11.2002

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COUNCIL REGULATION (EC) No 2026/97

of 6 October 1997

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

THE COUNCIL OF THE EUROPEAN UNION,

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

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

Having regard to the proposal from the Commission (1),

(1) Whereas, by Regulation (EEC) No 2423/88 (2), the Council adopted common rules for protection against dumped or subsidized imports from countries which are not members of the European Community;

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

(3) Whereas the conclusion of the Uruguay Round of multilateral trade negotiations has led to the establishment of the World Trade Organization ('the WTO');

(4) Whereas Annex 1A to the Agreement establishing the WTO ('the WTO Agreement'), approved by Decision 94/800/EC (3), contains, *inter alia,* the General Agreement on Tariffs and Trade 1994 ('the GATT 1994'), an Agreement on Agriculture ('the Agreement on Agriculture'), an Agreement on implementation of Article VI of the GATT 1994 (hereinafter referred to as 'the 1994 Anti-Dumping Agreement') and a new Agreement on Subsidies and Countervailing Measures ('the Subsidies Agreement');

(5) Whereas, in order to reach greater transparency and effectiveness in the application by the Community of the rules laid down in the 1994 Anti-Dumping Agreement and the Subsidies Agreement respectively, it is considered necessary to adopt two separate Regulations which will lay down in sufficient detail the requirements for the application of each of these commercial defence instruments;

(6) Whereas it is therefore appropriate to amend Community rules governing the application of countervailing measures in the light of the new multilateral rules, with regard *inter alia* to the procedures for initiation of proceedings and the conduct of subsequent investigations, including the establishment and treatment of the facts, the imposition of provisional measures, the imposition and collection of countervailing duties, the duration and review of countervailing measures, and the public disclosure of information relating to countervailing investigations;

(1) OJ C 99, 26. 3. 1997, p. 1.
(2) OJ L 209, 2. 8. 1988, p. 1. Regulation as last amended by Regulation (EC) No 522/94 (OJ L 66, 10. 3. 1994, p. 10).
(3) OJ L 336, 23. 12. 1994, p. 1.

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(7) Whereas, in view of the extent of the changes brought about by the new Agreements and to ensure an adequate and transparent implementation of the new rules, it is appropriate to transpose the language of the new Agreements into Community legislation to the extent possible;

(8) Whereas, furthermore, it seems advisable to explain, in adequate detail, when a subsidy shall be deemed to exist, according to which principles it shall be countervailable (in particular whether the subsidy has been granted specifically), and according to which criteria the amount of the countervailable subsidy is to be calculated;

(9) Whereas, in determining the existence of a subsidy, it is necessary to demonstrate that there has been a financial contribution by a government or any public body within the territory of a country, or that there has been some form of income or price support within the meaning of Article XVI of the GATT 1994, and that a benefit has thereby been conferred on the recipient enterprise;

(10) Whereas it is necessary to explain in sufficient detail which kind of subsidies are not countervailable and which procedure shall be followed if, during an investigation, it is determined that an enterprise undergoing investigation has received non-countervailable subsidies;

(11) Whereas the Subsidies Agreement states that the provisions concerning non-countervailable subsidies shall cease to apply five years after the date of entry into force of the WTO Agreement, unless they are extended by mutual agreement of the members of the WTO; whereas it may therefore be necessary to amend this Regulation accordingly if the validity of those provisions is not so extended;

(12) Whereas the measures listed in Annex 2 to the Agreement on Agriculture are non-countervailable, to the extent provided for in that Agreement;

(13) Whereas it is desirable to lay down clear and detailed guidance as to the factors which may be relevant for the determination of whether the subsidized imports have caused material injury or are threatening to cause injury; whereas, in demonstrating that the volume and price levels of the imports concerned are responsible for injury sustained by a Community industry, attention should be given to the effect of other factors and in particular prevailing market conditions in the Community;

(14) Whereas it is advisable to define the term 'Community industry' and to provide that parties related to exporters may be excluded from such industry, and to define the term 'related'; whereas it is also necessary to provide for countervailing duty action to be taken on behalf of producers in a region of the Community and to lay down guidelines on the definition of such region;

(15) Whereas it is necessary to lay down who may lodge a countervailing duty complaint, including the extent to which it should be supported by the Community industry, and the information on countervailable subsidies, injury and causation which such complaint should contain; whereas it is also expedient to specify the procedures for the rejection of complaints or the initiation of proceedings;

(16) Whereas it is necessary to lay down the manner in which interested parties should be given notice of the information which the authorities require, and should have ample opportunity to present all relevant evidence and to defend their interests; whereas it is also desirable to set out clearly the rules and procedures to be followed during the investigation, in particular the rules whereby interested parties are to make themselves known, present their views and submit information within specified time limits, if such views and information are to be taken into account; whereas it is also appropriate to set out the conditions under

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which an interested party may have access to, and comment on, information presented by other interested parties; whereas there should also be cooperation between the Member States and the Commission in the collection of information;

(17) Whereas it is necessary to lay down the conditions under which provisional duties may be imposed, including conditions whereby they may be imposed no earlier than 60 days from initiation and not later than nine months thereafter; whereas such duties may in all cases be imposed by the Commission only for a four-month period;

(18) Whereas it is necessary to specify procedures for the acceptance of undertakings eliminating or offsetting the countervailable subsidies and injury in lieu of the imposition of provisional or definitive duties; whereas it is also appropriate to lay down the consequences of breach or withdrawal of undertakings and that provisional duties may be imposed in cases of suspected violation or where further investigation is necessary to supplement the findings; whereas, in accepting undertakings, care should be taken that the proposed undertakings, and their enforcement, do not lead to anti-competitive behaviour;

(19) Whereas it is necessary to provide that the termination of cases should, irrespective of whether definitive measures are adopted or not, normally take place within 12 months, and in no case later than 13 months, from the initiation of the investigation;

(20) Whereas an investigation or proceeding should be terminated whenever the amount of the subsidy is found to be *de minimis* or if, particularly in the case of imports originating in developing countries, the volume of subsidized imports or the injury is negligible, and it is appropriate to define those criteria; whereas, where measures are to be imposed, it is necessary to provide for the termination of investigations and to lay down that measures should be less than the amount of countervailable subsidies if such lesser amount would remove the injury, and also to specify the method of calculating the level of measures in cases of sampling;

(21) Whereas it is necessary to provide for the retroactive collection of provisional duties if that is deemed appropriate and to define the circumstances which may trigger the retroactive application of duties in order to avoid the undermining of the definitive measures to be applied; whereas it is also necessary to provide that duties may be applied retroactively in cases of breach or withdrawal of undertakings;

(22) Whereas it is necessary to provide that measures are to lapse after five years unless a review indicates that they should be maintained; whereas it is also necessary to provide, in cases where sufficient evidence is submitted of changed circumstances, for interim reviews or for investigations to determine whether refunds of countervailing duties are warranted;

(23) Whereas, even though the Subsidies Agreement does not contain provisions concerning circumvention of countervailing measures, the possibility of such circumvention exists, in terms similar, albeit not identical, to the circumvention of anti-dumping measures; whereas it appears therefore appropriate to enact an anti-circumvention provision in this Regulation;

(24) Whereas it is expedient to permit the suspension of countervailing measures where there is a temporary change in market conditions which makes the continued imposition of such measures temporarily inappropriate;

(25) Whereas it is necessary to provide that imports under investigation may be made subject to registration upon importation in order to enable measures to be subsequently applied against such imports;

(26) Whereas, in order to ensure proper enforcement of measures, it is necessary that Member States monitor, and report to the

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Commission, the import trade in products subject to investigation or subject to measures, and also the amount of duties collected under this Regulation;

(27) Whereas it is necessary to provide for consultation of an Advisory Committee at regular and specified stages of the investigation; whereas the Committee should consist of representatives of Member States with a representative of the Commission as chairman;

(28) Whereas it is expedient to provide for verification visits to check information submitted on countervailable subsidies and injury, such visits being, however, conditional on proper replies to questionnaires being received;

(29) Whereas it is essential to provide for sampling in cases where the number of parties or transactions is large in order to permit completion of investigations within the appointed time limits;

(30) Whereas, it is necessary to provide that, where parties do not cooperate satisfactorily, other information may be used to establish findings and that such information may be less favourable to the parties than if they had cooperated;

(31) Whereas provision should be made for the treatment of confidential information so that business or governmental secrets are not divulged;

(32) Whereas it is essential that provision be made for proper disclosure of essential facts and considerations to parties which qualify for such treatment and that such disclosure be made, with due regard to the decision-making process in the Community, within a time period which permits parties to defend their interests;

(33) Whereas it is prudent to provide for an administrative system under which arguments can be presented as to whether measures are in the Community interest, including the interests of consumers, and to lay down the time periods within which such information has to be presented, together with the disclosure rights of the parties concerned;

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

(35) Whereas, by Regulation (EC) No 3284/94 of 22 December 1994 on protection against subsidized imports from countries not members of the European Community [1], the Council replaced Regulation (EEC) No 2423/88 and instituted a new common system of defence against subsidized imports from countries not members of the European Community;

(36) Whereas drafting problems in the text of Regulation (EC) No 3284/94 became apparent on publication; whereas, moreover, the Regulation has already been amended;

(37) Whereas, in the interests of clarity, transparency and legal certainty, that Regulation should therefore be repealed and replaced, without prejudice to the countervailing proceedings already initiated under it or under Regulation (EEC) No 2423/88,

[1] OJ L 349, 31. 12. 1994, p. 22. Regulation as amended by Regulation (EC) No 1252/95 (OJ L 122, 2. 6. 1995, p. 2).

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HAS ADOPTED THIS REGULATION:

Article 1

Principles

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

2. For the purpose of this Regulation, a product is considered to be subsidized if it benefits from a countervailable subsidy as defined in Articles 2 and 3.

3. Such subsidy may be granted by the government of the country of origin of the imported product, or by the government of an intermediate country from which the product is exported to the Community, known for the purpose of this Regulation as 'the country of export'.

The term 'government' is defined, for the purposes of this Regulation as a government or any public body within the territory of the country of origin or export.

4. Notwithstanding paragraphs 1, 2 and 3, where products are not directly imported from the country of origin but are exported to the Community from an intermediate country, the provisions of this Regulation shall be fully applicable and the transaction or transactions shall, where appropriate, be regarded as having taken place between the country of origin and the Community.

5. For the purpose of this Regulation the term 'like product' shall be interpreted to mean a product which is identical, that is to say, 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.

Article 2

Definition of a subsidy

A subsidy shall be deemed to exist if:

1. (a) there is a financial contribution by a government in the country of origin or export, that is to say, where:

(i) a government practice involves a direct transfer of funds (for example, grants, loans, equity infusion), potential direct transfers of funds or liabilities (for example, loan guarantees);

(ii) government revenue that is otherwise due is forgone or not collected (for example, fiscal incentives such as tax credits); in this regard, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have been accrued, shall not be deemed to be a subsidy, provided that such an exemption is granted in accordance with the provisions of Annexes I to III;

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government:

— makes payments to a funding mechanism,

or

— entrusts or directs a private body to carry out one or more of the type of functions illustrated in points (i), (ii) and (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments;

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or

(b) there is any form of income or price support within the meaning of Article XVI of the GATT 1994; and

2. a benefit is thereby conferred.

Article 3

Countervailable subsidies

1. Subsidies shall be subject to countervailing measures only if they are specific, as defined in paragraphs 2, 3 and 4.

2. In order to determine whether a subsidy is specific to an enterprise or industry or group of enterprises or industries (hereinafter referred to as 'certain enterprises') within the jurisdiction of the granting authority, the following principles shall apply:

(a) where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific;

(b) where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to.

For the purpose of this Article, objective criteria or conditions mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

The criteria or conditions must be clearly set out by law, regulation, or other official document, so as to be capable of verification;

(c) if, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises; predominant use by certain enterprises; the granting of disproportionately large amounts of subsidy to certain enterprises; and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In this regard, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall, in particular, be considered.

In applying the first subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

3. A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. The setting or changing of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Regulation.

4. Notwithstanding paragraphs 2 and 3, the following subsidies shall be deemed to be specific:

(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I.

Subsidies shall be considered to be contingent in fact upon export performance when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is accorded to enter-

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prises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

5. Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

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Article 5

Calculation of the amount of the countervailable subsidy

The amount of countervailable subsidies, for the purposes of this Regulation, shall be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period for subsidization. Normally this period shall be the most recent accounting year of the beneficiary, but may be any other period of at least six months prior to the initiation of the investigation for which reliable financial and other relevant data are available.

Article 6

Calculation of benefit to the recipient

As regards the calculation of benefit to the recipient, the following rules shall apply:

(a) government provision of equity capital shall not be considered to confer a benefit, unless the investment can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of the country of origin and/or export;

(b) a loan by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount that the firm would pay for a comparable commercial loan which the firm could actually obtain on the market. In that event the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay for a comparable commercial loan in the absence of the government guarantee. In this case the benefit shall be the difference between these two amounts, adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered to confer a benefit, unless the provision is made for less than adequate remuneration or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the product or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

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If there are no such prevailing market terms and conditions for the product or service in question in the country of provision or purchase which can be used as appropriate benchmarks, the following rules shall apply:

(i) the terms and conditions prevailing in the country concerned shall be adjusted, on the basis of actual costs, prices and other factors available in that country, by an appropriate amount which reflects normal market terms and conditions; or

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(ii) when appropriate, the terms and conditions prevailing in the market of another country or on the world market which are available to the recipient shall be used.

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Article 7

General provisions on calculation

1. The amount of the countervailable subsidies shall be determined per unit of the subsidized product exported to the Community.

In establishing this amount the following elements may be deducted from the total subsidy:

(a) any application fee, or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy;

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

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

2. Where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount of countervailable subsidy shall be determined by allocating the value of the total subsidy, as appropriate, over the level of production, sales or exports of the products concerned during the investigation period for subsidization.

3. Where the subsidy can be linked to the acquisition or future acquisition of fixed assets, the amount of the countervailable subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned. The amount so calculated which is attributable to the investigation period, including that which derives from fixed assets acquired before this period, shall be allocated as described in paragraph 2.

Where the assets are non-depreciating, the subsidy shall be valued as an interest-free loan, and be treated in accordance with Article 6 (b).

4. Where a subsidy cannot be linked to the acquisition of fixed assets, the amount of the benefit received during the investigation period shall in principle be attributed to this period, and allocated as described in paragraph 2, unless special circumstances arise justifying attribution over a different period.

Article 8

Determination of injury

1. For the purposes of this Regulation, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both:

(a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the Community market for like products; and

(b) the consequent impact of those imports on the Community industry.

3. With regard to the volume of the subsidized imports, consideration shall be given to whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the subsidized imports on prices, consideration shall be given to whether there

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has been significant price undercutting by the subsidized imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases which would otherwise have occurred, to a significant degree. No one or more of these factors can necessarily give decisive guidance.

4. Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the effects of such imports shall be cumulatively assessed only if it is determined that:

(a) the amount of countervailable subsidies established in relation to the imports from each country is more than *de minimis* as defined in Article 14 (5) and that the volume of imports from each country is not negligible; and

(b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

5. The examination of the impact of the subsidized imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including: the fact that an industry is still in the process of recovering from the effects of past subsidization or dumping, the magnitude of the amount of countervailable subsidies, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilization of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the subsidized imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

7. Known factors other than the subsidized imports which are injuring the Community industry at the same time shall also be examined to ensure that injury caused by these other factors is not attributed to the subsidized imports pursuant to paragraph 6. Factors which may be considered in this respect include the volume and prices of non-subsidized imports, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.

8. The effect of the subsidized imports shall be assessed in relation to the production of the Community industry of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by examination of the production of the narrowest group or range of products including the like product, for which the necessary information can be provided.

9. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent.

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In making a determination regarding the existence of a threat of material injury, consideration should be given to, *inter alia,* such factors as:

(a) the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(b) a significant rate of increase of subsidized imports into the Community market indicating the likelihood of substantially increased imports;

(c) sufficient freely disposable capacity of the exporter or an imminent substantial increase in such capacity indicating the likelihood of substantially increased subsidized exports to the Community, account being taken of the availability of other export markets to absorb any additional exports;

(d) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports; and

(e) inventories of the product being investigated.

No one of the factors listed above by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury will occur.

Article 9

Definition of Community industry

1. For the purposes of this Regulation, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 10 (8), of the total Community production of those products, except that:

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

(b) in exceptional circumstances the territory of the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if:

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

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

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

2. For the purpose of paragraph 1, producers shall be considered to be related to exporters or importers only if:

(a) one of them directly or indirectly controls the other; or

(b) both of them are directly or indirectly controlled by a third person; or

(c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.

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For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

3. Where the Community industry has been interpreted as referring to the producers in a certain region, the exporters or the government granting countervailable subsidies shall be given an opportunity to offer undertakings pursuant to Article 13 in respect of the region concerned. In such cases, when evaluating the Community interest of the measures, special account shall be taken of the interest of the region. If an adequate undertaking is not offered promptly or if the situations set out in Article 13 (9) and (10) apply, a provisional or definitive countervailing duty may be imposed in respect of the Community as a whole. In such cases the duties may, if practicable, be limited to specific producers or exporters.

4. The provisions of Article 8 (8) shall apply to this Article.

Article 10

Initiation of proceedings

1. Except as provided for in paragraph 10, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

The complaint may be submitted to the Commission, or to a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives. The complaint shall be deemed to have been lodged on the first working day following its delivery to the Commission by registered mail or the issuing of an acknowledgement of receipt by the Commission.

Where, in the absence of any complaint, a Member State is in possession of sufficient evidence of subsidization and of resultant injury to the Community industry, it shall immediately communicate such evidence to the Commission.

2. A complaint as referred to in paragraph 1 shall include sufficient evidence of the existence of countervailable subsidies (including, if possible, of their amount), injury and a causal link between the allegedly subsidized imports and the alleged injury. The complaint shall contain such information as is reasonably available to the complainant on the following:

(a) identity of the complainant and a description of the volume and value of the Community production of the like product by the complainant. Where a written complaint is made on behalf of the Community industry, the complaint shall identify the industry on behalf of which the complaint is made by a list of all known Community producers of the like product (or associations of Community producers of the like product) and, to the extent possible, a description of the volume and value of Community production of the like product accounted for by such producers;

(b) a complete description of the allegedly subsidized product, the names of the country or countries of origin and/or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(c) evidence with regard to the existence, amount, nature and countervailability of the subsidies in question;

(d) information on changes in the volume of the allegedly subsidized imports, the effect of those imports on prices of the like product in the Community market and the consequent impact of the imports on the Community industry, as demonstrated by relevant factors and indices having a bearing on the state of the Community industry, such as those listed in Article 8 (3) and (5).

3. The Commission shall, as far as possible, examine the accuracy and adequacy of the evidence provided in the complaint, in order to

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determine whether there is sufficient evidence to justify the initiation of an investigation.

4. An investigation may be initiated in order to determine whether or not the alleged subsidies are 'specific' within the meaning of Article 3 (2) and (3).

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7. An investigation may also be initiated in respect of measures of the type listed in Annex IV, to the extent that they contain an element of subsidy as defined by Article 2, in order to determine whether the measures in question fully conform to the provisions of that Annex.

8. An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has ben made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 % of total production of the like product produced by the Community industry.

9. The authorities shall, unless a decision has been made to initiate an investigation, avoid any publicizing of the complaint seeking the initiation of an investigation. However, as soon as possible after receipt of a properly documented complaint pursuant to this Article, and in any event before the initiation of an investigation, the Commission shall notify the country of origin and/or export concerned, which shall be invited for consultations with the aim of clarifying the situation as to matters referred to in paragraph 2 and arriving at a mutually agreed solution.

10. If, in special circumstances, the Commission decides to initiate an investigation without having received a written complaint by or on behalf of the Community industry for the initiation of such investigation, this shall be done on the basis of sufficient evidence of the existence of countervailable subsidies, injury and causal link, as described in paragraph 2, to justify such initiation.

11. The evidence both of subsidies and of injury shall be considered simultaneously in the decision on whether or not to initiate an investigation. A complaint shall be rejected where there is insufficient evidence of either countervailable subsidies or of injury to justify proceeding with the case. Proceedings shall not be initiated against countries whose imports represent a market share of below 1 %, unless such countries collectively account for 3 % or more of Community consumption.

12. The complaint may be withdrawn prior to initiation, in which case it shall be considered not to have been lodged.

13. Where, after consultation, it is apparent that there is sufficient evidence to justify initiating a proceeding, the Commission shall do so within 45 days of the lodging of the complaint and shall publish a notice in the *Official Journal of the European Communities*. Where insufficient evidence has been presented, the complainant shall, after consultation, be so informed within 45 days of the date on which the complaint is lodged with the Commission.

14. The notice of initiation of the proceedings shall announce the initiation of an investigation, indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the periods within which interested parties may make themselves known, present their views in writing and submit informa-

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tion, if such views and information are to be taken into account during the investigation; it shall also state the period within which interested parties may apply to be heard by the Commission in accordance with Article 11 (5).

15. The Commission shall advise the exporters, importers and representative associations of importers or exporters known to it to be concerned, as well as the country of origin and/or export and the complainants, of the initiation of the proceedings and, with due regard to the protection of confidential information, provide the full text of the written complaint referred to in paragraph 1 to the known exporters and to the authorities of the country of origin and/or export, and make it available upon request to other interested parties involved. Where the number of exporters involved is particularly high, the full text of the written complaint may instead be provided only to the authorities of the country of origin and/or export or to the relevant trade association.

16. A countervailing duty investigation shall not hinder the procedures of customs clearance.

Article 11

The investigation

1. Following the initiation of the proceeding, the Commission, acting in cooperation with the Member States, shall commence an investigation at Community level. Such investigation shall cover both subsidization and injury, and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of subsidization shall, normally, cover the investigation period provided for in Article 5. Information relating to a period subsequent to the investigation period shall not, normally, be taken into account.

2. Parties receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days to reply. The time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the day on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the country of origin and/or export. An extension to the 30-day period may be granted, due account being taken of the time limits of the investigation, provided that the party shows due cause for such extension, in terms of its particular circumstances.

3. The Commission may request Member States to supply information, and Member States shall take whatever steps are necessary in order to give effect to such requests. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out. Where this information is of general interest or where its transmission has been requested by a Member State, the Commission shall forward it to the Member States, provided it is not confidential, in which case a non-confidential summary shall be forwarded.

4. The Commission may request Member States to carry out all necessary checks and inspections, particulary amongst importers, traders and Community producers, and to carry out investigations in third countries, provided that the firms concerned give their consent and that the government of the country in question has been officially notified and raises no objection. Member States shall take whatever steps are necessary in order to give effect to such requests from the Commission. Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.

5. The interested parties which have made themselves known in accordance with Article 10 (14), shall be heard if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the

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result of the proceeding and that there are particular reasons why they should be heard.

6. Opportunities shall, on request, be provided for the importers, exporters and the complainants, which have made themselves known in accordance with Article 10 (14), and the government of the country of origin and/or export, to meet those parties having adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Oral information provided under this paragraph shall be taken into account by the Commission in so far as it is subsequently confirmed in writing.

7. The complainants, the government of the country of origin and/or export, importers and exporters and their representative associations, users and consumer organizations, which have made themselves known in accordance with Article 10 (14), may, upon written request, inspect all information made available to the Commission by any party to an investigation, as distinct from internal documents prepared by the authorities of the Community or its Member States, which is relevant to the presentation of their cases and is not confidential within the meaning of Article 29, and that it is used in the investigation. Such parties may respond to such information and their comments shall be taken into consideration wherever they are sufficiently substantiated in the reponse.

8. Except in circumstances provided for in Article 28, the information which is supplied by interested parties and upon which findings are based shall be examined for accuracy as far as possible.

9. For proceedings initiated pursuant to Article 10 (13), an investigation shall, whenever possible, be concluded within one year. In any event, such investigations shall in all cases be concluded within 13 months of initiation, in accordance with the findings made pursuant to Article 13 for undertakings or the findings made pursuant to Article 15 for definitive action.

10. Throughout the investigation, the Commission shall afford the country of origin and/or export a reasonable opportunity to continue consultations with a view to clarifying the factual situation and arriving at a mutually agreed solution.

Article 12

Provisional measures

1. Provisional duties may be imposed if:

(a) proceedings have been initiated in accordance with Article 10;

(b) a notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments in accordance with Article 10 (14);

(c) a provisional affirmative determination has been made that the imported product benefits from countervailable subsidies and of consequent injury to the Community industry; and

(d) the Community interest calls for intervention to prevent such injury.

The provisional duties shall be imposed no earlier than 60 days from the initiation of the proceedings but no later than nine months from the initiation of the proceedings.

The amount of the provisional countervailing duty shall not exceed the total amount of countervailable subsidies as provisionally established but it should be less than this amount, if such lesser duty would be adequate to remove the injury to the Community industry.

2. Provisional duties shall be secured by a guarantee and the release of the products concerned for free circulation in the Community shall be conditional upon the provision of such guarantee.

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

4. Where a Member State requests immediate intervention by the Commission and where the conditions of the first and second subparagraphs of paragraph 1 are met, the Commission shall, within a maximum of five working days from receipt of the request, decide whether a provisional countervailing duty shall be imposed.

5. The Commission shall forthwith inform the Council and the Member States of any decision taken under paragraphs 1 to 4. The Council, acting by a qualified majority, may decide differently.

6. Provisional countervailing duties shall be imposed for a maximum period of four months.

Article 13

Undertakings

1. Investigations may be terminated without the imposition of provisional or definitive duties upon receipt of satisfactory voluntary undertakings under which:

(a) the country of origin and/or export agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) any exporter undertakes to revise its prices or to cease exports to the area in question as long as such exports benefit from countervailable subsidies, so that the Commission, after consultation, is satisfied that the injurious effect of the subsidies is eliminated. Price increases under such undertakings shall not be higher than is necessary to offset the amount of countervailable subsidies, and should be less than the amount of countervailable subsidies if such increases would be adequate to remove the injury to the Community industry.

2. Undertakings may be suggested by the Commission, but no country or exporter shall be obliged to enter into such an undertaking. The fact that countries or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice consideration of the case. However, it may be determined that a threat of injury is more likely to be realized if the subsidized imports continue. Undertakings shall not be sought or accepted from countries or exporters unless a provisional affirmative determination of subsidization and injury caused by such subsidization has been made. Save in exceptional circumstances, undertakings may not be offered later than the end of the period during which representations may be made pursuant to Article 30 (5).

3. Undertakings offered need not be accepted if their acceptance is considered impractical, such as where the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. The exporter and/or the country of origin and/or export concerned may be provided with the reasons for which it is proposed to reject the offer of an undertaking and may be given an opportunity to make comments thereon. The reasons for rejection shall be set out in the definitive decision.

4. Parties which offer an undertaking shall be required to provide a non-confidential version of such undertaking, so that it may be made available to interested parties to the investigation.

5. Where undertakings are, after consultation, accepted, and where there is no objection raised within the Advisory Committee, the investigation shall be terminated. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the investigation be terminated. The investigation shall be deemed terminated if, within one month, the Council, acting by qualified majority, has not decided otherwise.

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6. If the undertakings are accepted, the investigation of subsidization and injury shall normally be completed. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, it may be required that an undertaking be maintained for a reasonable period. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Regulation.

7. The Commission shall require any country or exporter from whom undertakings have been accepted to provide, periodically, information relevant to the fulfilment of such undertaking, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a breach of the undertaking.

8. Where undertakings are accepted from certain exporters during the course of an investigation, they shall, for the purpose of Articles 18, 19, 20 and 22, be deemed to take effect from the date on which the investigation is concluded for the country of origin and/or export.

9. In case of breach or withdrawal of undertakings by any party, a definitive duty shall be imposed in accordance with Article 15, on the basis of the facts established within the context of the investigation which led to the undertaking, provided that such investigation was concluded with a final determination as to subsidization and injury, and that the exporter concerned, or the country of origin and/or export, has, except in the case of withdrawal of the undertaking by the exporter or such country, been given an opportunity to comment.

10. A provisional duty may, after consultation, be imposed in accordance with Article 12 on the basis of the best information available, where there is reason to believe that an undertaking is being breached, or in case of breach or withdrawal of an undertaking where the investigation which led to the undertaking has not been concluded.

Article 14

Termination without measures

1. Where the complaint is withdrawn, the proceeding may be terminated unless such termination would not be in the Community interest.

2. Where, after consultation, protective measures are unnecessary and there is no objection raised within the Advisory Committee, the investigation or proceeding shall be terminated. In all other cases, the Commission shall submit to the Council forthwith a report on the results of the consultation, together with a proposal that the proceeding be terminated. The proceeding shall be deemed terminated if, within one month, the Council, acting by a qualified majority, has not decided otherwise.

3. There shall be immediate termination of the proceeding where it is determined that the amount of countervailable subsidies is *de minimis*, in accordance with paragraph 5, or where the volume of subsidized imports, actual or potential, or the injury, is negligible.

4. For a proceeding initiated pursuant to Article 10 (13), injury shall normally be regarded as negligible where the market share of the imports is less than the amounts set out in Article 10 (11). With regard to investigations concerning imports from developing countries, the volume of subsidized imports shall also be considered negligible if it represents less than 4% of the total imports of the like product in the Community, unless imports from developing countries whose individual shares of total imports represent less than 4% collectively account for more than 9% of the total imports of the like product in the Community.

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5. The amount of the countervailable subsidies shall be considered to be *de minimis* if such amount is less than 1% *ad valorem,* except that:

(a) as regards investigations concerning imports from developing countries the *de minimis* threshold shall be 2% *ad valorem,* and

(b) for those developing countries Members of the WTO referred to in Annex VII to the Subsidies Agreement as well as for developing countries Members of the WTO which have completely eliminated export subsidies as defined in Article 3 (4) (a) of this Regulation, the *de minimis* subsidy threshold shall be 3% *ad valorem;* where the application of this provision depends on the elimination of export subsidies, it shall apply from the date on which the elimination of export subsidies is notified to the WTO Committee on Subsidies and Countervailing Measures, and for so long as export subsidies are not granted by the developing country concerned; this provision shall expire eight years from the date of entry into force of the WTO Agreement,

provided that it is only the investigation that shall be terminated where the amount of the countervailable subsidies is below the relevant *de minimis* level for individual exporters, who shall remain subject to the proceedings and may be re-investigated in any subsequent review carried out for the country concerned pursuant to Articles 18 and 19.

Article 15

Imposition of definitive duties

1. Where the facts as finally established show the existence of countervailable subsidies and injury caused thereby, and the Community interest calls for intervention in accordance with Article 31, a definitive countervailing duty shall be imposed by the Council, acting by simple majority on a proposal submitted by the Commission after consultation of the Advisroy Committee, unless the subsidy or subsidies are withdrawn or it has been demonstrated that the subsidies no longer confer any benefit on the exporters involved. Where provisional duties are in force, a proposal for definitive action shall be submitted to the Council not later than one month before the expiry of such duties. The amount of the countervailing duty shall not exceed the amount of countervailable subsidies from which the exporters have been found to benefit, established pursuant to this Regulation, but should be less than the total amount of countervailable subsidies, if such lesser duty were to be adequate to remove the injury to the Community industry.

2. A countervailing duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis, on imports of a product from all sources found to benefit from countervailable subsidies and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The regulation imposing the duty shall specify the duty for each supplier, or, if that is impracticable, the supplying country concerned.

3. When the Commission has limited its examination in accordance with Article 27, any countervailing duty applied to imports from exporters or producers which have made themselves known in accordance with Article 27 but were not included in the examination shall not exceed the weighted average amount of countervailable subsidies established for the parties in the sample. For the purpose of this paragraph, the Commission shall disregard any zero and *de minimis* amounts of countervailable subsidies and amounts of countervailable subsidies established in the circumstances referred to in Article 28. Individual duties shall be applied to imports from any exporter or producer for which an individual amount of subsidization has been calculated as provided for in Article 27.

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Article 16

Retroactivity

1. Provisional measures and definitive countervailing duties shall only be applied to products which enter free circulation after the time when the measure taken pursuant to Article 12 (1) or Article 15 (1), as the case may be, enters into force, subject to the exceptions set out in this Regulation.

2. Where a provisional duty has been applied and the facts as finally established show the existence of countervailable subsidies and injury, the Council shall decide, irrespective of whether a definitive countervailing duty is to be imposed, what proportion of the provisional duty is to be definitively collected. For this purpose, 'injury' shall not include material retardation of the establishment of a Community industry, not threat of material injury, except where it is found that this would, in the absence of provisional measures, have developed into material injury. In all other cases involving such threat or retardation, any provisional amounts shall be released and definitive duties can only be imposed from the date on which a final determination of threat or material retardation is made.

3. If the definitive countervailing duty is higher than the provisional duty, the difference shall not be collected. If the definitive duty is lower than the provisional duty, the duty shall be recalculated. Where a final determination is negative, the provisional duty shall not be confirmed.

4. A definitive countervailing duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures but not prior to the initiation of the investigation, provided that the imports have been registered in accordance with Article 24 (5), the importers concerned have been given an opportunity to comment by the Commission, and:

(a) there are critical circumstances where for the subsidized product in question injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from countervailable subsidies under the terms of this Regulation;

and,

(b) it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports.

5. In cases of breach or withdrawal of undertakings, definitive duties may be levied on goods entered for free circulation not more than 90 days before the application of provisional measures, provided that the imports have been registered in accordance with Article 24 (5) and that any such retroactive assessment shall not apply to imports entered before the breach or withdrawal of the undertaking.

Article 17

Duration

A countervailing measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the countervailable subsidies which are causing injury.

Article 18

Expiry reviews

1. A definitive countervailing measure shall expire five years from its imposition or five years from the date of the most recent review which has covered both subsidization and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of subsidization and injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon a request made by or on behalf of Community producers, and the measure shall remain in force pending the outcome of such review.

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2. An expiry review shall be initiated where the request contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of subsidization and injury. Such a likelihood may, for example, be indicated by evidence of continued subsidization and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious subsidization.

3. In carrying out investigations under this Article, the exporters, importers, the country of origin and/or export and the Community producers shall be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request, and conclusions shall be reached with due account taken of all relevant and duly documented evidence presented in relation to the question as to whether the expiry of measures would be likely, or unlikely, to lead to the continuation or recurrence of subsidization and injury.

4. A notice of impending expiry shall be published in the *Official Journal of the European Communities* at an appropriate time in the final year of the period of application of the measures as defined in this Article. Thereafter, the Community producers shall, no later than three months before the end of the five-year period, be entitled to lodge a review request in accordance with paragraph 2. A notice announcing the actual expiry of measures under this Article shall also be published.

Article 19

Interim reviews

1. The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter, importer or by the Community producers or the country of origin and/or export which contains sufficient evidence substantiating the need for such an interim review.

2. An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset the countervailable subsidy and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the countervailable subsidy which is causing injury.

3. Where the countervailing duties imposed are less than the amount of countervailable subsidies found, an interim review shall be initiated if the Community producers provide sufficient evidence that the duties have led to no movement, or insufficient movement, of resale prices of the imported product in the Community. If the investigation proves the allegations to be correct, countervailing duties may be increased to achieve the price increase required to remove injury; however, the increased duty level shall not exceed the amount of the countervailable subsidies.

4. In carrying out investigations pursuant to this Article, the Commission may *inter alia* consider whether the circumstances with regard to subsidization and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 8. In these respects, account shall be taken in the final determination of all relevant and duly documented evidence.

Article 20

Accelerated reviews

Any exporter whose exports are subject to a definitive countervailing duty but who was not individually investigated during the original investigation for reasons other than a refusal to cooperate with the

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Commission, shall be entitled, upon request, to an accelerated review in order that the Commission may promptly establish an individual countervailing duty rate for that exporter. Such a review shall be initiated after consultation of the Advisory Committee and after Community producers have been given an opportunity to comment.

Article 21

Refunds

1. Notwithstanding Article 18, an importer may request reimbursement of duties collected where it is shown that the amount of countervailable subsidies, on the basis of which duties were paid, has been either eliminated or reduced to a level which is below the level of the duty in force.

2. In requesting a refund of countervailing duties, the importer shall submit an application to the Commission. The application shall be submitted via the Member State in the territory of which the products were released for free circulation, within six months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty. Member States shall forward the request to the Commission forthwith.

3. An application for refund shall be considered to be duly supported by evidence only where it contains precise information on the amount of refund of countervailing duties claimed and all customs documentation relating to the calculation and payment of such amount. It shall also include evidence, for a representative period, of the amount of countervailable subsidies for the exporter or producer to which the duty applies. In cases where the importer is not associated with the exporter or producer concerned and such information is not immediately available, or where the exporter or producer is unwilling to release it to the importer, the application shall contain a statement from the exporter or producer that the amount of countervailable subsidies has been reduced or eliminated, as specified in this Article, and that the relevant supporting evidence will be provided to the Commission. Where such evidence is not forthcoming from the exporter or producer within a reasonable period of time the application shall be rejected.

4. The Commission shall, after consultation of the Advisory Committee, decide whether and to what extent the application should be granted, or it may decide at any time to initiate an interim review, whereupon the information and findings from such review, carried out in accordance with the provisions applicable for such reviews, shall be used to determine whether and to what extent a refund is justified. Refunds of duties shall normally take place within 12 months, and in no circumstances more than 18 months after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the countervailing duty. The payment of any refund authorized should normally be made by Member States within 90 days of the abovementioned decision.

Article 22

General provisions on reviews and refunds

1. The relevant provisions of Articles 10 and 11, excluding those relating to time limits, shall apply to any review carried out pursuant to Articles 18, 19 and 20. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

2. Reviews pursuant to Articles 18, 19 and 20 shall be initiated by the Commission after consultation of the Advisory Committee. Where warranted by reviews, measures shall be repealed or maintained pursuant to Article 18, or repealed, maintained or amended pursuant to Articles 19 and 20, by the Community institution responsible for their introduction. Where measures are repealed for individual expor-

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ters, but not for the country as a whole, such exporters shall remain subject to the proceeding and may be re-investigated in any subsequent review carried out for that country pursuant to this Article.

3. Where a review of measures pursuant to Article 19 is in progress at the end of the period of application of measures as defined in Article 18, the measures shall also be investigated under the provisions of Article 18.

4. In all review or refund investigations carried out pursuant to Articles 18 to 21, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Articles 5, 6, 7 and 27.

Article 23

Circumvention

1. Countervailing duties imposed pursuant to this Regulation may be extended to imports from third countries of like products, or parts thereof, when circumvention of the measures in force is taking place. Circumvention shall be defined as a change in the pattern of trade between third countries and the Community which stems from a practice, process or work for which there is insufficient cause or economic justification other than the imposition of the duty, and where there is evidence that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products and that the imported like product and/or parts thereof still benefit from the subsidy.

2. Investigations shall be initiated pursuant to this Article where the request contains sufficient evidence regarding the factors set out in paragraph 1. Initiations shall be made, after consultation of the Advisory Committee, by Commission Regulation which shall also instruct the customs authorities to make imports subject to registration in accordance with Article 24 (5) or to request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities, and shall be concluded within nine months. When the facts as finally ascertained justify the extension of measures, this shall be done by the Council, acting by simple majority and on a proposal from the Commission, from the date on which registration was imposed pursuant to Article 24 (5) or on which guarantees were requested. The relevant procedural provisions of this Regulation with regard to initiations and the conduct of investigations shall apply pursuant to this Article.

3. Products shall not be subject to registration pursuant to Article 24 (5) or measures where they are accompanied by a customs certificate declaring that the importation of the goods does not constitute circumvention. Such certificates may be issued to importers, upon written application following authorization by decision of the Commission after consultation of the Advisory Committee, or decision of the Council imposing measures, and they shall remain valid for the period, and under the conditions, set down therein.

4. Nothing in this Article shall preclude the normal application of the provisions in force concerning customs duties.

Article 24

General provisions

1. Provisional or definitive countervailing duties shall be imposed by Regulation, and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the Regulation imposing such duties. Such duties shall also be collected independently of the customs duties, taxes and other charges normally imposed on imports. No product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from export subsidization.

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2. Regulations imposing provisional or definitive countervailing duties, and Regulations or Decisions accepting undertakings or terminating investigations or proceedings, shall be published in the *Official Journal of the European Communities*. Such Regulations or Decisions shall contain in particular, and with due regard to the protection of confidential information, the names of the exporters, if possible, or of the countries involved, a description of the product and a summary of the facts and considerations relevant to the subsidy and injury determinations. In each case, a copy of the Regulation or Decision shall be sent to known interested parties. The provisions of this paragraph shall apply *mutatis mutandis* to reviews.

3. Special provisions, in particular with regard to the common definition of the concept of origin, as contained in Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (1), may be adopted pursuant to this Regulation.

4. In the Community interest, measures imposed pursuant to this Regulation may, after consultation of the Advisory Committee, be suspended by a decision of the Commission for a period of nine months. The suspension may be extended for a further period, not exceeding one year, if the Council so decides, acting by simple majority on a proposal from the Commission. Measures may only be suspended where market conditions have temporarily changed to such an extent that injury would be unlikely to resume as a result of the suspension, and provided that the Community industry has been given an opportunity to comment and that those comments have been taken into account. Measures may, at any time and after consultation, be reinstated if the reason for suspension is no longer applicable.

5. The Commission may, after consultation of the Advisory Committee, direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently be applied against those imports from the date of such registration. Imports may be made subject to registration following a request from the Community industry which contains sufficient evidence to justify such action. Registration shall be introduced by Regulation which shall specify the purpose of the action and, if appropriate, the estimated amount of possible future liability. Imports shall not be made subject to registration for a period longer than nine months.

6. Member States shall report to the Commission every month on the import trade of products subject to investigation and to measures, and on the amount of duties collected pursuant to this Regulation.

Article 25

Consultations

1. Any consultations provided for in this Regulation, except those referred to in Articles 10 (9) and 11 (10), shall take place within an Advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately on request by a Member State or on the initiative of the Commission, and in any event within a period of time which allows the time limits set by this Regulation to be adhered to.

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

3. Where necessary, consultation may be in writing only; in that event, the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation which the chairman shall arrange, provided that such oral consultation can be held within a period of

(1) OJ L 302, 19. 10. 1992, p. 1. Regulation as last amended by Regulation (EC) No 82/97 of the European Parliament and of the Council (OJ L 17, 21. 1. 1997, p. 1).

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time which allows the time limits set by this Regulation to be adhered to.

4. Consultation shall cover, in particular:

(a) the existence of countervailable subsidies and the methods of establishing their amount;

(b) the existence and extent of injury;

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

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

Article 26

Verification visits

1. The Commission shall, where it considers it appropriate, carry out visits to examine the records of importers, exporters, traders, agents, producers, trade associations and organizations, to verify information provided on subsidization and injury. In the absence of a proper and timely reply a verification visit may not be carried out.

2. The Commission may carry out investigations in third countries as required, provided that it obtains the agreement of the firms concerned, that it notifies the country in question and that the latter does not object to the investigation. As soon as the agreement of the firms concerned has been obtained the Commission should notify the country of origin and/or export of the names and addresses of the firms to be visited and the dates agreed.

3. The firms concerned shall be advised of the nature of the information to be verified during verification visits and of any further information which needs to be provided during such visits, though this should not preclude requests made during the verification for further details to be provided in the light of information obtained.

4. In investigations carried out pursuant to paragraphs 1, 2 and 3, the Commission shall be assisted by officials of those Member States who so request.

Article 27

Sampling

1. In cases there the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to:

(a) a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection; or

(b) to the largest representative volume of the production, sales or exports which can reasonably be investigated within the time available.

2. The selection of parties, types of products or transactions made under this Article shall rest with the Commission, though preference shall be given to choosing a sample in consultation with, and with the consent of, the parties concerned, provided that such parties make themselves known and make sufficient information available, within three weeks of initiation of the investigation, to enable a representative sample to be chosen.

3. In cases where the examination has been limited in accordance with this Article, an individual amount of countervailable subsidization shall, nevertheless, be calculated for any exporter or producer not initially selected who submits the necessary information within the time limits provided for in this Regulation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time.

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4. Where it is decided to sample and there is a degree of non-cooperation by some or all of the parties selected which is likely to materially affect the outcome of the investigation, a new sample may be selected. However, if a material degree of non-cooperation persists or there is insufficient time to select a new sample, the relevant provisions of Article 28 shall apply.

Article 28

Non-cooperation

1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.

Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of the facts available.

Interested parties should be made aware of the consequences of non-cooperation.

2. Failure to give a computerized response shall not be deemed to constitute non-cooperation, provided that the interested party shows that presenting the response as requested would result in an unreasonable extra burden or unreasonable additional cost.

3. Where the information submitted by an interested party is not ideal in all respects it should nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.

4. If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons therefor and shall be granted an opportunity to provide further explanations within the time limit specified. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.

5. If determinations, including those regarding the amount of countervailable subsidies, are based on the provisions of paragraph 1, including the information supplied in the complaint, it shall, where practicable and with due regard to the time limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation. ►M1 Such information may include relevant data pertaining to the world market or other representative markets, where appropriate. ◄

6. If an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, the result may be less favourable to the party than if it had cooperated.

Article 29

Confidentiality

1. Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom he has acquired the information), or which is provided on a confidential basis by parties to an investigation shall, if good cause is shown, be treated as such by the authorities.

2. Interested parties providing confidential information shall be required to furnish non-confidential summaries thereof. Those summaries shall be in sufficient detail to permit a reasonable understanding of

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the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

3. If it is considered that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information available or to authorize its disclosure in generalized or summary form, such information may be disregarded unless it can be satisfactorily demonstrated from appropriate sources that the information is correct. Requests for confidentiality shall not be arbitrarily rejected.

4. This Article shall not preclude the disclosure of general information by the Community authorities, and in particular of the reasons on which decisions taken pursuant to this Regulation are based, nor disclosure of the evidence relied on by the Community authorities in so far as is necessary to explain those reasons in court proceedings. Such disclosure must take into account the legitimate interests of the parties concerned that their business or governmental secrets should not be divulged.

5. The Council, the Commission and the Member States, or the officials of any of these, shall not reveal any information received pursuant to this Regulation for which confidential treatment has been requested by its supplier, without specific permission from the supplier. Exchanges of information between the Commission and Member States, or any information relating to consultations made pursuant to Article 25, or consultations described in Articles 10 (9) an 11 (10), or any internal documents prepared by the authorities of the Community or its Member States, shall not be divulged except as specifically provided for in this Regulation.

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

Article 30

Disclosure

1. The complainants, importers and exporters and their representative associations, and the country of origin and/or export, may request disclosure of the details underlying the essential facts and considerations on the basis of which provisional measures have been imposed. Requests for such disclosure shall be made in writing immediately following the imposition of provisional measures, and the disclosure shall be made in writing as soon as possible thereafter.

2. The parties mentioned in paragraph 1 may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.

3. Requests for final disclosure shall be addressed to the Commission in writing and be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty. Where a provisional duty has not been imposed, parties shall be provided with an opportunity to request final disclosure within time limits set by the Commission.

4. Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Articles 14 and 15. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commis-

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sion or the Council but where such decision is based on any different facts and considerations these shall be disclosed as soon as possible.

5. Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.

Article 31

Community interest

1. A determination as to whether the Community interest calls for intervention should be based on an appraisal of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; a determination pursuant to this Article shall be made only where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade-distorting effects of injurious subsidization and to restore effective competition shall be given special consideration. Measures, as determined on the basis of subsidization and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.

2. In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organizations may, within the time limits specified in the notice of initiation of the countervailing duty investigation, make themselves known and provide information to the Commission. Such information, or appropriate summaries thereof, shall be made available to the other parties specified in this paragraph, and they shall be entitled to respond to such information.

3. The parties which have acted in conformity with paragraph 2 may request a hearing. Such requests shall be granted when they are submitted within the time limits set in paragraph 2, and when they set out the reasons, in terms of the Community interest, why the parties should be heard.

4. The parties which have acted in conformity with paragraph 2 may provide comments on the application of any provisional duties imposed. Such comments shall be received within one month of the application of such measures if they are to be taken into account and they, or appropriate summaries thereof, shall be made available to other parties who shall be entitled to respond to such comments.

5. The Commission shall examine the information which is properly submitted and the extent to which it is representative, and the results of such analysis, together with an opinion on its merits, shall be transmitted to the Advisory Committee. The balance of views expressed in the Committee shall be taken into account by the Commission in any proposal made pursuant to Articles 14 and 15.

6. The parties which have acted in conformity with paragraph 2 may request that the facts and considerations on which final decisions are likely to be taken be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission or the Council.

7. Information shall be taken into account only where it is supported by actual evidence which substantiates its validity.

Article 32

Relationships between countervailing duty measures and multilateral remedies

If an imported product is made subject to any countermeasures imposed following recourse to the dispute settlement procedures of the Subsidies Agreement, and such measures are appropriate to remove

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the injury caused by the countervailable subsidies, any countervailing duty imposed with regard to that product shall immediately be suspended, or repealed, as appropriate.

Article 33

Final provisions

This Regulation shall not preclude the application of:

(a) any special rules laid down in agreements concluded between the Community and third countries;

(b) the Community regulations in the agricultural sector and Council Regulations (EC) No 3448/93 of 6 December 1993 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products [1], (EEC) No 2730/75 of 29 October 1975 on glucose and lactose [2] and (EEC) No 2783/75 of 29 October 1975 on the common system of trade for ovalbumin and lactalbumin [3]; this Regulation shall operate by way of complement to those regulations and in derogation from any provisions thereof which preclude the application of countervailing duties;

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

Article 34

Repeal of existing legislation and transitional measures

Regulation (EC) No 3284/94 is hereby repealed.

However, the repeal of Regulation (EC) No 3284/94 shall not prejudice the validity of proceedings initiated thereunder.

References to Regulations (EEC) No 2423/88 and (EC) No 3284/94 shall be construed as references to this Regulation, where appropriate.

Article 35

Entry into force

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

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

[1] OJ L 318, 20. 12. 1993, p. 18.
[2] OJ L 281, 1. 11. 1975, p. 20. Regulation as last amended by Commission Regulation (EC) No 2931/95 (OJ L 307, 20. 12. 1995, p. 10).
[3] OJ L 282, 1. 11. 1975, p. 104. Regulation as last amended by Commission Regulation (EC) No 2916/95 (OJ L 305, 19. 12. 1995, p. 49).

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ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

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

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

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

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available (1) on world markets to their exporters.

(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes (2) or social welfare charges paid or payable by industrial or commercial enterprises (3).

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

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes (2) in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes (2) on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste (4). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges (2) in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in paticular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

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

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

Provided, however, that if a Member of the WTO is a party to an international undertaking on official export credits to which at least 12 original such Members are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member of the WTO applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

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(1) The term 'commercially available' means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

(2) For the purpose of this Regulation:
- the term 'direct taxes' shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property,
- the term 'import charges' shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports,
- the term 'indirect taxes' shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges,
- 'prior-stage' indirect taxes are those levied on goods or services used directly or indirectly in making the product,
- 'cumulative' indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding state of production,
- 'remission' of taxes includes the refund or rebate of taxes,
- 'remission or drawback' includes the full or partial exemption or deferral of import charges.

(3) Deferral may not amount to an export subsidy where, for example, appropriate interest charges are collected.

(4) Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

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ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS (1)

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The illustrative list of export subsidies in Annex I makes reference to the term 'inputs that are consumed in the production of the exported product' in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

3. In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Regulation, the Commission must normally proceed on the following basis.

4. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the Commission must normally first determine whether the government of the exporting country has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the Commission must normally then examine the system or procedure to see whether it is reasonable, effective for the purpose intented, and based on generally accepted commercial practices in the country of export. The Commission may deem it necessary to carry out, in accordance with Article 26 (2), certain practical tests in order to verify information or to satisfy itself that the system or procedure is being effectively applied.

5. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting country based on the actual inputs involved will normally need to be carried out in the context of determining whether an excess payment occurred. If the Commission deems it necessary, a further examination may be carried out in accordance with paragraph 4.

6. The Commission must normally treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. An input need not be present in the final product in the same form in which it entered the production process.

7. In determining the amount of a particular input that is consumed in the production of the exported product, a 'normal allowance for waste' must normally be taken into account, and such waste must normally be treated as consumed in the production of the exported product. The term 'waste' refers to that portion of a given input which does not serve an independent function in the production process, isnot consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

(1) Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

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8. The Commission's determination of whether the claimed allowance for waste is 'normal' must normally take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The Commission must bear in mind that an important question is whether the authorities in the exporting country have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

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ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those submitted for the imported inputs. Pursuant to paragraph (i) of Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Regulation, the Commission must normally proceed on the following basis:

1. paragraph (i) of Annex I stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting country to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question;
2. where it is alleged that a substitution drawback system conveys a subsidy, the Commission must normally first proceed to determine whether the government of the exporting country has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the Commission shall normally then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy will be presumed to exist. It may be deemed necessary by the Commission to carry out, in accordance with Article 26 (2), certain practical tests in order to verify information or to satisfy itself that the verification procedures are being effectively applied;
3. where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not be actually applied or not be applied effectively, there may be a subsidy. In such cases, further examination by the exporting country based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the Commission deems it necessary, a further examination mat be carried out in accordance with point 2;
4. the existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy;
5. an excess drawback of import charges within the meaning of paragraph (i) of annex I would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

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ANNEX IV

(This Annex reproduces Annex 2 to the Agreement on Agriculture. Any terms or expressions which are not explained herein or which are not self-explanatory are to be interpreted in the context of that Agreement.)

DOMESTIC SUPPORT: THE BASIS OF EXEMPTION FROM THE REDUCTION COMMITMENTS

1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

   (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers;

   and,

   (b) the support in question shall not have the effect of providing price support to producers;

   plus policy-specific criteria and conditions as set out below.

Government service programmes

2. *General services*

   Policies in this category involve expenditures (or revenue foregone) in relation to programmes which provide services or benefits to agriculture or the rural community. They shall not involve direct payments to producers or processors. Such programmes, which include but are not restricted to the following list, shall meet the general criteria in paragraph 1 and policy-specific conditions where set out below:

   (a) research, including general research, research in connection with environmental programmes, and research programmes relating to particular products;

   (b) pest and disease control, including general and product-specific pest and disease control measures, such as early-warning systems, quarantine and eradication;

   (c) training services, including both general and specific training facilities;

   (d) extension and advisory services, including the provision of means to facilitate the transfer of information and the results of research to producers and consumers;

   (e) inspection services, including general inspection services and the inspection of particular products for health, safety, grading or standardization purposes;

   (f) marketing and promotion services, including market information, advice and promotion relating to particular products but excluding expenditure for unspecified purposes that could be used by sellers to reduce their selling price or confer a direct economic benefit to purchasers; and

   (g) infrastructural services, including: electricity reticulation, roads and other means of transport, market and port facilities, water supply facilities, dams and drainage schemes, and infrastructural works associated with environmental programmes. In all cases the expenditure shall be directed to the provision or construction of capital works only, and shall exclude the subsidized provision of on-farm facilities other than for the reticulation of generally available public utilities. It shall not include subsidies to inputs or operating costs, or preferential user charges.

3. *Public stockholding for food security purposes* (1)

   Expenditures (or revenue foregone) in relation to the accumulation and holding of stocks of products which form an integral part of a food security programme identified in national legislation. This may include government aid to private storage of products as part of such a programme.

(1) For the purpose of paragraph 3 of this Annex, governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS.

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The volume and accumulation of such stocks shall correspond to predetermined targets related solely to food security. The process of stock accumulation and disposal shall be financially transparent. Food purchases by the government shall be made at current market prices and sales from food security stocks shall be made at no less than the current domestic market price for the product and quality in question.

4. *Domestic food aid* (1)

Expenditure (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need.

Eligibility to receive the food aid shall be subject to clearly-defined criteria related to nutritional objectives. Such aid shall be in the form of direct provision of food to those concerned or the provision of means to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent.

5. *Direct payments to producers*

Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments as claimed shall meet the basic criteria set out in paragraph 1, plus specific criteria applying to individual types of direct payment as set out in paragraphs 6 to 13. Where exemption from reduction is claimed for any existing or new type of direct payment other than those specified in paragraphs 6 to 13, it shall conform to criteria (b) to (e) in paragraph 6, in addition to the general criteria set out in paragraph 1.

6. *Decoupled income support*

(a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.

(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.

(e) No production shall be required in order to receive such payments.

7. *Government financial participation in income insurance and income safety-net programmes*

(a) Eligibility for such payments shall be determined by an income loss, taking into account only income derived from agriculture, which exceeds 30% of average gross income or the equivalent innet income terms (excluding any payments from the same or similar schemes) in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry. Any producer meeting this condition shall be eligible to receive the payments.

(b) The amount of such payments shall compensate for less than 70% of the producer's income loss in the year the producer becomes eligible to receive this assistance.

(c) The amount of any such payments shall relate solely to income; it shall not relate to the type or volume of production (including livestock units) undertaken by the producer; or to the prices, domestic or international, applying to such production; or to the factors of production employed.

(d) Where a producer receives in the same year payments pursuant to this paragraph and pursuant to paragraph 8 (relief from natural disasters), the total of such payments shall be less than 100% of the producer's total loss.

(1) For the purposes of paragraphs 3 and 4 of this Annex, the provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph.

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8. *Payments (made either directly or by way of a government financial participation in crop insurance schemes) for relief from natural disasters*

   (a) Eligibility for such payments shall arise only following a formal recognition by government authorities that a natural or like disaster (including disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the Member concerned) has occurred or is occurring; and shall be determined by a production loss which exceeds 30% of the average of production in the preceding three-year period or a three-year average based on the preceding five-year period, excluding the highest and the lowest entry.

   (b) Payments made following a disaster shall be applied only in respect of losses of income, livestock (including payments in connection with the veterinary treatment of animals), land or other production factors due to the natural disaster in question.

   (c) Payments shall compensate for not more than the total cost of replacing such losses and shall not require or specify the type or quantity of future production.

   (d) Payments made during a disaster shall not exceed the level required to prevent or alleviate further loss as defined in criterion (b).

   (e) Where a producer receives in the same year payments pursuant to this paragraph and pursuant to paragraph 7 (income insurance and income safety-net programmes), the total of such payments shall be less than 100% of the producer's total loss.

9. *Structural adjustment assistance provided through producer retirement programmes*

   (a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to facilitate the retirement of persons engaged in marketable agricultural production, or their movement to non-agricultural activities.

   (b) Payments shall be conditional upon the total and permanent retirement of the recipients from marketable agricultural production.

10. *Structural adjustment assistance provided through resource retirement programmes*

   (a) Eligibility for such payments shall be determined by reference to clearly defined criteria in programmes designed to remove land or other resources, including livestock, from marketable agricultural production.

   (b) Payments shall be conditional upon the retirement of land from marketable agricultural production for a minimum of three years, and in the case of livestock on its slaughter or definitive permanent disposal.

   (c) Payments shall not require or specify any alternative use for such land or other resources which involves the production of marketable agricultural products.

   (d) Payments shall not be related to either type or quantity of production or to the prices, domestic or international, applying to production undertaken using the land or other resources remaining in production.

11. *Structural adjustment assistance provided through investment aids*

   (a) Eligibility for such payments shall be determined by reference to clearly-defined criteria in government programmes designed to assist the financial or physical restructuring of a producer's operations in response to objectively demonstrated structural disadvantages. Eligibility for such programmes may also be based on a clearly defined government programme for the reprivatization of agricultural land.

   (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than as provided for under criterion (e).

   (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

   (d) The payments shall be given only for the period of time necessary for the realization of the investment in respect of which they are provided.

   (e) The payments shall not mandate or in any way designate the agricultural products to be produced by the recipients except to require them not to produce a particular product.

   (f) The payments shall be limited to the amount required to compensate for the structural disadvantage.

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12. *Payments under environmental programmes*

(a) Eligibility for such payments shall be determined as part of a clearly-defined government environmental or conservation programme and be dependent on the fulfilment of specific conditions under the government programme, including conditions related to production methods or inputs.

(b) The amount of payment shall be limited to the extra costs or loss of income involved in complying with the government programme.

13. *Payments under regional assistance programmes*

(a) Eligibility for such payments shall be limited to producers in disadvantaged regions. Each such region must be a clearly designated contiguous geographical area with a definable economic and administrative identity, considered as disadvantaged on the basis of neutral and objective criteria clearly spelt out in a law or regulation and indicating that the region's difficulties arise out of more than temporary circumstances.

(b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period other than to reduce that production.

(c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

(d) Payments shall be available only to producers in eligible regions, but generally available to all producers within such regions.

(e) Where related to production factors, payments shall be made at a degressive rate above a threshold level of the factor concerned.

(f) The payments shall be limited to the extra costs or loss of income involved in undertaking agricultural production in the prescribed area.

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COMMUNITY INTEREST

Introduction

The 1979 GATT Anti-Dumping Agreement has always provided that even when all requirements for the imposition of anti-dumping duties have been fulfilled, the authorities in the importing country or customs territory have discretion to decide whether or not to impose anti-dumping duties, a provision now found in Article 9(1) of the 1994 Anti-Dumping Agreement. In accordance with this provision, the EC Anti-Dumping Regulation has always provided that in order for anti-dumping duties - whether provisional or definitive - to be imposed, a third condition must be met: it must be determined that "the Community interest calls for intervention".[1] In *Euroalliages and Others*,[2] the Court of First Instance confirmed that the Community interest criterion should also be taken into account in the framework of an expiry review investigation. In other words, a finding of both dumping and injury does not automatically give rise to the imposition or maintenance of anti-dumping duties.

Assessment of Community interest: the existing rules

Whilst the previous versions of the Regulation did not define the factors to be taken into account in assessing the Community interest, the Regulation contains a provision, Article 21, entirely dedicated to the concept of "Community interest". This provision has been the subject of heated discussions among the Member States and was bitterly opposed by the more protectionist Member States such as France, Spain, Italy, Portugal and Greece. It was finally accepted as part of a compromise under which the free-trade oriented Member States such as the UK, Denmark and the Netherlands agreed to drop their opposition to the circumvention provision of the Regulation.

According to Article 21(1),

> [A] determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers, and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2.

Article 21(1) highlights two factors which must be given special consideration in the assessment of the Community interest, namely, "the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition".

Articles 21 and 6(7) extend to users and consumer organisations the status of "interested parties", previously restricted to complainants, importers, exporters and representatives of the exporting country.

Article 6(7) expressly provides that users and consumer organisations, which have made themselves known in accordance with Article 5(10), may "inspect all information made available by any party to an investigation" and may respond to such

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1 Council Regulation 384/96, arts. 7(1) and 9(4).

2 Case T-132/01, *Euroalliages and Others v. Commission*, judgment of 7 July 2003, not yet published, at recital 42.

information. In addition, Article 21 provides that, subject to certain time-limits, users and consumer organisations are expressly given the following rights:

- the right to make themselves known;
- the right to provide information to the Commission;
- the right to receive information provided by other parties;
- the right to request a hearing;
- the right to comment on the application of any provisional duties imposed and to respond to the comments made by the other parties;
- the right to have disclosed the facts and considerations on which final decisions are likely to be taken;[3] and
- the right to have their submissions taken into account and communicated to the Member States.

Exporting producers are also entitled to be informed of the considerations concerning Community interest and have the right to be heard on that point.[4]

At the time of the introduction of Article 21, it was not clear whether this provision was actually meant to cause the Institutions to depart from their past practice of giving overwhelming weight to the complainants' interest in applying the Community interest criterion:

- Article 21(1) directs the Institutions to give "special consideration" to the need "to eliminate the trade distorting effects of injurious dumping" or, in other words, the need to protect the Community industry against dumping. Rather curiously, this need is lumped together in the same sentence with the need "to restore effective competition" as if the two were synonymous.

- The preference for the complainants' interest which underlies Article 21 is also apparent in the last sentence of Article 21(1) which urges the Institutions not to take anti-dumping measures only when they "can *clearly* conclude that it is not in the Community interest to apply such measures" (emphasis added).

An analysis of the cases decided within the framework of the Regulation reveals that the inclusion of an extensive "Community interest" provision has had little or no effect on the Institutions' practice in this matter.

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[3] It is interesting to note that, despite the fact that Article 20(2) gives only to the complainants, importers, exporters, their representative associations and representatives of the exporting countries the right to request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, Article 21(6) extends this right to users and consumer organisations.

[4] See Joined Cases T-33/98 and T-34/98, *Petrotub SA and Republica SA v. Council*, 1999 E.C.R. II-3837 (Ct. First Instance), at paras. 203-04.

The assessment of the Community interest requirement in past cases

(1) General considerations

An examination of past cases shows that the Community interest requirement has only played a minor role thus far.

It is only when the investigation and, in particular, the submissions of the interested parties revealed other factors which could be relevant that Community interest has been taken into account by the Community authorities in deciding not to impose any measures, or for purposes of determining the form or extent of relief.

There are very few cases in which the Community authorities have concluded that it would not be in the interest of the Community to impose any measures. In many of these cases the Community interest criterion was used merely to support a finding that no injury had occurred or that protective action would not alleviate the injury.

In some cases, it has been suggested that the Community interest criterion could also be used by Community authorities to limit the relief imposed under the Regulation. Thus, for instance, in *Unwrought Nickel* the Commission stated:

> [I]t had to be taken into account that if a duty exceeding the 7% price undercutting practised by the Soviet Union were imposed, the effect might be that the Soviet Union would be displaced from the market without relief to the Community industry as the Soviet exports would be replaced by other low-priced third country suppliers. In these circumstances, it is considered to be in the Community's interest that the amount of the duty be limited to 7%.[5]

It may be questioned, however, whether the Community interest criterion is at all relevant for the determination of the level of the duty. It would seem to result from the wording of Articles 7(1) and 9(4) of the Regulation that "Community interest" comes into play only to determine whether "intervention" is called for but that, once a decision to intervene has been made, the level of the duty must be fixed exclusively on the basis of the dumping and injury findings.

When assessing the Community interest requirement, the Institutions examine successively, where appropriate, the interests of the following interested parties: the Community industry, users, importers and consumers. The impact of anti-dumping measures on competition within the EC is also an aspect of Community interest which deserves some emphasis. Finally, in some cases, trade relations with other countries have also been considered.

(2) Interests of the Community industry

Having established that material injury has been caused to the Community industry by dumped imports, the assessment as to whether it is in the interest of the Community

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[5] *Unwrought Nickel* (USSR), 1983 O.J. (L 159) 43; see also *Oxalic acid* (Brazil, GDR, Spain), 1984 O.J. (L 239) 8; *Glycine* (Japan), 1985 O.J. (L 218) 1.

industry to impose anti-dumping measures has been dealt with in numerous cases by the following standard statement:

> The Community industry has been making considerable efforts to improve its productivity in recent years, in an attempt to lower its cost of production and to enhance its competitiveness in this price sensitive market. The Community industry deployed particular efforts of rationalisation during the period examined.[6]

The Institutions then usually conclude that in the absence of anti-dumping measures, the further deterioration of the Community industry would be quite probable.

In some cases, the Community authorities further elaborated upon their reasons and stressed the importance of maintaining viable Community production with a view to, for example, safeguarding employment,[7] avoiding dependency on imports, protecting the environment,[8] or keeping up with technological innovation.[9] In *Potassium Permanganate*,[10] the Commission considered that the absence of measures would seriously impair the privatisation process of the Community producer located in one of the new German *Länder*.

Also, in the *Typewriters* case, the Court of Justice rejected the argument that it is not in the Community interest to protect inefficient producers. The Court of Justice ruled that "the fact that a Community producer is facing difficulties attributable in part to causes other than the dumping is not a reason for depriving that producer of all protection against the injury caused by the dumping".[11]

In *Ferro-Silicon*,[12] the Commission terminated the anti-dumping proceeding following an expiry review investigation. Indeed, the Commission considered that the

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[6] See, e.g., *Styrene-butadiene-styrene thermoplastic rubber* (Taiwan), 2000 O.J. (L 124) 12, at recital 78; *Magnesium oxide* (China), 1999 O.J. (L 159) 1, at recital 92; *Polyester staple fibres (PSF)* (Australia, Indonesia, Thailand), 2000 O.J. (L 16) 30, at recital 101; *Gas-fuelled, non-refillable pocket flint lighters* (Japan), 2000 O.J. (L 22) 16, at recital 79; *Dead-burned (sintered) magnesia* (China), 2000 O.J. (L 46) 1, at recital 83; *Cathode-ray colour-television picture tubes* (India, Malaysia, China, Korea), 2000 O.J. (L 102) 15, at recital 105; *Bicycles* (China), 2000 O.J. (L 175) 39, at recital 137; *Black colorformers* (Japan), 2000 O.J. (L 259) 1, at recital 127; *Synthetic fibres of polyesters* (Taiwan), 1999 O.J. (L 204) 3, at recital 56; *Internal gear hubs* (Japan), 2001 O.J. (L 282) 1, at recital 104; *Certain filament yarns of cellulose acetate* (Lithuania, USA), 2002 O.J. (L 251) 9, at recitals 85-87; *Colour television receivers* (China, Korea, Malaysia, Thailand), 2002 O.J. (L 231) 1, at recital 215.

[7] In *Polyester stable fibres* (Belarus), 2002 O.J. (L 274) 1, at recital 114, it was underlined that "in the absence of measures against PSF originating in Belarus, the Community industry [was] likely to experience a significant worsening of its financial situation with a realistic possibility of further reduction of employment and closure or production facilities".

[8] *Furfuraldehyde* (China), 1994 O.J. (L 186) 11, at recital 43.

[9] See, e.g., *Plain paper photocopiers* (Japan), 1987 O.J. (L 54) 12, at recital 28; see also *Methenamine* (Hungary, Yugoslavia, Bulgaria, Czechoslovakia, Poland, Romania), 1990 O.J. (L 104) 14, at recital 17; *Calcium metal* (China, Soviet Union), 1989 O.J. (L 271) 1, at recital 4; *Recordable compact disks* (Taiwan), 2001 O.J. (L 334) 8, at recital 99.

[10] *Potassium permanganate* (India, Ukraine), 1998 O.J. (L 19) 23, at recital 76.

[11] Joined Cases 277 and 300/85, *Canon Inc. v. Council*, 1988 E.C.R 5731; Common Mkt. Rep. (CCH) ¶ 14,514 (1988).

[12] *Ferro-silicon* (China, Kazakhstan, Russia, Ukraine, Venezuela), 2001 O.J. (L 84) 36.

Community industry was not able to benefit from the existing measures that were obviously efficient. Therefore, the Commission concluded that the Community industry should not continue to benefit from the measures for a further period of five years. Following an action for annulment of the Commission's decision lodged by the Community industry, the Court of First Instance upheld the decision of the Commission.[13]

Finally, in *Farmed Atlantic Salmon*,[14] the Commission considered that even if anti-dumping measures limited to Chile alone were to trigger a price increase in the price of fresh salmon on the Community market, the resulting transfer of wealth to those producers/exporters in the countries not subject to measures would outweigh the benefits accruing to the Community industry. The Commission concluded that it was not in the interest of the Community to apply measures and it terminated the proceeding.

(3) Interests of consumers

Among the factors which have been considered in assessing whether the Community interest calls for intervention, the interests of consumers have been given little weight by the Community authorities.

The absence of comments from consumers or consumer organisations is always interpreted by the Commission as an indication that there is no real concern about the impact of the imposition of anti-dumping measures.[15]

In *Video Cassette Recorders*, typically, the Commission stated:

> [T]here can be no guarantee that the consumers will continue to benefit from price advantages resulting from unfair competition ... a possible limited disadvantage to consumers with respect to the higher prices of VCRs caused by the imposition of anti-dumping duties will be outweighed by the benefits of safeguarding employment and maintaining a foothold in this important technological sector.[16]

In *Colour Television Receivers*,[17] the Commission considered that, in light of the large number of players on the Community market, the large number of products

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[13] Case T-132/01, *Euroalliages and Others v. Commission*, judgment of 8 July 2003, not yet published.

[14] *Farmed Atlantic salmon* (Norway, Chile, Faeroe Islands), 2003 O.J. (L 133) 1.

[15] See, e.g., *Bicycles* (China), 2000 O.J. (L 175) 39, at recital 141.

[16] *Video cassette recorders* (Japan, Korea), 1988 O.J. (L 240) 5. In *Electronic typewriters* (Japan), 1985 O.J. (L 163) 1, the Council stated that "in the long term, it is in the consumers' interest to have a viable Community industry which will compete with and offer an alternative to imports". In *Ethanolamine* (USA), 1993 O.J. (L 195) 5, the Commission stated that "to refrain from taking action would seriously threaten the viability of the Community industry, the disappearance of which would, in fact, reduce supply and competition to the ultimate detriment of consumers". See also *Magnetic disks* (Japan, Taiwan, China), 1993 O.J. (L 95) 5, at para. 77; *Bicycles* (China), 1993 O.J. (L 155) 1. In *Silicon metal* (Brazil), 1992 O.J. (L 96) 17, the Commission stated that "the Community consumers cannot call for the continuation of advantages that have been secured improperly by reason of unfair trading practices". See also *Hairbrushes* (China, Korea, Taiwan, Thailand), 2000 O.J. (L 111) 4, at recitals 127-29.

[17] *Colour television receivers* (China, Korea, Malaysia, Thailand), 2002 O.J. (L 231) 1, at recital 224.

available and the high level of price competition, the continuation of the measures was not against the interests of consumers.

However, in *Photo Albums*, the Commission concluded:

> An analysis of the current situation reveals that the market supply by the Community industry of cheap non-book-bound photo albums of both categories 2 and 3 is insufficient and that therefore a shortage in overall supply would have to be expected if protective measures were taken with respect to these products. [...] in the given circumstances, on balance, the consumer interest takes precedence over the interest of the Community industry.[18]

Similarly, in *Handbags*,[19] the Commission pointed out that should a duty be imposed on synthetic handbags, a shortage of supply would occur, thus restricting consumer choice. The Commission also noted that the imposition of measures would not bring any benefit to the Community industry given that it was likely that synthetic handbags would be sourced from other third countries in the medium term. Therefore, it was concluded that the negative impact of measures would be disproportionate to any actual benefit to the Community industry. The proceeding concerning synthetic handbags was terminated accordingly.

Also, in *Laser Optical Reading Systems*,[20] the Commission considered that the imposition of anti-dumping duties would "severely limit consumer choice" and that "this loss of choice as regards the current variety of models available could not be compensated in the foreseeable future by the Community industry". In such circumstances, the Commission considered that "the interests of consumers [were] by far outweighing the interest of the Community industry", and the proceeding was terminated accordingly.

However, in *Compact Disks*,[21] although the Commission admitted that the capacity installed in Europe could not fulfil the existing demand on the Community market even taking into account the existing spare capacity and the postponed investment plans, the Commission concluded that this could not justify the injurious behaviour of Taiwanese exporting producers.

Finally, it is worth noting that in the *BEUC* case,[22] the Court of First Instance ruled that the Commission must decide on a case-by-case basis whether a consumer organisation should be considered as an interested party. The Court of First Instance quashed the Commission's decision to exclude BEUC from the circle of interested parties by applying a general criterion such as the distinction between products sold at

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18 *Photo albums* (Korea, Hong Kong), 1990 O.J. (L 138) 48.

19 *Handbags* (China), 1997 O.J. (L 208) 31, at recitals 105-11.

20 *Certain laser optical reading systems and the main constituent elements thereof* (Japan, Korea, Malaysia, China, Taiwan), 1999 O.J. (L 18) 62, at recital 18.

21 *Recordable compact disks* (Taiwan), 2001 O.J. (L 334) 8, at recital 106.

22 Case T-256/97, *Bureau européen des Unions de Consommateurs (BEUC) v. Commission* 2000 E.C.R. II-101 (Ct. First Instance), at paras. 63-85.

the retail level and other products.

(4) Interests of users

The EC Institutions have traditionally given more weight to the interests of the complainant industry than to those of user industries[23] and have accordingly rejected claims that it would not be in the Community interest to impose duties.[24] Also, the Commission has, where possible, always taken advantage of limited cooperation from users to support a finding that anti-dumping measures would have a limited impact on the users' cost of production.[25] In the vast majority of cases, the Community authorities justified their position on the grounds that:

(a) the impact of a price increase of the product concerned on users would be limited because the cost of the product in question in the total cost of production of users was very small.[26] However, in *Ferro-Silicon*,[27] where the measures had been in force for more than one five-year period, the Commission considered that, although on an annual basis anti-dumping measures had increased the costs of the user industries only marginally, the material cumulative effect of the measures on the users

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[23] See, e.g., *Polyester staple fibres* (India, Korea), 2000 O.J. (L 166) 1, at recital 109; *Synthetic staple fibres of polyester* (Australia, Indonesia, Thailand), 2000 O.J. (L 175) 10, at recital 144.

[24] In *Tungsten ores and concentrates* (China, Hong Kong), 1990 O.J. (L 83) 23, the Commission considered that the limited disadvantages to processors of price increases under the anti-dumping measures were outweighed by the medium- and long-term benefits of safeguarding the Community tungsten ore and concentrate industry. In *Certain filament yarns of cellulose acetate* (Lithuania, USA) 2002 O.J. (L 251) 9, the Commission took advantage of users' diverse views to conclude that the imposition of the measures would not have serious consequences on the user industry.

[25] See, e.g. *Polypropylene binder or baler twine* (Poland, Czech Republic, Hungary), 1999 O.J. (L 75) 1, at recital 66; *Magnesium oxide* (China), 1999 O.J. (L 159) 1, at recital 98; *Dead-burned (sintered) magnesia* (China), 2000 O.J. (L 46) 1, at recital 88; *Malleable cast iron tube or pipe fittings* (Brazil, Czech Republic, Japan, China, Korea, Thailand), 2000 O.J. (L 55) 3, at recital 184; *Cathode-ray colour-television picture tubes* (India, Malaysia, China, Korea), 2000 O.J. (L 102) 15, at recital 110; *Solutions of urea and ammonium nitrate* (Algeria, Belarus, Lithuania, Russia, Ukraine), 2000 O.J. (L 75) 3, at recital 67; *Synthetic staple fibres of polyester* (Australia, Indonesia, Thailand), 2000 O.J. (L 175) 10, at recital 141; *Recordable compact disks* (Taiwan), 2001 O.J. (L 334) 8, at recitals 103-05; *Coumarin* (China), 2002 O.J. (L 123) 1, at recital 84; *Polyester textured filament yarn* (India), 2002 O.J. (L 205) 50, at recital 116; *Certain tube or pipe-fittings, or iron or steel* (China, Thailand), 2003 O.J. (L 139) 1, at recital 89.

[26] See, e.g., *Polypropylene binder or baler twine* (Poland, Czech Republic, Hungary), 1998 O.J. (L 267) 7, at recital 66; *Steel ropes and cables* (China, India, Mexico, South Africa, Ukraine, Hungary, Poland), 1999 O.J. (L 45) 8, at recital 105; *Large aluminium electrolytic capacitors* (Japan, Korea, Taiwan), 2000 O.J. (L 22) 1, at recital 127; *Hot-rolled flat products of non-alloy steel* (China, India, Romania), 2000 O.J. (L 36) 4, at recital 107; *Low carbon ferro-chrome* (Kazakhstan, Russia, Ukraine), 1993 O.J. (L 80) 8; *Fluorspar* (China), 1993 O.J. (L 226) 3 at recital 42; see also *Isobutanol* (Russia), 1993 O.J. (L 246) 12; *Ammonium nitrate* (Lithuania, Russia), 1994 O.J. (L 129) 24; *Aspartame* (Japan, USA), 1991 O.J. (L 134) 1; *Calcium metal* (China, Russia), 1994 O.J. (L 104) 5, at recital 45; *Silicon carbide* (China, Poland, Russia, Ukraine), 1994 O.J. (L 94) 21, at recital 48; *Urea ammonium nitrate solution* (Bulgaria, Poland), 1994 O.J. (L 162) 16, at recital 48; *Disodium carbonate* (USA), 1995 O.J. (L 83) 8 at recitals 59-65; *Ferro-silico-manganese* (Russia, Ukraine, Brazil, South Africa), 1995 O.J. (L 248) 1, at recital 60; *Coumarin* (China), 1995 O.J. (L 239) 4, at recital 49; *Certain welded tubes and pipes of iron and non-alloy steel* (Czech Republic, Poland, Thailand, Turkey, Ukraine), 2002 O.J. (L 259) 14, at recital 58.

[27] *Ferro-silicon* (China, Kazakhstan, Russia, Ukraine, Venezuela), 2001 O.J. (L 84) 36, at recital 150.

over the period during which they had been in place should also be taken into account;

(b) it is in the interest of the users to ensure that Community producers do not disappear from the market so that the Community does not become dependent upon external sources of supply;[28]

(c) it is in the interest of the users to ensure that Community producers do not disappear from the market as users purchase a relevant percentage of the product from the Community industry, with some of their requirements being special types not available from third countries.[29]

However, in *Wrought Titanium*, although the regulation did not state the reasons, the interests of user industries were apparently taken into account in deciding that it was not in the Community interest to impose any measures.[30] In *Gum Rosin*, the Commission terminated the proceeding on the grounds that it would not be in the interest of users of gum rosin to continue the proceeding.[31]

In *Tungstic Oxide and Acid*,[32] the Commission considered that the effectiveness of a duty was not guaranteed in the absence of anti-dumping measures on upstream intermediary products. Moreover, a duty on tungstic oxide and tungstic acid would have been likely to inhibit the access of the user industry to supplies from a major supplier, whereas injury to the Community industry did not appear to be imminent.

(5) Interests of importers/distributors/traders

As is the case for consumers and users, limited cooperation from importers inevitably leads the Commission to conclude that anti-dumping measures will most likely not have a decisive impact on importers.[33]

In numerous cases, the Commission considered that importers/traders imported the product under investigation from various sources, and thus the likely impact of anti-dumping measures would not have been such as to put the economic activity of the importers/traders at serious risk.[34] In *Compact Disks*,[35] the Commission even

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28 See, e.g., *Furazolidone* (China), 1994 O.J. (L 174) 4, at recital 38; *Fluorspar* (China), 1993 O.J. (L 226) 3, at recital 42; *Grain oriented electrical sheets* (Russia), 1995 O.J. (L 252) 2, at recitals 46-48; *Coke of coal in pieces* (China), 2000 O.J. (L 141) 9, at recital 165; *Polysulphide polymers* (USA), 1998 O.J. (L 82) 25, at recital 73.

29 *Polyester staple fibres* (Belarus), 2000 O.J. (L 274) 1, at recital 120.

30 Beseler and Williams, *Anti-Dumping and Anti-Subsidy Law: the European Communities* (1986), 170; only a summary of the reasons for termination was published. *Unalloyed wrought titanium* (Japan), 1979 O.J. (C 207) 4.

31 *Gum rosin* (China), 1994 O.J. (L 41) 50.

32 *Tungstic oxide and tungstic acid* (China), 1998 O.J. (L 87) 24, at recitals 49-52.

33 See, e.g., *Stainless steel wires with a diameter of 1 mm or more* (India), 1999 O.J. (L 79) 13, at recital 67; *Dead burned (sintered) magnesia* (China), 2000 O.J. (L 46) 1, at recitals 86-87; *Silicon carbide* (China, Russia, Ukraine), 2000 O.J. (L 125) 3; *Polyester staple fibres* (Belarus), 2002 O.J. (L 274) 1, at recital 116; *Certain tube or pipe-fittings, of iron or steel* (China, Thailand), 2003 O.J. (L 139) 1, at recital 87.

34 See, e.g., *Malleable cast iron tube or pipe fittings* (Brazil, Czech Republic, Japan, China, Korea, Thailand), 2000 O.J. (L 55) 3, at recitals 182-83.

considered that the fact that the three cooperating importers suffered losses in 2000 after having realised profitable operations in 1999 seemed to indicate that an upward adjusted price level would be in the interest of importers.

Foreign producers have sometimes argued that they employ a considerable number of people in the distribution of their products on the Community market and that imposition of anti-dumping duties could jeopardise these jobs. In *Printers*, for example, the Commission replied to this argument by stating that, "on balance, the Community's interests lie more in maintaining employment in the manufacturing sector of the Community industry than in protecting a dealer and distributor business which depends to a great extent on imports".[36]

(6) Competition within the Community

The argument that the imposition of anti-dumping duties would reduce competition within the Community or would even create *de facto* a monopoly for Community producers has been raised in numerous cases.[37]

As for concerns raised by interested parties that the imposition of anti-dumping measures would reduce competition on the EC market, the Commission typically replies that they are unfounded in view of the existence of alternative sources of supply and that the level of measures is not such as to foreclose the Community market to the targeted countries.[38]

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[35] *Recordable compact disks* (Taiwan), 2001 O.J. (L 334) 8, at recital 102.

[36] *Serial-impact dot-matrix printers* (Japan), 1988 O.J. (L 130) 12. Similarly, in *Plain paper photocopiers* (Japan), 1987 O.J. (L 54) 12, at recital 28, the Commission decided that importers which sell the imported products under their own brand name (OEMs) are, in any event, vulnerable to the setting-up of new distribution systems and manufacturing facilities in the Community by foreign producers and that, on balance, to ensure the continued existence of at least certain Community producers is more in the Community's interest than favouring Community importers and distributors which have been, to a considerable extent, dependent on the injurious dumped imports. In *Plain paper photocopiers* (Japan), 1995 O.J. (L 244) 1, at recital 92, the Council stated:

> While some employment in sales and services activities may have shifted from these importers to the Community industry or to Japanese sales subsidiaries in the Community, this employment remained in the Community. This situation should be distinguished from the net loss of manufacturing employment which, as described above, is at stake for the Community if duties were allowed to lapse.

[37] See, e.g., *Plain paper photocopiers* (Japan), 1987 O.J. (L 54) 12, 29; *Electronic typewriters* (Japan), 1985 O.J. (L 163) 1, 90; see also *Dihydrostreptomycin* (China, Japan), 1991 O.J. (L 187) 23; *Tungsten carbide and fused tungsten carbide* (China), 1990 O.J. (L 83) 36; *Tungstic oxide and tungstic acid* (China), 1990 O.J. (L 83) 29, where the Commission emphasised that imports from China had already affected the structure of the Community market for the product concerned, having all but eliminated the use of the other non-Community source of supply; *Monosodium glutamate* (Indonesia, Korea, Taiwan, Thailand), 1993 O.J. (L 225) 35; *Certain magnetic disks* (USA, Mexico, Malaysia), 1995 O.J. (L 249) 3; *Polypropylene binder or baler twine* (Poland, Czech Republic, Hungary), 1998 O.J. (L 267) 7, at recital 67; *Magnesium oxide* (China), 1999 O.J. (L 159) 1, at recital 102; *Certain filament yarns of cellulose acetate* (Lithuania, USA), 2002 O.J. (L 251) 9, at recital 100; *Furfuryl alcohol* (China), 2003 O.J. (L 114) 16, at recitals 130-31.

[38] See, e.g., *Flat rolled products of iron or non-alloy steel* (Bulgaria, India, South Africa, Yugoslavia, Taiwan), 2000 O.J. (L 31) 15, at recitals 236-38; *Cathode-ray colour-television picture tubes* (India, Malaysia, China, Korea), 2000 O.J. (L 102) 15, at recital 112; *Solutions of urea*

Also, in a case characterised by the presence of one Community producer and one non-Community producer, the Commission considered that it was in the interest of the Community to impose measures since the expected price increases which would have resulted from the absence of competition due to the disappearance of the Community producer would have been higher than those created by anti-dumping measures.[39]

In *Typewriter Ribbon Fabrics*, where there was only one Community producer and one Chinese producer/exporter of the product concerned, the Commission considered that it was not in the Community's interest that there be only one supplier of this product and that, therefore, any protective measures should not lead to the withdrawal of Chinese imports from the Community market or eliminate competition between these imports and Community production. In this context, a price undertaking was considered appropriate.[40]

In *Potassium Chloride,*[41] the anti-dumping measures (specific duty combined with a minimum price) excluded imported potash from the Community market. The elimination of a significant source of supply on the Community market impeded competition on this market. In a review investigation, it was thus concluded that it was in the interest of the Community to change the form of the measures.

In *Stainless Steel Wires,*[42] certain exporting producers argued that it could not be in the Community interest to impose measures in view of Commission Decision 98/247/ECSC (Case IV/35.814 - Alloy surcharge), which stated that the Community producers of stainless steel (flat products) had disturbed competition by modifying in a concerted fashion the reference values used to calculate the alloy surcharge. The Commission, however, rejected this argument for the following reasons: (1) the "Alloy surcharge" Decision referred to flat products, as opposed to long products such as stainless steel wires; (ii) the investigation showed that the alloy surcharge had not been applied in a concerted manner; (iii) the sales prices for identical references varied; and (iv) the alloy surcharge constituted only a small percentage of the total price of steel wires.

The Commission applied the same reasoning in an anti-subsidy proceeding concerning imports of stainless steel bars originating in India.[43] However, following an application lodged by four exporting producers before the Court of First Instance pursuant to Articles 230 EC and 213 EC, the Court of First Instance annulled the regulation imposing a definitive countervailing duty and collecting the provisional duty

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ammonium nitrate (Algeria, Belarus, Lithuania, Russia, Ukraine), 2000 O.J. (L 75) 3, at recital 68; *Glycine* (China), 2000 O.J. (L 118) 6, at recitals 86-89; *Black colorformers* (Japan), 2000 O.J. (L 259) 1, at recitals 166-75; *Recordable compact disks* (Taiwan), 2001 O.J. (L 334) 8, at recital 106; *Sulphanilic acid* (China, India), 2002 O.J. (L 196) 11, at recital 41.

39 *Polysulphide polymers* (USA), 1998 O.J. (L 82) 25, at recital 77.

40 *Pure silk typewriter ribbon fabrics* (China), 1990 O.J. (L 174) 27.

41 *Potassium chloride* (Russia, Belarus, Ukraine), 2000 O.J. (L 112) 4, at recitals 123 and 125.

42 *Stainless steel wires with a diameter of 1 mm or more* (India), 1999 O.J. (L 79) 13, at recitals 27 and 76.

43 *Stainless steel bars* (India), 1998 O.J. (L 304) 1.

insofar as it concerned the four exporting producers.[44] The Court of First Instance ruled that the Council's assessment of injury and of the causal link between injury and the subsidised imports was vitiated by a manifest error. Indeed, in view of the price structure of stainless steel bars, the Council ought to have accepted the argument that the anti-competitive conduct of producers of flat products could have had significant repercussions on stainless steel bar prices, even though stainless steel bar prices themselves were not directly the subject of any unlawful concerted practices on the part of the producers.

In *Stainless Steel Heavy Plates*,[45] certain exporters raised the argument that any injury allegedly suffered by the Community industry was caused by the anti-competitive behaviour of the EC industry itself. In particular, it was argued that three out of four Community producers were fined by the Commission in 1998 for price-fixing (Decision 98/247/ECSC) in the market to which stainless steel heavy plates belonged. Although the Commission decision terminating the proceeding is silent on this matter, it may reasonably be assumed that the withdrawal of the complaint by Eurofer was prompted by the above-mentioned argument.

In *Seamless Pipes and Tubes*,[46] it was examined whether the anti-competitive practices of some Community producers that were part of the Community industry contributed to the injury suffered by the Community industry. Since the anti-competitive practices were found to have taken place in a period prior to that examined in the proceeding, the Council considered that "there [was] no reason to conclude that the imposition of anti-dumping measures in the present proceeding would have had an impact on the competition on this market in the future".

(7) Trade relations with other countries

In a few cases, trade relations with other countries have also been considered. In *Urea*, for example, it was argued that it was not in the Community's interest to take protective measures against countries such as Malaysia because of the Community's general policy of increasing commercial co-operation with the ASEAN countries and because it could force the ASEAN governments to reconsider their very open policy towards the Community fertiliser sector. The Commission replied that "although the maintenance of good relations with ASEAN countries was in the Community's interest, the maintenance of a multilateral free-trading system, which was in the interest of all participants, implied that sales did not take place at dumped prices".[47]

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44 Case T-58/99, *Mukand Ltd. and Others v. Council*, 2001 E.C.R. II-2521 (Ct. First Instance).

45 *Stainless steel heavy plates* (Slovenia, South Africa), 1999 O.J. (L 135) 95.

46 *Seamless pipes and tubes of iron or non-alloy steel* (Croatia, Ukraine), 2000 O.J. (L 45) 1, at recitals 30 and 39.

47 *Urea* (Austria, Hungary, Malaysia, Romania, USA, Venezuela), 1988 O.J. (L 235) 5, 12; see also *Deep freezers* (Soviet Union), 1987 O.J. (L 6) 1, where an importer argued that the imposition of anti-dumping duties would have the effect of stopping imports into the Netherlands of deep freezers originating in the Soviet Union and that this would have an adverse effect on its own exports under offset agreements with Eastern European countries which could take retaliatory measures. The Council took these arguments into account but nevertheless decided that, in view of the serious difficulties of the Community industry, it was in the Community interest to take measures. The European Court of Justice ruled that this statement of reasons was adequate. Case 77/87, *Technointorg v. Council*, 1988 E.C.R. 6077, at para. 23. See also *Ammonium nitrate* (Lithuania, Russia), 1994 O.J. (L 129) 24, where several exporters argued that the

An important issue which calls for consideration of trade relations with other countries is the existence of protective measures or arrangements with regard to the product under investigation. In answer to a parliamentary question in this respect, the Commission stated:

> While it is the Commission's practice to judge each complaint against dumping and subsidization on its merits, it would be idle to deny that the imposition of an anti-dumping or countervailing duty on products which are subject to quota restrictions could, in certain circumstances, provoke conflict with the Community's trading partners on the grounds that it involves the simultaneous application of two different measures to remedy the same situation ... circumstances could arise in which the imposition of a duty, in addition to a quota, would not be considered as being in the Community interest.[48]

This was taken into account, for example, in *Acrylic Fibres*, where the Council stated:

> [S]ince discontinuous acrylic fibre carded, combed or otherwise prepared, is among the products covered by the agreement between the European Community and Romania on trade in textile products which establishes agreed quantitative limits for this category of products as well as special procedures, this category of products should, for the time being, be excluded from any measures to be taken with regard to Romania.[49]

In *Seamless Pipes and Tubes*, the Commission considered that the effect of the tariff quota system on imports of the products concerned would be that the injurious consequences of the dumped imports originating in the Czech Republic and the Slovak Republic would be eliminated. The Commission therefore terminated the proceeding.[50]

Commission, when formulating proposals in anti-dumping cases, must give proper consideration to the Community's stated commitment to encouraging trade with the countries of the former Soviet Union in order to facilitate their transition to market economies. The Commission replied that this does not exclude anti-dumping measures from being imposed where legitimate protection for the Community industry is warranted; *Ammonium nitrate* (Russia), 1995 O.J. (L 198) 1, at recital 80, where the Council stated that to give proper consideration to the Community's stated commitment to encouraging trade with Russia "does mean, however, that the solution proposed should attempt to minimize any conflict between preventing injury to the Community industry from dumped imports and the need to encourage continued and increased trade with Russia".

[48] Answer given by Mr. Haferkamp on behalf of the Commission, 19 March 1982, 1982 O.J. (C 98) 9.

[49] *Certain acrylic fibres* (Israel, Mexico, Romania, Turkey), 1986 O.J. (L 272) 29, 33. In *Polyester yarn* (Mexico, Korea, Taiwan, Turkey), 1988 O.J. (L 151) 39, 44, the Commission took into account the fact that there were already certain regional quantitative restrictions for Spain and Italy on imports into the Community of polyester yarn originating in South Korea and Taiwan, but considered these measures insufficient to relieve the Community industry from the injury caused by dumping practices. See also *Synthetic fibres of polyesters* (Mexico, Romania, Taiwan, Turkey, USA, Yugoslavia), 1988 O.J. (L 151) 47, 52.

[50] *Certain seamless pipes and tubes, of iron or non-alloy steel* (Czech Republic, Slovak Republic),

1993 O.J. (L 252) 39, at recitals 4-5.