

The Anti-Absorption Provision in EC Anti-Dumping Law

Edwin Vermulst and Folkert Graafsma*

Euromyth: Imported shoes' price hiked

A load of cobblers

Britons will soon have to pay 20 per cent more on shoes imported from China and Vietnam. *Daily Express*, 24 March 2006

This is grossly exaggerated. There is no evidence for claims that prices will go up 20 per cent as a result of European Union anti-dumping measures to counter unfair trade. The increase in duty planned could put about 70p on the leather shoes affected – only nine pairs of out of 100. The Commission expects that retailers will be able to absorb this. Also, children's shoes and high-tech footwear are not touched.¹

I. INTRODUCTION

Article 12 of the basic EC Anti-Dumping Regulation, also known as the anti-absorption provision,² has recently gained attention in light of DG Trade statements that the impact of anti-dumping duties on consumers will be limited because importers and retailers can absorb (part of) the duties.³ We will review EC anti-dumping law and practice under the anti-absorption provision and discuss whether and to

what extent such absorption by importers and/or exporters is permissible.

II. BACKGROUND

Before explaining the anti-absorption provision, as applied, it is useful to recall the objective of the imposition of anti-dumping duties: To restore the level playing field on the EC market by removing the effects of injurious dumping.⁴ Thus, by passing on the amount of the anti-dumping duty to the customer in the form of higher resale prices, the importer *de facto* removes 'unfairly' cheap imports from the market and thereby restores a level playing field for the domestic producers.

In this connection it is important to note that although dumping and injury margins are established at the level of the *foreign* producers/exporters, the importers must pay anti-dumping duties imposed as a result of an anti-dumping investigation. The importers, whether related or not, therefore play a role in achieving the objective of the imposition of the duties. The following example may clarify this point.

Original situation: Sales channel with original prices

Exporter – Importer – Wholesaler – Retailer – Consumer
 100 130 160 190

Notes

- * Vermulst Verhaeghe & Graafsma Advocaten, Brussels, <<http://www.vvg-law.com>>. The authors wish to thank Jochen Beck, Jennifer Paterson and Simon Van Cutsem for their assistance.
- 1 <http://ec.europa.eu/unitedkingdom/press/euomyths/myth154_en.htm>, visited on 27 June 2006.
- 2 See Vermulst, Waer, *EC Anti-Dumping Law and Practice*, pp. 421–424 (1997).
- 3 See also *Anti-dumping: What effect would an anti-dumping duty have on consumer prices for Chinese and Vietnamese shoes?*, Brussels, 23 February 2006: '(. . .) In this hypothetical example, passing on the duty cost direct to the consumer would in fact raise the price of a 35 euro pair of shoes to 36.5 euros. But this is to assume that there would be no absorption of the new import price within the supply and retail chain. If the costs in this hypothetical example were spread across the whole supply chain the cost to consumers would be less than one euro on a pair of shoes that cost 35 euros or more . . .'; 'EU Trade Commissioner Mandelson proposes progressive duty following finding of dumping of Chinese and Vietnamese leather shoes' Brussels, 23 February 2006: 'There is margin within the supply chain to absorb a small duty on import costs by spreading it across product ranges and the distribution chain'.
- 4 See, e.g., *Magnesium Oxide from China*, OJ [2003] L143/1, at 2 (amendment); *Glyphosate from China*, OJ [2000] L124/1, at 2 (amendment). Compare Demataki, *Absorption in EC Antidumping Proceedings*, 32:6 *Journal of World Trade*, 57–77, at 57 (1998).

Investigation by EC reveals an injury margin of 20 per cent

EC producers' target price: 120

Foreign producers' EC export price: 100

Injury margin: $(120 - 100 = 20/100 =)$ 20%

Duties are imposed

If the dumping margin exceeds the injury margin, in the EC, the duty will be based on the injury margin, in this case the 20 per cent calculated above. If the importer wishes to keep the same mark-up, he will need to increase his resale price by 20 (the *amount* of the dumping duty). Thus, he will effectively pass on the payment of the duty to his purchasers, who, in turn, will further pass it on to the distribution chain, all the way down to the consumer. As prices of the imported products therefore increase, the level playing field is restored and the EC producers supposedly can compete again on 'fair' terms:

Sales channel after imposition of 20 per cent duty, assuming 100 per cent pass-through

Exporter – Importer – Wholesaler – Retailer – Consumer				
	100	150	180	210

However, suppose that the exporter and the importer decide that they will absorb the duty because they feel that the market will not accept any price increases:

Sales channel after imposition of 20 per cent duty, assuming 100 per cent absorption

Exporter – Importer – Wholesaler – Retailer – Consumer				
	90	130	160	190

In the example above, the exporter reduces his price by 10. As a result, the importer saves 10 on his purchase price and will pay less anti-dumping duty (20% of $90 = 18$ instead of 20). Thus, his mark-up, net of the payment of the anti-dumping duty, becomes 22. Compared to his previous mark-up of 30, he has therefore absorbed 8.

From the perspective of the EC industry, the effects of the injurious dumping are not being remedied because prices remain at injurious levels instead of increasing. Therefore, the injury continues and, in fact, worsens.⁵

In 1988, the EC adopted a special provision to deal with such absorption. At that time, absorption was addressed in only one paragraph, i.e. paragraph 11

of Article 13. After the overhaul of the basic EC anti-dumping Regulation in 1996,⁶ an entire article with five paragraphs was devoted to absorption, i.e. Article 12. Article 12 was last amended in 2004.

III. HOW DOES THE ANTI-ABSORPTION PROVISION WORK?

A. The Principle of Article 12

Article 12 of the basic EC anti-dumping Regulation in principle requires exporters and importers to pass on anti-dumping duties to customers. Additional anti-dumping duties [hereinafter: anti-absorption duties] may be imposed where it is found that the anti-dumping duty has been borne [absorbed] by the exporter or a related importer.

B. Who can Trigger an Anti-Absorption Investigation?

An investigation under Article 12 can be initiated on the basis of information submitted by the Community industry or any other interested party, at the request of a Member State, or even on the Commission's own initiative.

It should be noted that while Article 12(4) declares the relevant rules of Articles 5 and 6 applicable, it is unclear how the Article 5(4) 25 per cent threshold for complainants is reconciled with Article 12(1). Under Article 12(1), an investigation can start at the request of *any interested party*. For example, suppose just one EC producer who was part of the original Community industry but in itself represents far less than 25 per cent of the total EC production files a request under Article 12. Under Article 12(1), this producer cannot be rejected since it is an interested party, but under Article 12(4) (which refers back to Article 5(4)) he would not have standing to file such request.

C. When can an Anti-Absorption Investigation be Initiated?

Article 12(1) provides that where *normally* within two years from the entry into force of the measures sufficient information is submitted, the investigation may, after consultation, be reopened to examine whether the measure has had effects on the above-mentioned prices. Different from regular interim reviews, a request for

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- The dumping margin will have increased too but the duty is based on the injury margin in this case, so the increased dumping margin is irrelevant, unless it would become lower than the revised injury margin.
- Council Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community, [1996] OJ L56/1, as last amended by Regulation 2117/2005, OJ [2005] L340/17 (amendment). Hereinafter: 'Basic Anti-Dumping Regulation'.

an absorption investigation can therefore be made *any time* after the imposition of definitive duties and is not subjected to the otherwise mandatory one-year waiting period.

The word 'normally' makes clear that the two year 'limitation' on the submission of information is merely indicative. An anti-absorption investigation could in theory therefore start any time after the imposition of anti-dumping measures.⁷ The two years' period therefore only seems to express the expectation that if absorption occurs this is often likely to take place shortly after imposition of measures. Indeed, in EC practice to date, all absorption reviews started within two years after imposition of the original measures.

D. On What Basis can an Anti-Absorption Proceeding be Initiated?

The complainant must provide 'sufficient information' in order to trigger an anti-absorption proceeding. This information should show that, after the original investigation period and prior to or following the imposition of measures, export prices have decreased or that there has been no movement, or insufficient movement in the resale prices or subsequent selling prices of the imported product in the Community.

In other words, Article 12(1) foresees three possible situations that can occur after the original investigation period and prior to or following the imposition of measures:

- A. decreased export prices; or
- B. no movement in resale prices or subsequent selling prices; or
- C. insufficient movement in resale prices or subsequent selling prices.

Where export prices have decreased (A), the presumption is that the exporter is absorbing the duty directly by charging a lower export price than before, thereby increasing its dumping and injury margins. Where resale prices or subsequent selling prices have not increased (B), or have not increased sufficiently to reflect the level of the anti-dumping duties imposed (C), even though export prices remain the same, the presumption essentially is that there is a compensatory arrangement between the exporter and the importer and/or subsequent levels in the sales channel.

The 'sufficient information' to be submitted by the complainants can take any form that complainants deem useful. It can, for example, be provided in the form of market research studies or price lists. In *Weighing scales from Singapore*,⁸ such information consisted of price lists of EC importers selling the weighing scales which, according to the EC industry, demonstrated that, since the imposition of the anti-dumping duty, the resale prices of most models had remained unchanged or had actually declined and that therefore the anti-dumping duty had been borne by the exporter. In *Television Camera Systems from Japan*,⁹ the EC industry demonstrated that it lost several tenders as a result of the low prices offered by the exporters. In *Stainless Steel Fasteners from Malaysia and Thailand*,¹⁰ the complainant submitted information showing that, for Malaysia, the average import price decreased while the import volume increased, despite the imposition of measures. In that same case the information with respect to Thailand consisted of increased sales from Thailand, falling sales for the Community industry and prices which were considerably lower than those prevailing during the original investigation period.¹¹

E. The Re-investigation

Once the absorption proceeding is initiated, the EC commences its 're-investigation', per Article 12(2). The Article makes a distinction between three steps of an absorption proceeding:

- Step 1: exporters, importers and Community producers are provided with an opportunity to clarify the situation with regard to resale prices and subsequent selling prices. The purpose of this step is to allow the EC to understand the views of the various parties so that it can appraise whether prices should indeed have moved. For example, where exporters state that export prices have indeed gone down in comparison with the original investigation then this is *prima facie* evidence of absorption, unless an importer clarifies that he reduced his profits on resales, or unless the exporter clarifies that he also reduced his normal value;
- Step 2: if it is concluded that the measure should have led to movements in prices, then, in order to remove the injury previously established in

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- 7 It being understood that evidentiary requirements effectively preclude investigations from being initiated immediately after definitive duties have been imposed.
- 8 OJ [1995] L307/30 (amendment).
- 9 OJ [1997] L276/20 (amendment).
- 10 OJ [2000] L104/87 (termination).
- 11 OJ [1999] C125/12 (initiation).

accordance with Article 3, export prices are reassessed in accordance with Article 2 and dumping margins are recalculated to take account of the reassessed export prices;

- Step 3: where it is considered that the conditions of Article 12(1) are met due to a fall in export prices which has occurred after the original investigation period and prior to or following the imposition of measures, dumping margins may be recalculated to take account of such lower export prices.

It should be noted that the text of the Article would appear to leave some scope for discussion (to 'clarify the situation' (for example 'that new products have entered the market')). However, in practice it often comes down to the actual numbers. In other words, regardless of the first step (clarification), Article 12(2) implies that a new investigation period is set for which the export prices are collected (clarifying the situation). This new investigation period enables the Commission Services to compare price levels before and after the imposition of duties (whether the measure has led to movement). Then, where the prices have not sufficiently moved as compared to the original investigation period, the Commission Services will calculate a new dumping margin for that new period (re-calculation).

1. Comparing the Price Levels

In order to check whether the prices before and after the imposition of duties moved upwards sufficiently, the EC will first establish a 'benchmark' price. This 'benchmark' is the theoretical resale price level that would have been expected after the imposition of the anti-dumping measures. For this purpose, the EC will take the resale price during the original period of investigation and add the applicable amount of anti-dumping duty.

The EC will then collect the new (resale) export prices for the new period of investigation. These new export prices are called the 'current resale prices'.

Subsequently, the benchmark prices will be compared with the current resale prices on a weighted average basis. If the current resale prices are below the benchmark prices, then this constitutes *prima facie* evidence that absorption has taken place. The *prima facie* percentage of absorption will then be the amount with which the current resale price undercuts the benchmark price, expressed as a percentage of the current resale price. In other words, this is the *prima facie* absorption margin. We use the word *prima facie* since it is of course possible that the lack of movement in resale prices is due to a reduction in the normal value and/or a reduction in the profit realized by the importer.

a. New Products

One reason that prices may not or not sufficiently have moved is the introduction of new products into the market. This could especially be the case for products in the mechanical sector where products are nowadays subject to fast technological developments. Such developments could then be discussed during the clarification phase. Of course, if the new products are sufficiently different from the previous ones, then this could give rise to an entirely new investigation. However, if the changes in the product are 'merely' on account of changed physical characteristics, the question will 'only' be how to take this into account when comparing the price levels.

b. Currency Conversions

Another reason that prices may not or not sufficiently have moved is that the currency in the exporting country has undergone significant devaluations. For example, the exporter which keeps his accounts in the currency of the exporting country, but sets his export prices in USD or Euro, may realize more money in home market currency by charging the same export price. This occurred, for example, in *Stainless Steel Fasteners* from Malaysia, where the significant drop of the Ringgit allowed the exporter to realize more turnover for the same USD export price. After this explanation during the clarification phase, the exporter then had to prove these assertions during the calculation phase.

2. Re-calculating the Dumping Margin

Once the clarification phase is over, and the EC has performed its initial check on the movement in price levels, the actual calculation of the absorption can take place by re-calculating the dumping margin.

This re-calculation could either be a 'straight-forward' comparison of the export prices of the new investigation period with the normal value of the previous period *or* a comparison of the export prices of the new investigation period with the new normal value of the new investigation period. This latter option is possible where exporters allege during the clarification phase that changes in normal value should be taken into account. In such latter case, the complete information on the revised normal values, duly substantiated by evidence must be made available to the Commission within the time limits set out in the notice of initiation.¹²

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¹² Basic Anti-Dumping Regulation, as note 6 above, Article 12(5).

It should be noted that a 'straightforward' comparison of *new* export prices with *old* normal values, is not as 'straightforward' as it may seem, since Articles 2.4 of the Anti-Dumping Agreement ('ADA') and 2(10) of the basic Regulation mandate a comparison 'as nearly as possible' at the same time. Since there is often a time lapse of two to three years between the original investigation period and the new investigation period it can be argued that such a comparison does not comply with the requirement of comparing sales as nearly as possible at the 'same time'.

3. Increased Dumping

Article 12(3) provides that, where the reinvestigation shows increased dumping, the measures in force may, after consultation, be amended by the Council, acting on a proposal from the Commission in accordance with the new findings on export prices. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal within a period of one month after its submission by the Commission. The amount of the anti-dumping duty imposed pursuant to this Article cannot exceed twice the amount of the duty imposed initially by the Council. Thus, if the original anti-dumping duty was 20 per cent, the revised duty cannot be higher than 40 per cent. Nothing however would prevent complainants from filing a second absorption complaint if the first set of additional duties gives rise to another round of absorption.

4. Time Frame

An anti-absorption investigation must be carried out expeditiously and should normally be concluded

within six months, and in all cases within nine months, of the date of initiation of the re-investigation. These relatively short deadlines seem to reflect the underlying character of an absorption proceeding, which is that the anti-dumping duties which appear to be non-effective should be 'repaired' as soon as possible. This underlying character of urgency is also already reflected in the above-mentioned absence of a one-year waiting period for interested parties to request the initiation of an absorption proceeding.

It is important to note that where a reinvestigation is not completed within these deadlines the measure shall remain unchanged. The actual time frames of the investigations to date can be summarized as follows:

5. Changes in Normal Value

Finally, Article 12(5) requires alleged changes in normal value to be taken into account when such information is submitted on time. This is normally the standard 37 or 40 days period as mentioned in the notice of initiation. It should be noted that where an investigation involves a re-examination of normal values, imports may be made subject to registration. Such registration has the legal effect that anti-absorption duties can be imposed retroactively until the date of initiation. Such registration is not foreseen in the context of a normal re-calculation of the dumping margin. Presumably, the reason is that a case with a re-examination of normal values may last nine months (as opposed to six), which the EC considers as an excessively long period during which the domestic EC producers would otherwise remain 'unprotected'. The *practical* effect of registration is of course that an exporter may think twice before submitting new data on normal values since it contains the risk that if the margin is indeed higher than before,

Product	Country	Definitive	Original IP	Initiation	AA IP
Silicon Metal	China	28/7/1990	1/1/1988-31/12/1988	18/10/1991	1/4/1990-30/9/1991
Polyolefin Sacks	China	17/11/1990	1/1/1988-31/12/1988	15/6/1991	1/8/1990-30/4/1991
Weighing Scales	Singapore	22/10/1993	1/1/1991-31/12/1991	11/5/1994	23/10/1993-30/4/1994
TCS	Japan	30/4/1994	1/7/1991-31/12/1992	10/4/1996	1/4/1995-31/3/1996
Microwave Ovens	Korea	4/1/1996	1/10/1992-30/9/1993	18/1/1997	1/1/1996-31/12/1996
Ammonium nitrate	Russia	2/8/1995	1/4/1993-31/3/1994	5/29/1997	1/4/1996-31/3/1997
Glyphosate	China	18/2/1998	1/9/1994-31/8/1995	6/8/1998	1/1/1998-30/6/1998
RBM	China	24/1/1997	1/10/1994-30/9/1995	19/1/1999	1/1/1998-31/12/1998
Stainless Steel Fasteners	Malaysia and Thailand	20/02/1998	1/1/1996-30/11/1996	6/5/1999	1/4/1998-31/3/1999
UU Magnesium	China	7/11/1998	1/7/1996-30/6/1997	4/9/1999	1/9/1998-31/8/1998
PP binder/baler twine	Poland	20/3/1999	1/1/1997-31/12/1997	9/8/2000	1/7/1999-30/6/2000
		11/5/2000 (amended)			
Sulphanilic Acid	China	25/7/2002	1/7/2000-30/6/2001	26/6/2003	1/4/2002-31/3/2003
CLF-i	China	19/7/2001	1/1/1999-31/3/2000	10/10/2002	1/7/2001-30/6/2002
Sodium Cyclamate	China	11/3/2004	1/10/2001-30/9/2002	27/4/2005	1/1/2004-31/12/2004
Handtrucks	China	21/7/2005	1/4/2003-31/2/2004	31/3/2006	1/4/2005-31/4/2006

his importer will be required to pay nine months worth of duties, whereas without new normal values, and thus without registration, the importer will remain free from additional duties for at least six more months.

IV. COMMISSION PRACTICE

The actionability of absorption in EC anti-dumping law dates back to 1988. While a number of anti-absorption investigations have been conducted since that time, compared to the total measures in force, such proceedings are not common. This may be in part because an interim review investigation may accomplish the same result (although it will take longer).

It is noteworthy that the large majority of anti-absorption investigations have targeted China and that many of these investigations resulted in a doubling of the original anti-dumping duty.

Broadly speaking, the investigations conducted thus far can be distinguished between early (1988-1995), rather primitive investigations and later (1996-present), more sophisticated investigations. In the more recent investigations, the Commission has used a two-step analysis. A summary of noteworthy cases is below.

A. Early Investigations

In *Silicon Metal from China*,¹³ the Commission compared the export prices charged by the Chinese producers during the original investigation period, i.e. the period from 1 January 1988 to 31 December 1988, with the export prices charged during the period starting from imposition of the provisional anti-dumping duties until publication of the notice of initiation of the anti-absorption investigation, i.e. the 18 months' period from 1 April 1990 to 30 September 1991. This led to imposition of an additional duty of 198 ECU/tonne or a total duty of 396 ECU/tonne, a doubling of the duty.

Similarly, in *Woven polyolefin sacks from China*,¹⁴ the Commission compared the original investigation period export prices (1 January to 31 December 1988) with the export prices during the nineteen months' period following the imposition of the provisional anti-dumping duty and prior to the initiation of the anti-absorption investigation, i.e. from 1 August 1990 to 30 April 1991. An additional duty of 42.3 per cent was imposed (on top of the original duty of 43.4 per cent).

In *Weighing scales from Singapore*,¹⁵ the Commission compared the prices charged by the Singaporean producer during the original investigation period, i.e. 1 January through 31 December 1991 with the prices during the period following the imposition of the *definitive* anti-dumping duty and prior to the initiation of the anti-absorption investigation, i.e. 23 October 1993 to 30 April 1994. An additional duty of 4.6 per cent was imposed on top of the anti-dumping duty of 10.8 per cent imposed previously. In this case, the Commission found that the producer's export prices had fallen considerably for most models. Therefore, in order to calculate the level of absorption, the Commission calculated the amount of absorption per model as equalling the amount of reduction in the export price, plus the duty *amount* initially intended for collection (equal to the dumping margin) during the reference period, minus the *amount* of anti-dumping duty actually paid on the reduced export price during the investigation period.

B. More Recent Investigations

In two cases involving *Television camera systems* from Japan [TCS] and *Microwave ovens* from Korea [MWOs], the Commission first spelt out its reasoning in more detail. In both cases, the Japanese and Korean companies involved sold through related EC importers.

In these and all subsequent cases, the Commission used the following two-step analysis:

First, it examined whether export prices decreased and/or whether there was insufficient movement in resale or subsequent selling prices. This was done by comparing the relevant price levels during the original investigation period with those during the new investigation period.

Second, if the first step led to a finding that export prices decreased or resale or subsequent selling prices did not move upwards sufficiently, export prices were re-assessed and the dumping and injury margins recalculated on the basis of the re-assessed export prices. The revised anti-dumping duty was then based on the lower of the two, as is the case in original Article 5 investigations.

TCS was initiated in early 1996. In order to establish whether the anti-dumping measures had led to sufficient movement in the resale prices or subsequent selling prices in the EU, the Commission calculated the resale price level to be expected after imposition of the

Notes

13 OJ [1992] L170/1 (amendment).

14 OJ [1993] L215/1(amendment).

15 OJ [1995] L307/30 (amendment).

duties (benchmark price), and the actual resale price after imposition of the duties. The two prices were then compared in order to assess whether the movement of the resale prices after the imposition of the duties was 'sufficient'. The new investigation period chosen for this purpose covered the time period from 1 January 1993 to 31 March 1996, i.e. more than three years. We understand that the reason for this unusually long new investigation period was the fact that there were relatively few transactions of TCS.

The *benchmark price* was calculated by adjusting the resale prices, i.e. the prices charged by the related importers to their unrelated customers, established during the initial investigation period, for differences between the initial and the current investigation period, incurred between the ex-factory level in Japan and the sale to the first independent buyer in the Community. The SGA costs of EC sales subsidiaries were quantified separately for the initial and current investigation period and the difference between the two amounts was added or deducted as appropriate. The anti-dumping duty imposed was quantified on the basis of the free-at-Community-frontier price basis in the initial investigation period, and the resulting amount of anti-dumping duty due was added to the resale prices.

As for *actual resale price after imposition of the duties*, the Commission took the net resale prices actually charged to the first independent buyer in the Community after the imposition of the provisional duties.

The Commission found that the resale prices for both companies had not moved sufficiently. On a weighted average basis, the Commission found that during the new investigation period the actual resale prices remained below the benchmark prices by 31.6 per cent for Sony and by 140.6 per cent for Ikegami.

In order to re-calculate the dumping margins, the period 1 April 1995 to 31 March 1996 was used. As none of the companies submitted any change in the normal values, data established during the initial investigation were used. The weighted average dumping margins found were 108.3 per cent for Sony and 200.3 per cent for Ikegami. Amended anti-dumping duties were imposed accordingly.¹⁶

The MWOs case was also initiated in 1996. In their replies to the questionnaires, two Korean exporters provided information on revised normal values pursuant to Article 12(5) of the Basic Regulation. The Community industry submitted a registration request. The Commission agreed with the request of the Community industry and adopted Regulation 1144/97,¹⁷ making imports of MWOs originating in Korea subject to registration.

As was the case in TCS, the Commission calculated the resale price level to be expected after imposition of the duties (benchmark price), and the actual resale price after imposition of the duties. The two prices were then compared.

The *benchmark price* was calculated by adding the resale prices of MWOs during the original investigation period (1 October 1992 to 30 September 1993) to the applicable amount of the anti-dumping duty. Differences in SGA costs of EC sales subsidiaries during the two periods were taken into account.

As for the *actual resale price after imposition of the duties*, the Commission took the net resale price actually charged to the first independent buyer in the Community by the companies concerned and their related importers after the imposition of the duties during the absorption investigation period (1 January to 31 December 1996). The two cooperating Korean producers, Samsung Electronics Co., Ltd and Daewoo Electronics Co., Ltd provided information on resale prices for certain models considered comparable to those sold during the initial investigation period by their related importers. [The Commission requested information on resale prices also to independent importers, but such information was not made available by the unrelated importers; therefore, all findings were made on the basis of the information provided by the related importers].

The *comparison* was carried out between the benchmark prices and the resale prices of MWO models sold during the absorption investigation period. These models, although not identical to the models sold during the initial investigation period, were considered comparable for the purposes of Article 12.

The Commission found that the actual resale prices had not moved sufficiently after the imposition of the anti-dumping duties, and that the actual prices undercut the benchmark prices significantly. However, since one exporter had argued that the decline in the sales prices had been caused by changes in technology and consumers' preferences, which had modified trading patterns and costs after the initial investigation period, and therefore also the normal values of the products concerned, the Commission proceeded to investigate the alleged changes in normal values. [For a third Korean producer, LG, the Commission found that no exports took place during the re-investigation period, and concluded that a re-assessment of the dumping margin was not appropriate for that company].

As regards the re-calculation of the dumping margin, the Commission considered that the *normal values* of several MWO models had to be constructed,

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16 OJ [1997] L276/20 (amendment).

17 OJ [1997] L166/1.

since the models sold on the Korean market were not comparable to those sold in the Community. For certain models sold on average at a loss, normal value also had to be constructed. For others, domestic prices were used.

The *comparison* between re-assessed normal values and export prices did not show any increase in the dumping margin for the two co-operating companies. [It actually showed a decrease, although this is not apparent from the published determination]. As it was found that the export volume to the Community reported by the two co-operating companies during the investigation period covered the totality of the imports of MWOs as reported by Eurostat, the Commission decided that a re-calculation of the dumping margin for the non-cooperating companies was not necessary. In light of the above, the Commission decided to terminate the investigation without changing the anti-dumping measures in force.¹⁸

Thus, in *MWOs*, although resale prices had not moved sufficiently, this lack of movement was cured by decreases in normal values. On the other hand, although there was negative absorption in the sense that the re-calculated dumping margins were lower than the dumping margins established in the original proceeding, the Commission refrained from applying the new (lower) rates.

In *Glyphosate from China*,¹⁹ the original duty of 24 per cent doubled to 48 per cent as a result of the reinvestigation. The EC industry had submitted evidence that export prices had actually fallen. The Commission considered:

The purpose of this investigation is to establish whether measures have had the intended remedial effects in removing injury and whether any such failure to remove injury is as a result of increased dumping through a fall in export prices. . . . [S]uch a fall in export prices may be reflected in the direct export prices charged by exporters to the Community or it may be reflected in a lack of movement in resale prices or subsequent selling prices in the Community due to a compensatory arrangement. Therefore, the investigation examined price movements of export prices from China as well as prices at resale and other levels in the Community.

The Commission found that Chinese export prices had fallen by approximately 45 per cent while resale prices of unrelated importers had fallen by approximately 12 per cent. As the costs and profits of the unrelated importers had remained the same, the fall could not be justified.

With respect to the second step, the Commission noted that in Article 12 investigations based on lack of movement of resale prices, the export prices would normally be re-assessed on the basis of prices charged to independent buyers in the Community by the importer from which all costs and a normal profit of the importer are deducted to arrive at a constructed export price (supposedly because of the existence of a compensatory arrangement). In this case, however, that step was not necessary because the direct fall in export prices was considered to be the reason for the lack of movement in resale prices and subsequent selling prices and, consequently, the absorption of the measures had been reflected in the fall in export prices. Therefore, the reassessed export prices were established by taking the export prices in the original investigation and deducting the amount of the anti-dumping duty in force. This led to a revised dumping margin of 62 per cent. However, the new duty was based on the recalculated injury margin of 48 per cent.

In *Ring binder mechanisms from China*,²⁰ the duty went up from 32.5 per cent to 51.2 per cent for World Wide Stationery [WWS], the only company that had obtained individual treatment in the original investigation, while the country-wide rate doubled from 39.4 per cent to 78.8 per cent.

It is noteworthy that for one exporting company a finding of absorption was based, albeit on the basis of facts available, on the company's having exported on an 'anti-dumping duty paid' basis.

The Commission noted again, as it had done in *Glyphosate*, that a fall in export prices may be reflected by a fall in the direct export prices charged by the exporters or by lack of movement of resale or subsequent selling prices in the Community due to a compensatory arrangement. In this case however the Commission decided to perform the analysis at the resale level and found that, as far as WWS was concerned, resale prices had increased by only 3.1 per cent, even though they should have increased by over 30 per cent. For all others, the duty had been absorbed in full.

The SGA of the unrelated importers had increased by 0.86 per cent while profits had decreased by 4.72 per cent. Of this 4.72 per cent decrease, 3.8 per cent was found to be related to offsetting the cost increases of the anti-dumping duty. Credit was therefore given for the 3.8 per cent in the calculation.

For purposes of re-assessing the export prices, the Commission constructed the export prices:

Export prices were reconstructed since there appeared to be a compensatory arrangement between the exporters and importers. The reassessment was

Notes

18 OJ [1998] L85/29 (termination).

19 OJ [2000] L124/1 (amendment).

20 OJ [2000] L250/1 (amendment).

made by reference to the export prices found in the original investigation period, deducting the amount of the anti-dumping duty in force and adding any adjustments found to be warranted, i.e. any reduction in the SG&A expenses of importers, any reduction in the profit level of importers and any amount by which resale prices had increased since the imposition of the measure.

While the recalculated dumping margins were 115.3 per cent for WWS and 168.6 per cent for all others, the duties were based on the recalculated injury margins.

In *Stainless Steel Fasteners from Malaysia and Thailand*,²¹ the request for review was finally withdrawn. The case was interesting since the drop of the Malaysian Ringgit and the Thai Baht, as a result of the Asian economic crisis, led exporters to realize more local turnover while being able to charge the same USD or EUR prices. No absorption could therefore be established although, according to the complainant, prices in the EC allegedly had not moved since the imposition of the original measures.

In *Unwrought unalloyed magnesium from China*,²² the duty originally imposed was 31.7 per cent. The Commission compared the original investigation period of 1 July 1996 to 30 June 1997 with the new investigation period covering 1 September 1998 to 31 August 1999 and decided to focus the analysis on the resale level, as it had done in *Ring binder mechanisms*. However, in setting out the objective of the investigation, the Commission seemed to slightly modify its framework for analysis by noting that an analysis of decreased export prices normally will be undertaken only if the analysis at the resale level is inconclusive:

The investigation sought to establish whether the measures previously imposed have had the intended effect and whether any failure to have had such effects was a result of increased dumping. Such failure can be identified by (i) no movement, or an insufficient movement, of resale or subsequent selling prices in the Community or, if no clear conclusion can be drawn from these price movements, (ii) a fall in the direct export prices charged by exporters to the Community.

The Commission found that resale prices (i.e. the prices charged by EC importers to their customers) in the new period, including all payable duties, on average fell by 0.7 per cent, even though they should have increased by more than 30 per cent. Arguments by importers that the decrease in resale prices was due to the decrease in export prices, which in turn were caused by a general decrease in the prices of

magnesium in the world market, were found to be contradicted by the facts (increase in prices on the EC and the Norwegian market). Thus, as EC resale prices had decreased, it was not necessary to investigate the development of export prices.

In the second step, the Commission decided not to use the export prices during the new investigation period because they appeared unreliable (suspicion of compensatory arrangement between exporter and importer). Therefore, it re-assessed the export prices on the basis of the originally established export prices, including all applicable costs, and found a dumping margin of 63.4 per cent, exactly double the original margin.

In *Polypropylene binder or baler twine from Poland*,²³ the evidence provided by the EC industry showed that export prices and resale prices of twines in the EC fell significantly following the imposition of the anti-dumping measures, suggesting an increase in dumping which impeded the remedial effects of the measures in force.

In the first part of the analysis, the Commission compared original investigation period data (1 January to 31 December 1997) with new investigation period data (1 July 1999 to 30 June 2000). The Commission accepted arguments that the resale price charged by the unrelated importer had gone down because of efficiency gains of the importer (lower profit margin) and because of depreciation of the Polish Zloty against the Deutschemark and the Euro. On the other hand, a more general argument that prices had fallen worldwide was rejected as such (although it was indirectly taken into account through recalculation of normal value). The Commission concluded that some absorption had taken place, as the slight decrease in the resale price could not be fully justified on the basis of the arguments accepted above.

The Commission therefore proceeded to re-assess the export prices. As absorption had been found to take place, the export prices during the new investigation period had become unreliable (suspicion of compensatory arrangement) and therefore could not be used. Therefore, export prices were re-assessed on the basis of the originally established export prices, including all applicable costs, particularly the amount of the anti-dumping duty in force. These export prices were then adjusted for changes in SGA expenses or profit, and for foreign currency conversions. Furthermore, as a fall in export prices had been observed during the new investigation period, the Commission also checked these export prices to verify that they would not be lower than the re-assessed export prices. In fact, for one exporter, the export prices during the new

Notes

21 OJ [2000] L104/87 (termination).

22 OJ [2000] L267/17 (amendment).

23 OJ [2001] L221/1 (amendment).

investigation period were lower than the re-assessed export prices and for this exporter the actual—lower—export prices of the new investigation period were used in the investigation.

Two of the three Polish exporters had claimed that normal values had also gone down. The investigation confirmed that this was indeed the case, due to reduced cost of production. Subsequently, dumping margins for these two exporters were re-calculated and it was found that their dumping margins had not increased. For the third producer, the dumping margin was found to have increased from 17.2 per cent to 19.4 per cent. Consequently, the duty for the third exporter was increased to 19.4 per cent.

In *Sulphanilic acid from China*,²⁴ the request was based on decreased export prices. The Commission found in its investigation that export prices had decreased by 18.1 per cent. While a small part of the decrease was due to a decline in the conventional EC duty from 8.5 per cent to 7.4 per cent and another portion of the decrease could be attributed to the depreciation of the USD versus the Euro, a decrease of 9.3 per cent remained. As a result, the recalculated dumping margin became 33.7 per cent, as compared to the original rate of 21 per cent.

In *Integrated electronic compact fluorescent lamps (CFL-i) from China*,²⁵ the complainants withdrew their request because they considered that priority should be given to imports of CFL-i 'that have illegally taken place by violating the Community customs law, the international trade law and are otherwise in conflict with acceptable trade practices rather than on imports for which normal customs procedures have been fulfilled, on which anti-dumping duties have been paid and which apparently represent a minority of imports of Chinese CFL-i entering the Community.' The absorption investigation was therefore terminated. The proceeding was nevertheless interesting since the EC resorted to sampling techniques in the context of the absorption investigation.

In *Sodium cyclamate from China*,²⁶ the EC compared the average export prices in the original IP with those in the new IP. It also compared the resale prices in the

Community. The resale prices were based on information provided by the importer in the Community. Although the average resale price had decreased by 10 per cent, this was attributed to the depreciation of the USD versus the Euro, and thus, no decrease in the level of resale prices in the Community was found.

V. WTO-COMPATIBILITY?

Thus far, no country has challenged an anti-absorption measure taken by the EC. It is therefore unclear how the EC would defend itself, should it find itself subject of a challenge in this regard. An obvious basis for a WTO challenge could be that there is no equivalent provision within the WTO Anti-Dumping Agreement that addresses the imposition of anti-absorption duties. Hence, a Member might argue that this specific review proceeding is not consistent with the rules governing a review proceeding and therefore falls outside the scope of the ADA.

The EC might defend itself by invoking the framework of Article 11 ADA.²⁷ However, a defence based on Article 11 of the ADA might not necessarily prevail. Notably, the fact that in an Article 12 review the new dumping duties can only be higher (or in the best case stay the same), but never be lower (even where reduced dumping is found), an argument could be made that such a biased approach is neither *objective* nor *even-handed*. Moreover, if an absorption review shows no dumping at all, but the original measures are continued nonetheless, an argument could be made that this is inconsistent with Article 11.2 ADA last sentence which mandates that 'If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately'.

It is also possible that the EC would not (solely) defend itself under the ADA, but rather might contend that anti-absorption measures are permissible under Article XX(d) of the GATT 1994 because they are measures that secure compliance with customs enforcement rules.²⁸ However, to the extent that

Notes

24 OJ [2004] L40/17 (amendment).

25 OJ [2004] L71/35 (termination).

26 OJ [2005] L342/96 (termination).

27 Indeed, the EC has justified its anti-absorption provision on just such a premise in responses to questions posed by Members in the context of trade reviews. See, e.g. Trade Policy Review Body 24 and 27 July 2002, Trade Policy Review – European Union – Minutes of Meeting (31 March 2003), WT/TPR/M/102/Add.2 ('As regards the anti-absorption procedure in the EC legislation, from the point of view of the WTO rules, this procedure is only a form of review under Article 11.2 of the Anti-dumping Agreement, whose object is to reassess the export price in accordance with Article 2 of the Anti-dumping Agreement.'). More recently, the EC has stated: 'The ADA and Article VI of GATT 1994 do not contain any explicit provision on anti-dumping absorption. The anti-absorption procedure followed by the EC aims at re-establishing the effectiveness of the measures when, in the period closely following the imposition of anti-dumping or countervailing duties, it is shown that the duties are being absorbed. From the GATT point of view this is to be seen as a form of review whose primary objective is to reassess the export price'. Trade Policy Review Body, Trade Policy Review – European Communities – Minutes of Meeting – Addendum (24 January 2005), WT/TPR/M/136/Add.2.

28 Compare Demataki, as note 4 above, at 59 (1998).

any panel or the Appellate Body may not consider anti-absorption measures justified under the ADA, it is unlikely that the measures would be upheld under Article XX(d).

More specifically, the GATT Panel in *EEC-Regulation on Imports of Parts and Components*²⁹ determined that 'to secure compliance with' could not be interpreted, as the EC advocated its anti-circumvention measures did, to prevent actions which undermine the *objectives* of laws or regulations. Thus, the Panel found: 'Article XX(d) merely covers measures to secure compliance with obligations under laws and regulations *as such* and not with their *objectives*.'³⁰ Consequently, the EC anti-circumvention measures designed to ensure compliance with the *objective* of laws and regulations and which did not ensure compliance with obligations under the laws and regulations *as such* (i.e., the obligation of exporters to a specified amount of an anti-dumping duty³¹) were not compatible with the specific wording or purpose of Article XX(d).³²

Ultimately, as in the case of anti-circumvention measures, anti-absorption measures do not have the purpose of enforcing the obligation to pay anti-dumping duties *per se*. Rather, they are more properly characterized as measures to prevent actions which undermine the objectives of the anti-dumping duties, which as noted are to restore the level playing field on the EC market by removing the effects of injurious dumping.³³ Consequently, a defence under this exception is not likely to be successful.

Another question is how the EC would fend off a challenge that it has initiated absorption proceedings against producers that did not dump in the original proceeding. Upholding the Panel finding in *Mexico – Rice*, the Appellate Body has already confirmed that failure to terminate a proceeding against exporters who are found not to be dumping is inconsistent with the ADA.³⁴ Hence, the initiation of review proceedings, especially an *absorption* review proceeding where there is nothing to absorb, could prove difficult to defend.³⁵

VI. CONCLUSIONS AND RECOMMENDATIONS

The objective of the imposition of an anti-dumping duty is to remedy the effects of injurious dumping. This remedial effect is supposed to be achieved by the importers (which must pay the anti-dumping duties) increasing their resale prices by the *amount* of the anti-dumping duties so as to maintain their mark-up. The same logic applies to subsequent levels of the sales channel.

If the EC industry submits adequate evidence of insufficient movement of resale or subsequent price levels, the Commission will initiate an anti-absorption investigation and the burden of proof will then essentially be on the importers to convince the Commission that the insufficient movement can be explained by efficiency gains or reduced profits. In most investigations conducted thus far, it has been difficult to provide the necessary proof. Perhaps the best illustration of this is the *Ring binder mechanism* case where the Commission actually found a profit decrease of 4.72 per cent, but then decided that only 3.8 per cent was related to offsetting the cost increases of the anti-dumping duty. Thus, the very existence of the anti-absorption provision, as well as its aggressive use in past cases, militate against importers absorbing the costs of the anti-dumping duties.

In other words, while absorption of the amount of the anti-dumping duties by unrelated importers/distributors through reduction of their costs and/or profits is permissible in that (if proven) it may provide a justification for the insufficient movement of resale prices or subsequent price levels, the anti-absorption investigation itself is wrought with difficulties and creates significant risks.

Furthermore, it is unclear why importers/distributors should sacrifice their profit margins. This effectively would make them the parties that shoulder the burden of the duties, even though they carry no blame for injurious dumping. Indeed, the WTO Appellate Body recently emphasized in the report *United States-Zeroing* that it is the exporters

Notes

29 Panel Report, *EEC-Regulation on Imports of Parts and Components*, adopted on 16 May 1990, L/6657-37S/132.

30 *Ibid.*, at para. 5.16 [emphasis added]; see also *ibid.*, at para. 5.18.

31 The Panel found that the basic anti-dumping Regulation did not establish obligations that require enforcement. Instead, it determined that the individual regulations imposing definitive anti-dumping duties gave rise to enforcement. *Ibid.*, para. 5.18.

32 See *ibid.*, paras 5.16-5.18.

33 See, e.g. *Magnesium Oxide from China*, OJ [2003] L143/1, at 2 (amendment); *Glyphosate from China*, OJ [2000] L124/1, at 2 (amendment).

34 See Appellate Body Report, *Mexico-Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, adopted 20 December 2005, paras 117 and 221.

35 For example, in *Sodium Cyclamate from China* where two of the original exporters were found not to be dumping yet were subjected to co-operate in an absorption review. Understandably, these exporters refused to co-operate, especially since under EC law, the additional duty in an absorption review can never exceed the original duty. Any co-operation would therefore simply be meaningless since there was nothing to absorb.

that engage in dumping (and notably not the importers), stating³⁶:

Establishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behaviour. Indeed, it

is the exporter, not the importer, that engages in practices that result in situations of dumping.

Third, and perhaps most importantly, if the importers in fact were to absorb the cost of the duties, then prices at the consumer level will not go up and the whole investigation amounts to an exercise in futility.

ANNEX Original and Revised Duties in Anti-absorption Proceedings

Product	Country	Original duty	Revised duty
Silicon metal ³⁷	China	198 ECU/MT	396 ECU/MT
Polyolefin sacks ³⁸	China	43.4%	85.7%
Weighing scales ³⁹	Singapore	10.8%	15.4%
TCS ⁴⁰	Japan	Sony: 62.6%	108.3%
		Ikegami: 82.9%	200.3%
Microwave ovens ⁴¹	Korea	Samsung: 3.3%	Unchanged
		Daewoo: 9.4%	
		LG: 18.8%	
		Nisshin: 24.4%	
		Others: 24.4%	
Glyphosate ⁴²	China	24%	48%
Ammonium Nitrate ⁴³	Russia	MIP ECU 102.9 per tonne	Specific ECU 26.3 per tonne.
RBM ⁴⁴	China	WWS: 32.5	51.2%
		Others: 39.4%	78.8%
UU Magnesium ⁴⁵	China	MIP ECU 2622 per tonne (unrelated parties)	Unchanged
		31.7% (all others)	63.4%
Stainless Steel Fasteners ⁴⁶	Malaysia and Thailand	<u>Malaysia</u>	
		Tigges: 5.7%	Unchanged
		Tong Heer: 7.0%	Unchanged
		Others: 7.0%	Unchanged
		<u>Thailand</u>	
		A.B.P.: 8.4%	Unchanged
		Dura: 2.7%	Unchanged
		Others: 8.4%	Unchanged
PP binder/baler twine ⁴⁷	Poland	Defalin: 16.3%	Unchanged
		Terplast: 6.1%	Unchanged

Notes

36 Appellate Body Report, United States–Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing'), WT/DS294/AB/R, adopted 9 May 2006, para. 129.

37 OJ [1992] L170/1 (amendment).

38 OJ [1993] L215/1 (amendment).

39 OJ [1995] L307/30 (amendment).

40 OJ [1997] L276/20 (amendment).

41 OJ [1998] L85/29 (termination).

42 OJ [2000] L124/1 (amendment).

43 OJ [1998] L93/1 (amendment).

44 OJ [2000] L250/1 (amendment).

45 OJ [2000] L267/17 (amendment).

46 OJ [2000] L104/87 (termination).

47 OJ [2001] L221/1 (amendment).

Product	Country	Original duty	Revised duty
Sulphanilic acid ⁴⁸ CLF-i ⁴⁹	China China	Bezzalin: 17.2%	19.4%
		Industrial Chemistry Research Institute: 12.8%	Unchanged
		WKI Isoliertechnik Spolka: 15.7%	Unchanged
		Others: 20.3%	Unchanged
		21%	33.7%
		Changzhou Hailong : 59.5%	Unchanged
		City Bright: 17.1%	Unchanged
		Deluxe Well: 37.1%	Unchanged
		Lisheng: 0%	Unchanged
		Philips & Yaming: 32.3%	Unchanged
		Sanex: 20.2%	Unchanged
Sodium cyclamate ⁵⁰	China	Shenzhen Zuoming: 8.4%	Unchanged
		Zhejiang Sunlight: 35.3%	Unchanged
		Others: 66.1%	Unchanged
		Fang Da Shenzhen: 0%	Unchanged
		Fang Da YQ: 0%	Unchanged
		Golden Time: 6.9%	Unchanged
Handtrucks ⁵¹	China	Others: 17.6%	Unchanged
		Ningbo Liftstar: 32.2%	Not yet determined.
		Ningbo Ruyi: 28.5%	
		Ningbo Tailong: 39.9%	
		Zhejiang Noblelift: 7.6%	
		Others: 46.7%	

Notes

48 OJ [2004] L40/17 (amendment).

49 OJ [2004] L71/35 (termination).

50 OJ [2005] L342/96 (termination).

51 OJ [2006] C78/24 (initiation).