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**A COMPARATIVE STUDY ON CANADIAN AND EC ANTI-DUMPING
LEGISLATION AND THE COMPATIBILITY OF ANTI-DUMPING LAW WITH
FREE TRADE AREAS**

NASSIB ABOU-KHALIL

**STUDY DIRECTED BY
PROFESSOR DONALD MCRAE**

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**A COMPARATIVE STUDY ON CANADIAN AND EC ANTI-DUMPING
LEGISLATION AND THE COMPATIBILITY OF ANTI-DUMPING LAW
WITH FREE TRADE AREAS**

This paper looks at how anti-dumping legislation was implemented in Canada and in the European Communities. This comparison of Canadian and EC anti-dumping law aims at examining how the Anti-Dumping Code was transposed and applied in each jurisdiction by looking at each step of an anti-dumping investigation, starting with the initiation of an investigation, the calculation of the normal value and of the export price, the determination of the dumping margin, the finding of injury, and ending with other related matters such as anti-absorption and anti-circumvention rules.

Having looked at Canadian and EC anti-dumping law as such, this paper examines the compatibility of anti-dumping actions with the creation of free trade areas and the effect of anti-dumping duties on such free trade areas. It looks specifically at the EC and the NAFTA examples. Both the NAFTA and the EC treaty create, generally speaking, a free trade area, however the approach taken *vis-à-vis* anti-dumping duties within the free trade area is different in each case: while the EC abolished anti-dumping duties within the free trade area, these duties are maintained under the NAFTA regime.

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Introduction

Anti-dumping legislation is one of the most commonly used trade protection instruments. In fact, amongst the three main instruments of contingent protection under the WTO regime, meaning, anti-dumping, countervailing and safeguard measures, anti-dumping is by far the most commonly used protection measure. According to some studies, anti-dumping investigations accounted for eighty-six per cent of all contingent protection investigations launched in 1999¹. Industrialized countries seeking to protect their internal markets from allegedly unfair trade practices were the first to introduce anti-dumping legislation. The first country to ever adopt anti-dumping legislation is Canada in 1904. The trend was shortly after followed by New Zealand in 1905, Australia in 1906, South Africa in 1914, the US in 1921 and Great Britain in 1921. Since the first anti-dumping legislation, the practice of imposing anti-dumping duties has grown in popularity and is used by an increasing number of countries, including an increasingly growing number of developing countries. In this context, it has become clear to the international community that anti-dumping legislation, although meant to be used as a protection measure against unfair trade practices, can be used in reality simply and purely as a tool to create barriers to trade and to stop undesirable imports from entering domestic markets. This reality led the international community to develop binding rules on the imposition of anti-dumping duties in the context of the first GATT of 1947.

The anti-dumping provisions of the GATT were meant to provide Members with tools allowing them to protect their internal markets from injurious dumping

¹Tharakan, P.M.K., *The Problem of Anti-Dumping Protection and Developing Country Exports*, WIDER, The United Nations University, Working Paper No. 198, Sept. 2000, p. 1.

and not with ways to create trade barriers and thus, reduce the beneficial effects of trade liberalization. As such, anti-dumping rules allow, in theory, an importing country to take protective action against dumped imports if the dumping caused or is threatening to cause injury. The reality is somewhat different from the theory: Members of the GATT used anti-dumping law to protect their markets from unwanted imports. In this context, at least part of the international community has become increasingly aware of the necessity of adopting rules which would be uniformly applied by all Members, and which not only aim at protecting national markets from unfair trade practices, but also prevent the imposition of abusive anti-dumping duties which in reality result in creating trade barriers. During the Uruguay Round negotiations', anti-dumping was perhaps one of the most contentious issues. Nevertheless, the Uruguay Round negotiations resulted in the adoption of an agreement dealing exclusively with the implementation of anti-dumping rules: *Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (hereafter the '*GATT Anti-Dumping Code*' or the '*Anti-Dumping Code*' or the '*Code*'). This *Code* is the result of ongoing efforts to create an international framework for anti-dumping measures. However, this is not the first attempt to create such a '*Code*'. In fact, a generic framework for anti-dumping actions was included in Article VI of the GATT 1947. This provision is maintained in the new GATT 1994. The problem of the implementation of Article VI has been addressed by the adoption of three anti-dumping codes in total. The first code was adopted in 1968 as a result of the Kennedy Round negotiations (the '*Kennedy Code*'), and the second code was adopted in 1979 as a result of the Tokyo Round negotiations (the '*Tokyo Code*').

The Current *Code* is a complete revision of the *Tokyo Code*. It entered into force on the first of January 1995 and it is binding on all WTO Members.

The new *Anti-Dumping Code* provides for guidelines to be followed by national authorities on all aspects of the imposition of an anti-dumping duty, from the initiation of the investigation to the actual collection of the duty, however it requires implementation by the national authorities in their national legislation, and therefore, it is left to each Member individually to adopt legislation implementing the *Anti-Dumping Code* within its territory. This would inevitably result in discrepancies between the anti-dumping legislation adopted and implemented by certain Members. In this study we will mainly look at how two of the biggest historical users of anti-dumping law have implemented the *GATT Anti-Dumping Code* within their respective jurisdictions, namely Canada and the European Communities (EC). This comparison will show whether or not the *Code* is implemented in a similar manner in both jurisdictions and whether we could conclude that Canada and the EC have a uniform anti-dumping regime, which is in line and in conformity with the guidelines of the *GATT Anti-Dumping Code*. We will therefore look at how anti-dumping legislation was implemented in Canada and in the European Communities. This comparison of Canadian and EC anti-dumping law aims at examining how the *Anti-Dumping Code* was transposed and applied in each jurisdiction by looking at each step of an anti-dumping investigation, starting with the initiation of an investigation, the calculation of the normal value and of the export price, the determination of the dumping margin, the finding of injury, and ending with other related matters such as anti-absorption and anti-circumvention rules. The *GATT Anti-Dumping Code* does not require Members to adopt its text word for word in their national legislation and does not

impose mandatory clause-by-clause interpretation and application principles. This, in conjunction with the fact that the provisions of the *Code* could potentially be interpreted to serve different interests, indicate that it is unlikely that the *Code* will be applied uniformly in Canada and in the EC. This study will show that anti-dumping legislation as implemented in the EC and Canada is in reality a measure used to create trade barriers rather than to protect against unfair trade practices, and we will show that such measures should not find their place in an increasingly regional economy focused on the elimination, not the creation, of trade barriers and on free movement of goods.

Having looked at Canadian and EC anti-dumping law as such, we will examine the compatibility of anti-dumping actions with the creation of free trade areas. We will look specifically at the EC² and the NAFTA³ examples. Both the NAFTA and the EC treaty create, generally speaking, a free trade area, however the approach taken *vis-à-vis* anti-dumping duties within the free trade area is different in each case: while the EC abolished anti-dumping duties within the free trade area, these duties are maintained under the NAFTA regime. Despite major differences between the NAFTA, which is a free trade area properly speaking and the EC Treaty which creates a customs union, the focus here is on some common aspects of both agreements, namely the abolition of tariff trade barriers and the intention of the members to achieve free circulation of goods within the free trade area. In that sense both the EC Treaty and NAFTA create a free trade area with some similarities, and considering the relationship between tariff elimination and anti-dumping action, our focus will be on the similarities between these two free

²*Treaty Establishing the European Community as modified by the Amsterdam Treaty*, 1997, hereafter EC Treaty.

³*North American Free Trade Agreement*, 1992.

trade areas from a tariff elimination perspective and their differences as to the approach taken with respect to anti-dumping legislation. This study will not only show that maintaining anti-dumping duties within a free trade area has a negative effect on trade within the free trade area and therefore, these duties should as such be abolished and replaced by alternative rules, but also that the simple idea of creating a free trade area is in itself not reconcilable with maintaining anti-dumping legislation by members of the free trade area within the boundaries of the free trade area. Our comparison of Canadian and EC anti-dumping law will serve as grounds for this conclusion. In fact this detailed analysis of how anti-dumping legislation is used in each respective jurisdiction will show whether anti-dumping is in fact a trade defense tool or a trade barrier, and whether the way it is used, meaning the way authorities come to a conclusion that dumping exist, is compatible with the creation of a free trade area or whether the method of determining that dumping exists and imposing an anti-dumping duty is in itself a dumping creating instrument that ends up inhibiting trade rather than protecting against unfair trading practices.

Finally, although we recognize that anti-dumping legislation has an effect on trade regardless of whether it is applied within a free trade area or outside of a free trade area, it is not within the scope of this study to look at the effect of anti-dumping legislation on global trade, and as a result such effect will not be specifically addressed in this paper.

1. The definition of dumping

Dumping is traditionally defined as “transnational price discrimination where prices vary between national markets”⁴. It is the practice of “pricing in export markets at levels that are below prices or “normal values” in the home market, i.e. international price discrimination”⁵. In other words it is “price discrimination between national markets”⁶. Some authors tend to expand this definition and to include “transnational sale below cost” as being a dumping practice⁷. Talking about the definition of dumping, Allan Deadroff says that “the definition has broadened over the years [...] Some now consider dumping to include “sales below cost”, at least presumptively [...] This alternative criteria for dumping has gradually acquired the elevated status of an alternative definition”⁸. It is clear that the concept of price discrimination, and the concept of sales below cost are two separate concepts, each situation may take place independently, meaning that price discrimination may occur without sales below cost and sales below cost could occur without price discrimination. Describing dumping actions as being both, is equivalent to saying that it could indifferently be one or the other⁹.

⁴Marceau, G., *Antidumping and Antitrust issues in free trade areas*, Clarendon Press, Oxford, (1994) p.11.

⁵Holmes, P. & Kempton, J., *Study on the economic and industrial aspects of Antidumping policy: Final Report*, Sussex European Institute, University of Sussex, Brighton, (1997).

⁶Vermulst, E. & Waer, P., *EC Antidumping law and practice*, Sweet & Maxwell, London, (1996) p.1.

⁷In her book Gabrielle Marceau talks about the ‘classic’ definition of dumping and the ‘pragmatic’ definition of dumping. The classic definition of dumping is described as transnational price discrimination practice, and is defined as being a situation where “different units of the same commodity are sold at different prices for reasons not associated with differences in costs or when different units are sold at the same price where costs are different. Dumping refers to a situation where prices are lower in the importing market than in the domestic market of the exporter” See *Antidumping and Antitrust issues in free trade areas*, p.11. The pragmatic definition of dumping is described as transnational sale below cost, and is defined as being “the pricing of goods below some definition of cost” See Marceau, G., *supra* n. 4, p.13.

⁸Deardoff, A., ‘Economic Perspective on Antidumping Law’ in J. Jackson and V. Vermulst, *Antidumping Law and Practice* (1991), p. 29.

⁹Marceau, *supra* n. 4, p.11.

Article VI of the General Agreement on Tariffs and Trade (GATT) defines

dumping as follows:

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to the other:

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
 - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade,
 - or
 - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

According to Holmes & Kempton the definition of dumping would include the following economic circumstances¹⁰:

a) Monopolistic predatory pricing:

This covers situations where a producer or a company with a dominant position in a market is selling its product at a low price in order to secure its monopolistic position and raise prices.

b) Strategic behavior falling short of monopolistic predation:

These are all actions taken by a company with the objective of influencing the behavior of rivals. "To be more precise, behavior is strategic if it would not be optimal profit maximizing behavior, if the actions of other firms were taken as given, but which becomes profit maximizing when the reaction of others is taken into account"¹¹.

c) Price discrimination aimed at market entry:

¹⁰Holmes, P. & Kempton, J., *supra* n. 5, p. 2.

¹¹*Ibid*, p. 4.

This is the case when prices are lowered with the simple objective of entering a new market.

d) Cyclical price-cutting (price discriminating or selling below cost):

This involves selling at a low price in periods where the business or a plant is threatened of closing down. Action is then taken to safeguard it.

e) Behavior by state trading enterprises, not based on commercial consideration:

These are dumping cases “represented by exports from state trading countries where commercial considerations are not paramount”¹².

This approach of Holms and Kempton of defining dumping by type of behavior shows that not all dumping actions are ill willed. Some dumping actions would not be classified as ‘anti- competitive behavior’ but rather as ‘survival action’ allowing companies to stay in business.

This point of view is not uncommon. Pierre Didier¹³ says that Article VI of the GATT defines dumping as being an unlawful commercial practice destined to gain foreign markets using export prices, which are lower than normal value of the exported merchandise.

However, Didier brings on a precision by saying that the ‘competition’ aspect of dumping is not clearly established in the whole of Article VI. Referring to the first paragraph of Article VI, Didier says that ‘normality’ in this Article is not defined using usual competition parameters, but rather arbitrary and mechanical ones, meaning the difference between the interior price or its substitutes and the export price. From the point of view of commercial competition this practice is accepted and encouraged, but not from the point of view of dumping. Didier would

¹²*Ibid*, p.7.

¹³Didier, P., *Les principaux Accords de l'OMC et leur Transposition dans la Communauté Européenne*, Bruylant, Bruxelles, (1997), p. 5 & seq.

privilege the view that anti-dumping measures are not protective of fair competition, but are rather safeguard measures.

2. The EC legislation on anti-dumping

2.1. Applicable legislation in the European Communities

2.1.1. General

Anti-dumping law in the European Communities is not left to the individual states composing the actual fifteen members entity. Anti-dumping falls directly within the Community's jurisdiction. Articles 133 of the EC Treaty and Article 74 of the ECSC award this competence to the EC¹⁴. Article 133 of the EC Treaty deals with the Common Commercial Policy (CCP). It gives the Commission¹⁵ the sole right to initiate legislation with respect to the CCP. The Commission makes proposals to implement the CCP, it also recommends to the Council¹⁶ to open negotiations. The Commission has as well authority to negotiate international agreements and to represent the EC in international trade bodies. Anti-dumping measures are a component of the CCP. This is specifically and clearly stated in paragraph 1 of Article 133 of the EC Treaty. The competence of the Community with respect to the CCP is exclusive, which means that Member

¹⁴*European Coal and Steel Community*, Paris Treaty, 1951. (This Treaty expired in 2002).

¹⁵See Articles 3, 5, 7 of the *Treaty on European Union* & Articles 211 to 217 of the *Treaty of Amsterdam (Treaty Establishing the European Community)*: The Commission is the policy initiator in the European Union. It is charged of making proposals for all new legislation. It acts as guardian of the EU treaties to ensure that EU legislation is applied correctly and where necessary it takes action against those in the public or private sector who fail to respect their treaty obligations. It has the power to initiate legal proceedings against Member States or businesses that fail to comply with European law. It also occupies the function of the executive body of the EU and it is responsible for implementing and managing policy.

¹⁶See Articles 4, 5 & 7 of the *Treaty on European Union* & Articles 202 to 210 of the *Treaty of Amsterdam (Treaty Establishing the European Community)*: The Council is the Community's legislative body, it co-ordinates the general economic policies of the Member States, it concludes on behalf of the Community international agreements, together with the European Parliament it constitutes the budgetary authority that adopts the Community's budget, it takes the necessary decisions for the implementation and definition of the common security and foreign policy. The Council is composed of one representative at ministerial level from each Member State, who is empowered to commit the Government.

States can not take any anti-dumping action, only the Community has such a power¹⁷.

2.1.2. EC Regulation 384/96¹⁸

This Regulation of the European Community establishes a formal framework within which investigations on dumping allegations can be carried out. It also enunciates the procedural steps from the initiation of a complaint to the final finding of dumping, and the imposition of duties if dumping is in effect found to be taking place. This Regulation will be the focus of our comparative study, since it is through this Regulation that the GATT *Anti-Dumping Code* is brought into application within the European Communities.

2.1.3. Provisions under ECSC Treaty

Anti-dumping provisions under the ECSC Treaty are dealt with by Commission Decision No 2277/96/ECSC¹⁹. These provisions are basically identical to non-ECSC products with three exceptions²⁰: Firstly, under the ECSC Treaty the imposition of definitive duties lies with the Commission and not with the Council²¹. Secondly, “ anti-dumping measures by Member States are not in principle excluded [...], Member States can take action if the Commission itself

¹⁷ See Fallon, M., *Droit Matériel Général des Communautés Européennes*, Bruylant-Academia, Louvain -la-Neuve, 1997, p. 30: “[...]ceci revient à exclure la compétence des Etats membres en la matière”. Also see EC Treaty, footnote 30 at Articles 2 & 3.

¹⁸ *Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community as amended by Regulation (EC) No 2331/96 of 2 December 1996.*

¹⁹ Commission Decision No 2277/96/ECSC of 28 November 1996 *on protection against dumped imports from countries not members of the European Coal and Steel Community.*

²⁰ Muller, W., Khan, N., Neuman, H. -A., *EC Anti-Dumping Law - A commentary on Regulation 384/96*, John Wiley & Sons, West Sussex, 1998, p.27.

²¹ *Regulation 384/96*, Article 9(4).

does not take action; so far, this situation has never occurred”²². And thirdly, circumvention rules do not contain provisions concerning the assembly of product²³; EC Regulation 384/96 contains such rules.

3. Canadian anti-dumping legislation

3.1. Canadian Special Import Measures Act²⁴ (*SIMA*)

Anti-dumping investigations in Canada are, primarily, the responsibility of the Anti-Dumping and Countervailing Directorate (hereafter ADCD or ‘the Directorate’), which falls within the Canada Customs and Revenue Agency (The ‘CCRA’), commonly referred to as Revenue Canada. *SIMA* is the Canadian equivalent of *EC Regulation 384/96*. It embodies the provisions of the *GATT Anti-Dumping Code* and it is the legal basis on which Revenue Canada relies in order to impose anti-dumping duties. *SIMA* is also complemented by a series of regulations referred to as the *Special Import Measure Regulations*²⁵ (*SIMR*).

3.2. The Canadian Institutions

The CCRA is responsible for the collection of duties and taxes on imported goods. The ADCD is more specifically responsible for the administration of *SIMA*. Dumping findings are made by the ADCD who is responsible for evaluating a complaint and deciding whether or not to initiate an investigation into the alleged dumping, the determination of the dumping margin, and the collection of the anti-dumping duties. The ADCD has the initial

²²Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, p.27.

²³*Regulation 384/96*, Article 13.

²⁴*Special Import Measures Act*, R.S. 1985, c. S-15.

²⁵*Special Import Measures Regulations*, SOR/84-927.

responsibility of determining whether or not dumping exists. If the ADCD determines that there is actual dumping, then the question of injury is referred by the Commissioner of Customs and Revenue²⁶ to a different body: the Canadian International Trade Tribunal (CITT)²⁷. The Commissioner has to be satisfied that there is sufficient evidence of injury to initiate an investigation before referring the question to the CITT. If the Commissioner is unsure that there is sufficient evidence to initiate an injury investigation, he may also refer that question to the CITT. The CITT will have to determine whether or not there is sufficient evidence of injury to cause an investigation²⁸ and the Commissioner will be bound by that decision and must initiate an investigation²⁹.

The CITT is an independent and quasi-judicial body. It carries out its statutory responsibilities in an impartial manner. It is not part of any government department or agency. In anti-dumping investigations, the CITT is primarily responsible for determining whether the Canadian industry has suffered injury as a result of the investigated dumping activities. According to Sections 42 and 43 of *SIMA*, the CITT is responsible for conducting an inquiry and issuing a finding as to whether the dumped imports have caused or are causing injury or retardation to the Canadian domestic industry, or if they are likely to cause such injury.

Complainants could also use the CITT as an avenue of appeal of the Commissioner's decision not to refer the injury investigation to the CITT for lack of sufficient evidence. Some decisions of the CITT may be appealed to the Federal Court of Canada, or to a By-National panel in the case of goods of the

²⁶*SIMA*, Section 2(1), *SIMA* defines 'Deputy Minister' as being the Commissioner of Customs and Revenue Canada, hereafter 'Commissioner' or 'Deputy Minister'. Section 2(9) of *SIMA* authorizes the Commissioner to delegate some of its duties under the Act to other officials.

²⁷The role of the CITT is defined by Sections 42 to 47 of *SIMA*.

²⁸*SIMA*, Section 33(2).

²⁹*SIMA*, Section 31(3).

United States or Mexico. Appeals on questions of law may be made to the Federal Court of Appeal. Finally, decisions of the CITT remain subject to judicial review to the Federal Court of Appeal within the meaning and the parameters of Canadian administrative law.

4. Canadian and EC anti-dumping law

4.1. Initiating an anti-dumping investigation: the EC's centralized approach in Comparison with the Canadian example within the NAFTA

The initiation of an anti-dumping investigation in the EC is triggered by the lodging of a complaint directly with the Commission, or with a Member State, who will forward it to the Commission³⁰. The Commission could also initiate a proceeding on its own initiative, regardless of whether a complaint has been lodged by a Member State³¹. The latter situation practically never occurs³². Typically a complaint is always lodged with the Commission. *EC Regulation 384/96* states that an investigation is “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”³³. The majority of the complaints are lodged by a federation, an association or by a legal representative rather than by the Community producers themselves³⁴. It should be pointed out here that a key notion with respect to the complaint lodging process is the definition of ‘Community industry’, since the Commission will only consider complaints representing a Community industry. The definition of ‘Community industry’ will

³⁰ *Regulation 384/96*, Article 5(1).

³¹ *Regulation 384/96*, Article 5(6).

³² Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 5.34, p. 263.

³³ *Regulation 384/96*, Article 5.

³⁴ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 5.8, p. 257.

be examined in greater detail later. Finally, the complaint must be in writing³⁵, it has to meet an evidentiary test and include evidence of dumping, injury and a causal link³⁶. When the Commission finds that there is sufficient evidence, it will publish a notice of initiation of proceedings³⁷.

Similarly, in Canada an investigation is triggered by lodging a complaint with the Commissioner of Customs and Revenue³⁸, or on the Commissioner's own initiative, the latter situation being far less frequent.

We will turn now to the actual legislative requirements for initiating an investigation. Articles 5 and 12 of the *GATT Anti-Dumping Code* deal with the initiation of a procedure. These provisions state that a written application by or on behalf of the domestic industry is required to initiate an investigation in order to determine the existence, degree and effect of any alleged dumping. Such an application should include evidence of dumping, injury and a causal link. The *Code* puts an onus on the national authorities to examine the accuracy and adequacy of the information contained in the application in order to determine whether sufficient evidence has been submitted to support the initiation of an investigation, however the *Code* does not specify what is 'sufficient evidence'. The purpose of this preliminary step would be presumably to avoid having investigations launched based on pure unsubstantiated or weak allegations of dumping, which, as such, could adversely affect imports into the investigating territory.

³⁵ *Regulation 384/96*, Article 5(1).

³⁶ *Regulation 384/96*, Article 5(2).

³⁷ *Regulation 384/96*, Article 5(9). Such notice contains information on the product, countries concerned, give a summary of the information received by the Commission and invite for the submission of all relevant information and positions within a specified time frame.

³⁸ *SIMA*, S. 31(1).

Prior to examining what is considered to be ‘sufficient evidence’ under Canadian and EC law, a preliminary remark on EC law is necessary. Under EC legislation the evidence submitted, according to the text of the legislation, is examined ‘as far as possible’ by the Commission. This limitation is neither contained in the *GATT Anti-Dumping Code*, nor is it found in the Canadian legislation. The choice of words by the EC Legislator is surprising. Although it is generally acknowledged that not all evidence submitted in the initiation process can be examined by the relevant authority, one would expect that the evidence should be examined to the ‘extent necessary’ and not ‘as far as possible’. The later choice seems to give some latitude to the Commission when examining a complaint and to attach more weight to certain elements of evidence rather than others. What is ‘possible’ will depend solely on the resources invested in such a process, while what is ‘necessary’ aims at reaching a certain result.

Returning to the specific requirement of ‘sufficient proof’, we note that the wording of the Canadian legislation is very different from the wording of the *GATT Anti-Dumping Code*, in that it states: “The Commissioner shall cause an investigation to be initiated respecting the dumping or subsidizing of any goods and whether there is a *reasonable indication* that such dumping or subsidizing has caused injury or retardation or is threatening to cause injury”³⁹[emphasis added]. Under Canadian law the ‘sufficient evidence’ test of the *Code* is met when there is a ‘reasonable indication’ that dumping has caused injury retardation or threatening to cause injury. In comparison, under EC legislation, the test to be met remains the ‘sufficient evidence’ test without any further clarifications. Although the wording of the EC legislation is in keeping with the *GATT Anti-Dumping Code*, it

³⁹*SIMA*, S. 31 (1).

is however not specified in EC law what constitutes 'sufficient evidence', leaving it open to an arbitrary evaluation by the Commission. Comparing the wording of the two legislations, it is clear that under Canadian law an objective test has been introduced while under EC law the test is subjective and far more prone to interpretation. Although at this stage the finding of 'sufficient evidence' would only mean that an investigation will be launched, the lack of a specific and strict test to establish that such evidence exists is a clear indication that authorities enjoy a certain latitude in deciding whether or not to initiate an investigation and further, given the lack of guidelines as to what effectively constitutes 'sufficient evidence', it is also clear that any evidence could constitute sufficient evidence. Perhaps the elaboration of a test to determine what constitutes sufficient evidence is an item to be included in the next multilateral negotiations round on the *GATT Anti-Dumping Code*.

Further on this very same issue, it is interesting to note that the three texts differ on another key point. The *GATT Anti-Dumping Code* specifically states that in order to initiate an investigation there must be evidence of dumping, injury and a causal link. It is further stated that a "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient [...]"⁴⁰. Comparatively, even though *EC Regulation 384/96* uses the exact wording of the *Code*, it is striking to see that the above mentioned sentence relating to the 'simple assertion' was omitted from the text of the regulation. The Canadian text displays a similar difference. As stated above it requires a 'reasonable indication' that "dumping [...]" has caused injury or retardation or is threatening to cause injury"⁴¹. However, no reference is made to the 'simple assertion' criteria. This omission is important

⁴⁰ *GATT Anti-Dumping Code*, Article 5(2).

⁴¹ *SIMA*, S. 31 (1).

under EC law since EC legislation does not define what is ‘sufficient evidence’, however under Canadian law it is difficult to see how a ‘simple assertion’ could constitute a ‘reasonable indication’. This is further evidence of the underlying legislative intention in some cases not to limit the discretionary powers of the investigating authority in deciding whether or not to launch an investigation.

Further examination of the provisions relating to the initiation of a complaint widens the gap between Canadian and EC legislation. Indeed, when the Commissioner under Canadian legislation concludes that no investigation will be initiated because there is no ‘reasonable indication’ that the dumping causes retardation or injury or is likely to cause injury, the complainant has an automatic right to appeal the Commissioner’s decision to the CITT. The CITT can then examine the question of retardation and eminent or future injury⁴². The Commissioner is bound by the decision of the CITT, and must initiate an investigation forthwith if the CITT finds a ‘reasonable indication’ of retardation or injury or a threat of injury⁴³. This right to appeal of the Commissioner’s decision is only available when the Commissioner decides not to initiate an investigation. If the Commissioner decides to initiate an investigation, foreign producers do not have a similar right of appeal. This is yet another clear indication of the legislative inclination towards favoring the initiation of anti-dumping proceedings in Canada. The powers of the CITT in deciding to initiate an investigation expand further. It is stated in the *SIMA Handbook*⁴⁴ that “[w]here the CITT, in conducting its injury inquiry respecting goods to which a preliminary determination applies, concludes

⁴²*SIMA*, s. 33(2)(b).

⁴³*SIMA*, s. 31(7).

⁴⁴*Special Imports Measures Act Handbook*, Anti-Dumping and Countervailing Directorate, Ottawa, hereafter referred to as *SIMA Handbook* or *Handbook*.

that other similar goods may also be injuriously dumped, the CITT⁴⁵ has to inform the Commissioner. The Commissioner then decides whether or not an investigation should be initiated with respect to these other goods⁴⁶. Although the text of the legislation and of the *Handbook* seem to suggest that the Commissioner may or may not initiate an investigation, it is hard to imagine that he would not do so, especially when it is suggested that he does by the administrative body that could overturn his decision.

Under EC legislation a rejection of a complaint by the Commission could be attacked by way of judicial review pursuant to Article 173 of the EC Treaty. A judicial review is a much more arduous process than an automatic referral right as procured by the Canadian legislation.

The *GATT Anti-Dumping Code* further states that an application shall be rejected and an investigation terminated when there is no sufficient evidence of either dumping or injury, if the margin of dumping is *de minimis*⁴⁷, if the volume of actual or potential dumped goods is negligible⁴⁸, or if the injury is negligible⁴⁹. Here again Canadian and EC legislation differ from each other and from the *GATT Anti-Dumping Code* on some of these issues.

Canadian legislation integrated the notion of *de minimis* margin of dumping⁵⁰. The margin of dumping is considered *de minimis* if it is less than two

⁴⁵ *SIMA Handbook*, pg. 4.1.1.

⁴⁶ *SIMA*, s. 31(8).

⁴⁷ *GATT Anti-Dumping Code*, s. 5.8, the *de minimis* dumping margin is defined as being less than 2% of the export price.

⁴⁸ *GATT Anti-Dumping Code* s. 5.8, the volume of dumped imports is considered negligible "if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing member collectively account for more than 7 per cent of imports of the like product in the importing Member."

⁴⁹ The *GATT Anti-Dumping Code* does not define negligible injury.

⁵⁰ *SIMA*, s. 35(1)(a)(ii).

per cent of the export price of the goods⁵¹. This is identical to the margin specified in the *GATT Anti-Dumping Code*. EC legislation did the same⁵².

With respect to the definition of ‘negligible import volumes’, Canadian legislation integrated the concept as it is in the *GATT Anti-Dumping Code*⁵³. The same could not be said about EC legislation, where the definition of ‘negligible import volumes’ was modified. Import volumes are not measured in comparison with imports of like goods into the EC, but rather in comparison with community consumption⁵⁴. The EC legislation text speaks of ‘market share’. In other words, the Commission will not initiate a proceeding against the imported goods of a specific country when the volume of such imports accounts for less than one per cent of Community consumption, unless collectively with other countries, these imports account for more than three per cent of Community consumption.

Although the figures here are numerically lower than the figures in the *GATT Anti-Dumping Code* and the Canadian legislation, the criterion used is different and it does not necessarily mean that the Community adopted a lower threshold to allow goods to fall in the ‘negligible imports’ exception. The criterion used by the Community is altogether different, since it does not relate to import volumes but to consumption. This difference in the approach leads to different results and “given the size of the Community market the thresholds contained in Article 5(7) of EC Regulation 384/96 will, as a rule, be higher than those of Article 5.8 of the *GATT Anti-Dumping Code*”⁵⁵, and as a result of the Canadian Legislation. In other words it is more difficult to conclude that the volume of imports is

⁵¹ *SIMA*, s. 2(1) “insignificant”.

⁵² *EC Regulation 386/96*, Article 9(3).

⁵³ *SIMA*, s. 2(1) “negligible”.

⁵⁴ *EC Regulation 386/96*, Article. 5(7).

⁵⁵ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 5.20, p.260.

negligible and as such it does not justify the initiation of a dumping investigation under EC law than it is under Canadian law.

The above clearly shows that from their early stages anti-dumping investigations are not immune to political manipulation aiming at implementing protective measures. We found that the *GATT Code* did not impose strict criteria as to the required level of evidence in order to conclude that there are grounds to initiate an investigation. Comparing the Canadian and the EC legislation shows that Canada seems to have adopted in its legislation a more objective test. This, of course, is a positive initiative, especially considering that Canada would have to resort to this initial test when considering initiating an anti-dumping investigation against one of its free trade partners under the NAFTA. Nevertheless, the fact remains that it is left to Canada and almost entirely up to Canada to make that decision, and even if it is difficult to prove that Canadian authorities would act in a biased manner at this stage, it is difficult to deny that there is a strong appearance of bias.

4.2. Standing requirements

Besides the requirements stated above, the decision to initiate an investigation depends on the degree of support of the complaint by the domestic producers. The *GATT Anti-Dumping Code* requires “that the application be made by or on behalf of the domestic industry”⁵⁶. This will be the case when fifty per cent of the producers who expressed an opinion, either favorable or unfavorable on the application, support the initiation of an investigation. However, if those producers in favor of the application account for less than twenty five per cent of

⁵⁶*GATT Anti-Dumping Code*, Article 5(4).

the total production of the domestic industry, which includes the producers in favor, those who are opposed and those who did not express an opinion, then it will be deemed that the application does not benefit from the support of the domestic industry, and an investigation will not be initiated.

Although at first glance Canadian and EC legislation seem to be in keeping with the *GATT Anti-Dumping Code* with respect to the standing requirement, this impression changes when we take a closer look at how exactly it is determined that the domestic industry supports the launch of an investigation. The fifty per cent test does not pose any problems since we are looking at the production of producers who have expressed an opinion on the application. A problem arises specifically when establishing whether or not the producers in favor of the application account for more than twenty-five per cent of the total production of the domestic industry. There comes into play the definition of 'domestic industry'. The *GATT Code* states that 'domestic industry' consists of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production of those products"⁵⁷, 'those products' meaning here the like products. Determining what constitutes a major proportion of the total domestic production becomes a key element. It is required that producers representing twenty five percent of that major proportion of the domestic production support the investigation. Therefore, although it seems that the *Code* sets a precise and strict standard, this standard loses its precision when we look at how 'domestic industry' is defined. This lack of precision is caused by the fact that the *Code* does not specify what constitutes a 'major proportion'. The result of this is that when national authorities are transposing the *Code* into their national legislation they

⁵⁷*GATT Anti-Dumping Code*, Article 4(1).

can opt for an interpretation of 'major proportion' which would allow a small number of producers representing a fraction of the whole domestic industry to support an investigation.

It is specifically the definition of 'major proportion' that is at the heart of the disparity between Canadian and EC law. *SIMA* does not define 'major proportion' in the legislation itself, although when defining 'domestic industry', the text of the legislation uses the term 'major proportion'⁵⁸. The interpretation given to that term is found in the *SIMA Handbook*, where it is stated, "the Directorate has, for some time, been equating a 'major proportion' with at least a 25 to 30% figure in mind"⁵⁹. That means in practice, that it is required that a complaint must be supported by twenty five per cent of the Canadian domestic industry, and the Canadian domestic industry is defined as being a major proportion of the total domestic production, and in reality such a major proportion constitutes 25 % to 30% of the total Canadian production. Therefore, the twenty five per cent rule under Canadian law represents 25% of what constitutes effectively twenty five to thirty per cent of the total domestic production, which means in reality that it could be a very small portion of the total domestic production.

The EC took a completely different approach and imposes a double standard. The term 'major proportion' is defined in article 5(4) of *EC Regulation 384/96*. It is considered that there is enough support when the producers supporting the investigation account for more than fifty per cent of the total production of community producers who expressed either support or opposition to the investigation. In this calculation, producers who did not express an opinion on the investigation are simply not accounted for. Therefore, it is very difficult to assess

⁵⁸ *SIMA*, s. 2(1) "domestic industry".

⁵⁹ *SIMA Handbook*, pg. 4.1.4.2.

what is in reality the proportion of the total Community production that is supporting or opposing the initiation of an investigation.

We should also examine the second test required under EC law, although this second test is not directly relating to standing as such, but to ensuring ongoing support for the investigation by the domestic industry. EC legislation has created a direct link between the notion of 'major proportion' of domestic producers and the co-operation of these same producers in the investigation. In other words Community legislation imposes a co-operation requirement on a major proportion of the Community industry: "in the light of Articles 16(1) and 18, co-operation constitutes making a proper and timely reply to the Commission's questionnaire and providing the necessary information on the occasion of a verification visit by Commission officials"⁶⁰. The information submitted is the grounds for the determination of injury, and it will only constitute valid grounds if the Community producers submitting it "represent a major proportion of Community production as defined in Article 5(4)"⁶¹. This means that the 'major proportion' criteria will only be met when the Community producers who provided information represent more than "50% of the total production of the like product produced" by Community producers who expressed support or opposition to the complaint, unless those who expressly support the complaint account for less than twenty five percent of the Community industry⁶².

This double test does not alter the fact that the standing requirement is not dependent on the representation of the Community production as a whole but only on the fraction of the Community production represented by producers who

⁶⁰ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 4.15, p. 240.

⁶¹ *Ibid.*

⁶² *EC Regulation 384/96*, Article 5(4).

expressed their support or opposition to initiating an investigation. This does not necessarily mean that this double requirement has no effect, quite the contrary, it serves a very specific purpose: insuring on going support for the investigation. Practically, the result of this double requirement is that once the investigation has been initiated and producers have been requested to give information, then the level of support in Canada does not have to be maintained at the same level required during the initiation process, while in the EC the threshold to be met in order to complete the investigation is maintained at the exact same level of support by Community producers is required at this later stage of the initiation of an investigation process. As stated at paragraph 9.18 of *EC Anti-Dumping Law*:

“if the combined production volume of those Community producers which replied to the Commission’s questionnaire is not representative, i.e. if it does not constitute a major proportion of the total Community production, the proceeding would normally have to be terminated without the adoption of measures because it would be difficult if not impossible to establish in such circumstances whether or not the Community industry as defined in Article 4(1) in conjunction with Article 5(4) has been injured”⁶³.

Both Canadian and EC legislation allow for the initiation of anti-dumping investigations based on standing requirements, which do not account for what would presumably be producers whose aggregate production is quantitatively superior to the aggregate production of producers who expressed an opinion in favor or against the initiation of a procedure. The ignored producers are the silent producers, those who did not manifest any interest in the procedure, favorable or not. In other words, it is possible under both legislations to initiate investigations, although in reality the producers supporting the investigation do not represent the producers whose production accounts for the majority of the production in either Canada or the EC. This is simply a way for investigating authorities to conclude

⁶³Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 9.18, p. 314.

that there is sufficient support for an investigation and base their assessment on those producers pursuing the imposition of anti-dumping duty, while ignoring those who could weaken the standing requirement because of their lack of co-operation or interest.

4.3. The notions of 'Community industry' and 'on behalf of a community Industry' in comparison with the Canadian notion of 'domestic industry'

The term 'domestic industry' under the *GATT Anti-Dumping Code* refers to all domestic producers of like products, or to those of them whose production constitutes a major proportion of the total domestic production of such products. The definitions of the term 'major proportion' as well as the generic definition of 'domestic industry' have been discussed above. We will be discussing here some additional specific issues relating to the definition of 'domestic industry'.

According to the *GATT Code*, certain producers are excluded from the definition of 'domestic industry'. When a producer is related to the importer or exporter, or is himself an importer or exporter of the dumped product, he may or may not be included in the definition of 'domestic industry'. The decision to include or exclude a producer from the definition of the 'domestic industry' lies with the investigating authority and it is discretionary. It is relevant for this study to look at the rules which lead to the exclusion of certain producers from the definition of 'domestic industry' for two reasons: this will allow us to determine to which degree anti-dumping investigations are initiated on behalf of producers who actually suffered an injury as a result of unfair trade practices and to what extent the existing rules allow for strategic import manipulation aiming at

conducting investigations, which in all likelihood would result in a finding of dumping.

Both Canadian and EC legislation require the respective investigative authorities with the discretionary power to include or exclude producers from the definition of ‘domestic industry’ during an inquiry. At first sight, excluding producers who are participating in the dumping seems logical. Indeed, why extend the benefit of anti-dumping protection to the producers that are profiting from these actions and are unlikely to support an anti-dumping investigation and to contribute to the finding of injury? We will see that the reality is different, considering particularly that the definition of ‘domestic industry’ has a direct link to the finding of injury since it is the injury caused to the domestic industry that leads to a finding of dumping . Defining what constitutes the domestic industry is a key element of an investigation.

In Canada, this discretionary power has been used to exclude certain producers from the definition of ‘domestic industry’ on the basis that they marketed their products “only on a local basis”⁶⁴, and therefore they were not representative of the domestic industry. In this particular case, the excluded producers accounted for thirty per cent of the total domestic production, and for the remaining seventy per cent, only half suffered injury. Nonetheless, this exclusion did not affect the finding of dumping and the imposition of an antidumping duty⁶⁵, quite the contrary, those producers who were likely to weaken the finding of injury were simply excluded. Indeed, one might wonder what would have been the outcome of

⁶⁴ *Brunswick International (Canada) Ltd. v. Canada (Anti-Dumping Tribunal)*, [1979] F.C.J. No.1114, Court File No. A-87-78, F.C.A.

⁶⁵ *Brunswick International (Canada) Ltd. v. Canada (Anti-Dumping Tribunal)*.

the investigation should the excluded producers have been included in the definition of domestic industry.

Producers have also been excluded when they imported dumped goods, and when they are of “marginal significance in terms of production, sales and market share”⁶⁶. In this case smaller producers were excluded and the domestic industry was finally constituted by one producer who accounted for eighty percent of the Canadian production, thus not affecting the continuation of the proceedings.

The tribunal clearly enunciated its discretionary power with respect to exclusions of certain producers from the definition of domestic industry⁶⁷:

“The Tribunal notes that, while it must take into account paragraph 1 of Article 4 of the Anti-Dumping Code in defining “domestic industry,” the word “may” in paragraph 1(i) indicates that it is within the Tribunal’s discretion to exclude from the definition of “domestic industry” those producers that are related to the exporters or importers or that are themselves importers of the allegedly dumped product.

The Tribunal and its predecessors have refused to exercise their discretion in favor of such exclusions when to do so would effectively deny the existence of a domestic industry”⁶⁸.

In this case the tribunal did not exclude any domestic producers from the definition of domestic industry, even those domestic producers who imported dumped goods were included. The Tribunal found that there was no ‘compelling’ reason to exclude these producers, considering that their sales volume of dumped goods was not significant⁶⁹.

⁶⁶ *Photo Albums with Self-Adhesive Leaves (Re)*, Canadian International Trade Tribunal Finding Concerning Dumped or Subsidized Imports Inquiry No.: NQ-90-003 [1991] C.I.T.T. No. 1.

⁶⁷ Also see *Refill paper (Re)*, Canadian International Trade Tribunal Finding Concerning Dumped or Subsidized Imports, Inquiry No.: NQ-96-001, [1996] C.I.T.T. No. 130, at pg. 43.

⁶⁸ *Women’s Footwear (Re)*, Canadian International Trade Tribunal Review Finding Review No.: RR-94-003, [1995] C.I.T.T. No. 27; also see *Bottoming Materials and Toplifting*, Anti-dumping Tribunal, Inquiry No. ADT-7-82, September 27, 1982, where producers were not excluded, but would have been, according to the tribunal, if the volumes of dumped imports were greater and the imports were not defensive in origin; also see *Certain flat hot-rolled carbon and alloy steel sheet products (Re)*, Canadian International Trade Tribunal Finding Concerning Dumped or Subsidized Imports, Inquiry No.: NQ-98-004, [1999] C.I.T.T. No. 58, July 2, 1999, pg. 107.

⁶⁹ The sales of dumped goods by domestic producers in this case were, with respect to boots, of less than 2% of the domestic producers total sales and of less than 3% of total import volumes, and with respect to boots these numbers are respectively 13% and 4.5%. Also see *Refill paper (Re)*, Canadian International Trade Tribunal Finding Concerning Dumped or Subsidized Imports, Inquiry No.: NQ-96-001, [1996] C.I.T.T. No. 130, at pg. 44-45.

In addition to insignificant volumes, the Tribunal stated that the importers should not be excluded, when they used the imported goods to defend their position in the marketplace against other imported goods, or when the imports, for the most part, were directed at a particular market segment in which there is almost no other competition from domestic production.⁷⁰ The application of this twofold test, consisting of assessing the volume of dumped imports and on finding a justification, led to the exclusion of domestic producers where, the volume⁷¹ of imported goods was found to be too significant to be justified “on the basis of factors such as material shortages, the ability to make certain products or the capacity to stock products in inventory”⁷². In this particular case the two other producers were considered to constitute the domestic industry for the purpose of the investigation. In another case the tribunal refused to exclude producers who imported goods, on the grounds that injury is not caused by the relationship between the domestic producers importing the goods and those exporters whose exports are contributing to injury:

“If the dumping of the subject goods by the related exporters is contributing to injury, in the Tribunal’s view, this would not flow from the relationship between these producers and their respective related exporters”⁷³

What the Tribunal seems to say here is that producers importing goods at a dumped price will not be excluded unless injury flows from the relationship between these importing producers and the exporters of the goods, regardless of

⁷⁰See *Women’s Footwear*, see also *Certain flat hot-rolled carbon and alloy steel sheet products*, at pg. 109.

⁷¹*Refill paper (Re)*, pg. 47: Hilroy imported 100 percent of the subject refill paper that was found to be dumped by the Deputy Minister and approximately 70 percent of the subject notebooks that were also found to be dumped by the Deputy Minister. The evidence also shows that, in 1995, Hilroy’s total sales from imports of refill paper from Indonesia represented 39 percent of its total sales of refill paper. In addition, the evidence shows that, in 1995, Hilroy’s total sales from imports of spiral-bound notebooks from Indonesia and Brazil represented 77 percent of its total sales of spiral-bound notebooks.

⁷²*Refill paper (Re)*, pg. 48.

⁷³*Refined Sugar (Re)*, Canadian International Trade Tribunal Finding Concerning Dumped or Subsidized Imports, Inquiry No.: NQ-95-002, [1995] C.I.T.T. No. 71, November 6, 1995.

the fact that the imports are contributing to the injury. The tribunal goes on to say that the domestic producers should not be excluded for various additional reasons: the volume of imports during a specific year is a result of special circumstances and does not reflect a practice of regular import of significant quantities of the subject goods; the imports are primarily for specialty goods, which the domestic industry does not manufacture and has no intention of manufacturing; the imports constitute insignificant volumes⁷⁴.

The following clearly summarizes the use of this discretion by Canadian investigative Authorities:

“The discretion granted to the [Canadian Import Trade] Tribunal by reference to Article 4 of the Code in paragraph 42(3)(a) of the Act must be exercised in such a way as to give effect to the purpose of the Code and the Act as it is applicable in a Canadian setting. The Canadian economy is characterized by a relatively concentrated industrial structure where, given the small number of participants in many industries, the presence of foreign-owned firms and the important flow of international trade, the role of foreign affiliates and the consequential impact of their activities on Canadian economic life are potentially far greater than in other industrialized nations. [...] To refuse to the complainant [...] the right to allege and establish likelihood of material injury from dumping by its parent company [...] would not only deny the existence of a domestic industry and deprive domestic producers of their right to protection against injurious dumping on the ground that any future injury would be self-inflicted, but it would also not recognize the realities of the interaction and strong competition among multinational enterprises which plan their industrial and marketing strategy on a world-wide basis”⁷⁵.
[Emphasis added]

The Tribunal refused to exercise its discretion and to exclude domestic producers who imported goods “as a defensive response to the low-priced [...] imports into the domestic market in order to maintain market share”⁷⁶. The tribunal also refused to exclude domestic producers who imported dumped goods if protection of the domestic industry against dumping would be denied:

⁷⁴*Refined Sugar (Re)*.

⁷⁵*Gasoline Powered Chain Saws*, Canadian Import Tribunal, Inquiry No. CIT-2-87, July 3, 1987, 14 C.E.R. 171, at p. 8-9.

⁷⁶*Black Granite Memorials (Re)*, Canadian International Trade Tribunal Finding Concerning Dumped or Subsidized Imports, Inquiry No.: NQ-93-006,[1994] C.I.T.T. No. 116.

“[T]he Tribunal is not prepared to exclude Cello from the definition of domestic industry in this inquiry on the basis that it is an importer of dumped goods since to do so would, in effect, be denying that there is a domestic industry, and Cello would not have a remedy against dumping of the subject goods.”⁷⁷

The bottom line with respect to CITT practices is that producers will not be excluded unless their exclusion has no effect on the investigation. In other words, an importer in Canada could commercially benefit from the low prices of dumped goods, and then later on, participate in the investigation and support it. This is a clear indication that anti-dumping law is not necessarily a tool used to halt unfair business practices, but rather a protective measure used to combat imports. Indeed, if protecting domestic producers from dumping were the primary objective of the investigation, then the producers participating in the offence would logically be excluded from expressing an opinion on whether or not an investigation should be carried since they have clearly benefited from dumping activities, and even contributed to these activities by importing so called dumped goods and marketing them. The fact that these domestic producers who benefited from the dumping activities are included in order to make sure that there is a domestic industry and to allow the investigation to proceed is clear evidence of the artificiality of the process. The above analysis shows that producers who support an investigation will, regardless of their importing activities or relations with exporters, be considered as part of the domestic industry. It is obvious from the CITT’ s reasoning that the pursued objective in this process is to ensure that the domestic industry, including the producers who imported goods or those related to exporters are not denied a remedy against the dumped goods, regardless of whether they have imported these goods or not. An objective approach would

⁷⁷ *Canadian International Trade Tribunal Finding Concerning Dumped or Subsidized Imports*, Inquiry No.: NQ-93-001, [1993] C.I.T.T. No. 120, October 18, 1993.

be to balance the benefits resulting from the import of dumped goods against the injury suffered. Unfortunately such an analysis is never made, not even at the injury determination level.

In the EC, in order to exclude a producer from the domestic industry, it should be established whether or not the injury suffered by the producer is 'self inflicted'⁷⁸. This is similar to the Canadian approach, however at first sight, it seems like a more objective approach, considering that it is not a simple discretionary power of the investigative authority to exclude producers who used dumped imports to defend their market position.

Producers were not excluded when they imported low levels of goods, which could not have shielded them from the effect of the dumped goods in the EC⁷⁹. However, when the volume of imports was larger⁸⁰, the Commission looked for a justification, and concluded that the imports were made in order to be able to offer customers a full range of models; the products were sold at a higher price than those of the foreign suppliers; and earlier attempts to develop and market a full range of products failed due to depressed market prices caused by imports⁸¹. The EC will not exclude Community producers who imported goods as an act of self-defense⁸². In the case of *Magnetic disks from Japan*, the Community producer was unable to meet demand and imported goods in order to maintain its market position. The Community producer imported dumped goods because it had no choice but to do so as a result of the dumping activities. The EC did not exclude

⁷⁸ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 4.43, p.249 & pg. 4.45, p. 250.

⁷⁹ *Magnetic disks from Japan, Taiwan, and P.R. of China/ provisional*, OJ No L 95, ECJ. In this case the imports accounted for less than 7% of each producer's sales in the EU (see recital 43).

⁸⁰ *PPC's from Japan*, in this case the imports represented 35% to 40% of the sales and rentals of the Community importer.

⁸¹ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, p. 249, pg. 4.43.

⁸² *Magnetic disks from Japan, Taiwan and P.R. China/ provisional*, OJ No L 95, ECJ.

the producer from the definition of Community industry in this case, despite the fact that the volume of imported goods was substantial⁸³.

The EC considers it to be an act of self-defense, when a producer imports goods that it can no longer produce, precisely because of the dumping activities. The producer will not be considered as inflicting injury on himself under such circumstances⁸⁴.

Community producers importing goods at a dumped price, but selling them at a normal market price will not be excluded from the investigation since they have not contributed to the injury suffered by the Community industry⁸⁵. Again here, the result of this approach is that producers who did not actually suffer injury will be allowed to support the investigation, and that is despite the fact that they profited from importing goods at a low price and selling them at their higher market value in the domestic industry.

This shows that despite the appearance of objectivity, the justification mechanism used in the EC practically gives the commission the power to include or exclude producers from the definition of domestic industry, considering that there are no objective justification guidelines or criteria.

The approach taken by both Canadian and EC law resembles a rally by the authorities to guarantee that an investigation has sufficient support levels. Authorities seem to tell producers if you have imported dumped goods but you want to support the investigation and help meet the standing requirement, then we will find a way to include you.

⁸³The imports in this case accounted for nearly 35% of the Community producer's sales.

⁸⁴*Nakajima All Precision Co. Ltd. v. Council*, Case C-69/89, [1991] ECR I-2069, pg. 81 & 82.

⁸⁵*Fechimex SA v. Council*, Case T-164/94, [1994] ECR II-2681, pg. 112.

The comparison between the EC and the Canadian law on the matter shows that legislative authorities have given the investigative authorities in each respective jurisdiction a wide discretionary power in deciding which producers to include or excluded from the definition of domestic industry and this not inconsistent with the *GATT Code*, since the *Code* recognizes this discretionary power. The difference between Canadian and EC law here is in the approach taken, but the result is the same. In this case the *Code* should incorporate objective guidelines aiming at preventing producers from provoking and benefiting from dumping activities and later on provoking and benefiting from an anti-dumping action.

4.3.1. Producers related to exporters or importers of dumped goods

In addition to allowing for the exclusion of producers who actually have imported goods into the domestic market, we saw that the *GATT Code* provides also for the exclusion of producers, which are related to importers or exporters. In this section we will be discussing this last motive for excluding a producer from the definition of 'domestic industry'.

In Canada, the CITT has excluded producers, because an exporter controlled them⁸⁶. The Tribunal concluded that the importer was acting jointly with the exporter "in selling sugar products in the Canadian market at low prices made possible by dumped or dumped and subsidized inputs", and that the importer is "contributing to the downward pressure on net margins experienced in the Canadian market"⁸⁷. In other words, producers were excluded without any evidence of them contributing to injury or even profiting from the dumping

⁸⁶ *Refined Sugar (Re)*, pg. 112: the exporter owned 85% of the Canadian company.

⁸⁷ *Refined Sugar (Re)*, pg. 112.

activities. We can almost qualify the CITT' s decision here as being simply arbitrary, based on a bias and protectionist uncorroborated assumption that including such producer would compromise the level of support of the complaint as the producer in question might act in the interest of the company controlling it rather than in its own best interest. Excluding the producer in this case did not deny the existence of a domestic industry and the continuation of the investigation; one would wonder what would have been the CITT' s decision if the exclusion had resulted in just that.

EC institutions did not exclude Community producers who are linked to exporters, even though these Community producers imported dumped goods themselves⁸⁸. This does not, by itself, mean that the approach taken by EC authorities is any less bias. As a matter of fact, EC institutions did exclude producers who were taken over by exporters and subsequently withdrew their support of the complaint. Producers linked to exporters who did not support the complaint were also excluded. These exclusions did not however affect the standing requirement for the complaint to proceed. This clearly shows that the EC has a 'complaint support' approach, meaning that whatever is good to sustain the complaint will be done.

Both Canadian and EC legislation allow national authorities to exclude producers which inclusion could adversely affect the standing requirement and the initiation of an anti-dumping investigation, which corroborates our prior conclusion on the exclusions from the definition of domestic industry. Even at these early stages of an anti-dumping investigation, these methods used by national authorities in Canada and in the EC, constitute clear evidence of the

⁸⁸ *PPC's from Japan.*

willingness and the ability of these authorities to manipulate the law in order to ensure the pursuit of an anti-dumping investigation.

4.4. Determination of dumping

The second major step in an anti-dumping investigation, after the determination of standing, is the determination of dumping. Section 2.1 of the *GATT Anti-Dumping Code* says that a product is dumped or “introduced into the commerce of another country at less than its normal value” when the export price of the product is less than the price of a like product destined for consumption in the country of origin. This is what Marceau⁸⁹ called the ‘classic’ definition of dumping. The key element here is the relationship between the ‘normal value’ of the product and its ‘export price’. This general definition of dumping was adopted in EC and Canadian legislation, even though the wording used to express this basic principle is different. Canadian legislation uses a short but clear definition stating that dumping “means that the normal value of the goods exceeds the export price thereof”⁹⁰, while EC legislation states that a product is 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”⁹¹. Why the EC legislation did not use the term ‘normal value’ in the definition of dumping is unexplained, however we can only conclude that the ‘normal value’ concept was not excluded from the EC definition of dumping but rather paraphrased, since Article 2 of *EC Regulation 384/96* defines ‘normal value’ in great detail. The generic definition of ‘normal value’ would therefore be the “comparable price for

⁸⁹ Marceau, G., *supra* no. 4, p.11.

⁹⁰ *SIMA*, section 2(1) “dumped”.

⁹¹ *EC Regulation 384/96*, Article 1(2).

the like product, in the ordinary course of trade, as established for the exporting country”⁹². We will examine the notion of normal value in more detail later on. In this section we will look at the different steps leading to the determination of dumping. We will first consider the notion of like product, which is basically the product subject to the dumping investigation, and then consider the different steps and notions relevant to the determination of normal value and the export price, which are the two key values in a dumping investigation.

4.4.1. Like Product

The definition of ‘like product’ is key to a dumping investigation since it is the normal value of a ‘like product’ that is compared to the export price of the imported product. According to the *GATT Anti-Dumping Code*, ‘like product’ refers to products, which are identical, “i.e. alike in all respects to the product under consideration”⁹³. It is possible to deviate from that rule in the absence of such a product, and then the product is compared to a product, which “has characteristics closely resembling those of the product under consideration”⁹⁴. This definition is adopted in both Canadian and EC legislation.

4.4.2 Normal value

Having determined what is the like product in the exporting country, the next step is to establish the normal value. Establishing the normal value is a very important aspect of the dumping investigation, considering that it is precisely this normal value that sets the standard used to assess whether goods are dumped

⁹² *EC Regulation 384/96*, Article 1(2).

⁹³ *GATT Anti-Dumping Code*, Article 2(6).

⁹⁴ *GATT Anti-Dumping Code*, Article 2(6).

or not. A higher normal value means a higher likelihood of a finding of dumping and a lower normal value simply means a lower likelihood of a finding of dumping. The importance of accurately determining the normal value of the product under investigation could not be overemphasized. From this point on it is quite obvious that in order to conclude that anti-dumping legislation is not being used as a barrier to trade, but rather as a tool to combat unfair trade practices, we must be able to conclude that anti-dumping legislation provides for clear methods allowing authorities to calculate normal value but also precluding them from manipulating information and interpreting legislation in a way which would result in biased figures. 'Normal value' is defined in the *GATT Anti-Dumping Code* as being the price paid for a product in the ordinary course of trade, when the product is destined for consumption in the exporting country⁹⁵. Alternative methods of calculating normal value are dealt with in Article 2(2). Three distinct situations are addressed: first, when a like product is not sold in the ordinary course of trade in the domestic market. Second, when the volume of sale in the exporting country is too low⁹⁶ to allow a proper comparison. Third, when the characteristics of the market do not allow for a proper comparison. Under any of these circumstances the reference becomes the price of the product exported to an appropriate third country.

4.4.2.1. The rule

Canadian legislation contains an elaborate and comparatively detailed mechanism for calculating normal value. Normal value of goods is the price of

⁹⁵*GATT Anti-Dumping Code*, Article 2.1.

⁹⁶See *GATT Anti-Dumping Code* at footnote 2: Sales volume constituting 5% or more of the sales to the importing country will be considered sufficient. An even lower percentage would be accepted if it is demonstrated that "domestic sales of such a lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison".

like goods sold under the following six conditions⁹⁷: first, the goods have to be sold “to purchasers with whom the exporter is not associated at the time of the sale of the like goods”; second, the purchaser has to be at “the same or substantially the same trade level as the importer”; third, the sale quantities have to be the same or substantially the same; fourth, the sale has to take place “in the ordinary course of trade for use in the country of export under competitive conditions”; fifth, the sale has to take place during a specific period of time⁹⁸ ; sixth, the price of the goods has to be at the place from which the goods were, or would have been shipped to Canada.

EC legislation is far less elaborate. It states “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”⁹⁹. Four further conditions must be met¹⁰⁰: first, there has to be domestic sales; second, these domestic sales must be representative; third, they must have been made in the ordinary course of trade and fourth, they must permit proper comparison¹⁰¹.

A closer examination of EC case law is necessary in order to accurately determine how the *GATT Anti-Dumping Code* is actually implemented in the EC. This will also allow for a proper comparison between Canadian and EC legislation. At this stage it seems that Canadian legislation introduced concepts and criteria, which were not part of the mechanism to determine normal value

⁹⁷ *SIMA*, Section 15.

⁹⁸ *SIMA*, Section 15(d) gives Canadian Authorities a certain level of leniency as to the selection of the period during which the sales to be considered have to take place. In fact, that period has to cover 60 days, but these 60 days could start one year and sixty days prior to the date of the sale of goods into Canada and up to the date of sale into Canada. This would allow the Authorities to choose the most suitable date for the investigation and influence the process one way or another.

⁹⁹ *EC Regulation 384/96*, Article 2.1.

¹⁰⁰ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.12, p. 68-69.

¹⁰¹ *Ibid.*

under the *GATT Anti-Dumping Code*. This hypothesis will also be examined further.

With respect to the ‘sales to independent customers’ under EC law, the following criteria must be respected while determining normal value based on prices paid in the country of export: the sale price taken into consideration must be the price paid by “the first independent buyer”¹⁰². In other words, sales between related entities could not be taken into consideration in order to avoid faking or manipulating data. Normal value has to be “based on data resulting from the play of market forces”¹⁰³. Therefore, the only price that matters remains “the price charged to an independent customer”¹⁰⁴. This is similar to the first condition under Canadian legislation, which requires that the sale considered be made to a purchaser with whom the producer is not associated at the time of sale. The *GATT Anti-Dumping Code* remains silent on this point, giving no indication as to how sales between related parties should be treated. Although it might appear that by adopting such a rule, national authorities are aiming at calculating an accurate normal value, the reality is that these sales are usually made at lower prices and their inclusion would result in lower normal value and a decreased possibility of a finding of dumping. On this point, Pierre Didier states that: “the systematic and irrebuttable disregard of intra-group domestic prices is not only creative of dumping but also affects competition between domestic business in the exporting country: those who sell direct from factory to unrelated distributors, wholesalers etc. are treated much better than those who sell domestically via a captive network, even though the structure of domestic sales should be neutral in a

¹⁰² *Ibid*, pg. 2.14, p.69.

¹⁰³ *Ibid*, pg. 2.14, p.70.

¹⁰⁴ *Ibid*, pg. 2.16, p.71.

dumping assessment”¹⁰⁵. Already at this stage we can start seeing how anti-dumping legislations are ‘dumping creating’, meaning that they can be used to create legal dumping, whilst actual dumping is not really occurring.

Looking more closely at the first two conditions necessary to base normal value on domestic sales prices under EC legislation, the first condition, as mentioned earlier, is the existence of domestic sales. This means that there has to be a like product sold in the country of origin. The second condition refers to the fact that domestic sales must be representative. EC legislation contains a similar rule to what is found in footnote 2 of the *GATT Anti-Dumping Code*, meaning that sales will be considered representative if they constitute five per cent or more of sales of the subject product to the Community¹⁰⁶. Footnote 2 of the *GATT Anti-Dumping Code* provides for an exception to this rule: a lower ratio may be used “where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison”¹⁰⁷. EC legislation also incorporates this exception, however the wording used is different: “a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned”¹⁰⁸. The grounds for using a lower volume of sales are not expressed in general terms like it is the case in the *GATT Anti-Dumping Code*, only an example is used to illustrate a scenario where such lower volumes of sales could be used to establish the normal value. The purpose of this rule is to ensure that “transactions on the domestic market are sufficient in number to be considered to reflect normal behavior on the part of

¹⁰⁵ Didier, P., *The WTO Anti-Dumping Code and EC Practice, Issues for review in trade negotiations*, *Journal of World Trade*, 35(1), 2001, p. 35.

¹⁰⁶ *EC Regulation 384/96*, Article 2(2).

¹⁰⁷ *GATT Anti-Dumping Code*, footnote 2.

¹⁰⁸ *EC Regulation 384/96*, Article 2(2).

purchasers and sellers and result from normal patterns of price formation”¹⁰⁹. In other words, this is to ensure that normal value is based on representative data rather than relying on sales, which are in such low volumes that a price pattern could not be reasonably established.

Examining the EC case law on the topic, EC institutions do not depart from the five per cent rule unless exceptional circumstances justify doing so¹¹⁰. The use of the word ‘normally’ in the first sentence of Article 2.2 of *EC Regulation 384/96* suggests that, under certain circumstances, sales will not be considered representative although the five per cent criterion is met. Community institutions have not resorted to this possibility yet¹¹¹. On another hand, sales could be considered representative for the purpose of establishing normal value, even when the five per cent rule is not met. This is of particular importance when dealing with exporting countries with a comparatively small but competitive market¹¹².

Canadian legislation stirred away from the *GATT Anti-Dumping Code* and did not adopt a clear representativity standard. Although there is reference in Article 19 of *SIMA* to the representativity standard, the problem however is that *SIMA* does not define “such a number of sale” leaving it unclear as to what constitutes a sufficient volume of sales. This omission of the Canadian legislator did not go unnoticed and the *SIMA Handbook* fills the gap by adopting the threshold of footnote 2 of Article 2(2) of the *GATT Anti-Dumping Code*, in other words by stating that it is considered that there is a sufficient number of sales when the domestic sales taken into consideration constitute five per cent or more of the total

¹⁰⁹ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, Pg. 2.23, p.73 & see *Goldstar Co. Ltd. v. Council*, Case C-105/90 [1992] I-677 ECR pg.15.

¹¹⁰ *Goldstar Co. Ltd. v. Council*, pg. 16.

¹¹¹ The argument was unsuccessfully raised in *Goldstar*.

¹¹² Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, Pg. 2.23, p.73.

sales to Canada¹¹³. The *Handbook* further states, “it should be kept in mind that in order to determine normal value in accordance with section 15 of SIMA, the quantity of sales of like goods must normally equal at least five per cent of the quantity of subject goods exported to Canada”¹¹⁴.

Canadian legislation contains a set of rules, which are additional to the five per cent requirement, and which must be followed in order to determine if sales do qualify as representative sales. These additional rules are also subject to a series of specific exceptions. Canadian legislation has introduced some additional requirements which must be met prior to concluding that sales transactions could be considered for the calculation of normal value, we will discuss each of these requirements and their potential effect on the determination of normal value. Our first comment relates to the second condition noted above in relation with determining normal value based on domestic sale prices under Canadian law.

Canadian legislation requires that such sales be “in the same or substantially the same quantities as the sale of goods to the importer”¹¹⁵. This requirement aims at insuring that the sales taken into consideration on the domestic market are concluded in similar conditions to the sales of the exported goods. The apparent effect of this is a better comparability between normal value and export price without the need to resort to sales’ quantities related adjustments. In all fairness to Canadian legislation, although it might also seem that this requirement would constitute a very difficult selection criterion when deciding which sales should be taken into account in the domestic market of the exporter, and as such could be used to eliminate a huge number of sales from the sample and as a result making it

¹¹³ *SIMA Handbook*, pg. 5.2.2.1.

¹¹⁴ *SIMA Handbook*, pg. 5.2.2.8.

¹¹⁵ *SIMA*, Section 15(b).

impossible to identify representative sales, and therefore to establish normal value based on actual sales data, this is not the case. Canadian legislation has introduced two exceptions to this principle allowing investigators to deviate from its strict requirement. These exceptions cover situations where the quantity of goods imported into Canada is either larger than the largest quantity of like goods sold by the exporter for use in the country of origin, or smaller than the smallest of such quantity¹¹⁶. In these circumstances the sales taken into consideration will be respectively the largest and the smallest quantity of goods sold by the exporter for use in the domestic market of the country of origin. The direct consequences of these exceptions are that the rule is softened and has little if no negative effect on the determination of normal value based on actual data.

The second comment relates to Section 15(e) of *SIMA*, which deals with the geographic area where the sale has to take place in order to be considered for the calculation of normal value based on sale price in the country of origin. Such sale has to occur “at the place from which the goods were shipped directly to Canada or, if the goods have not been shipped directly to Canada, at the place from which the goods would be shipped directly to Canada under normal conditions of trade”¹¹⁷. The word ‘place’ used in this section does not mean ‘country’ but a geographic area. The *Code* does not require the sales to take place in the ‘place’ where the goods were or would have been directly shipped to Canada, but rather in the country of export of the goods. Such a restriction has a potential of making it very difficult to calculate normal value using Section 15 provision but favoring instead the construction of normal value, however it is also tempered by some exceptions.

¹¹⁶ *SIMA*, Section 16(1)(d)&(e).

¹¹⁷ *SIMA*, Section 15(e).

Section 16 of *SIMA* provides for two exceptions to this latter requirement of section 15, stating that “if there was not in the opinion of the Commissioner such a number of sales [...] to permit a proper comparison”, then sales in alternative geographic areas within the exporting country or to alternative purchasers, “who are at a trade level nearest and subsequent to that of the importer”¹¹⁸, can be considered for the purpose of determining the normal value¹¹⁹. Further exceptions to the requirements of Section 15 relate to the volume of sales, but they also deal with a series of factual situations where these requirements could not be respected and provide alternative ways of calculating normal value. If there were insufficient sales to allow a proper comparison because the exporter did not sell goods on the national market, or if they sold exclusively or almost exclusively to purchasers who were linked to them, then normal value will be calculated based on the sales of like goods in the country of origin by other vendors¹²⁰. Obviously Canadian legislation seeks to establish a quantitative balance between the price of goods imported and those sold in the domestic market of the exporter. This approach favoring a great deal of precision is certainly welcome, but is rather inefficient. On one hand, if it were to be applied strictly, the immediate result is that it would be virtually impossible to calculate normal value based on actual sale price of the goods in the country of origin. On another hand, the series of exceptions to these rules, practically takes away all the precision, which might be gained if normal value is to be established by respecting them. However, this approach is a welcome initiative from the Canadian legislator, who establishes a hierarchy for using these rules relating to determining which is the sale price to be

¹¹⁸ *SIMA*, Section 16(1)(b).

¹¹⁹ *SIMA*, Section 16(1)(a)(b).

¹²⁰ *SIMA*, Section 16(1)(c).

used when calculating normal value in order to determine a figure that is closest to comparable realities. This said, Section 16 (2) of *SIMA* provides for a series of sales transactions, which must be excluded from normal value calculation. The first exclusion covers isolated sales to purchasers, if the producer did not sell at the same time to other purchasers at the same trade level. The second exclusion covers any sales taking place during a period of at least six months at less than the cost¹²¹ of the goods and either amounting to twenty per cent of the total sales of the producer, or if the average selling price during the said period is less than the average cost of the like goods, and the sale is made at a lower price per unit than the average cost of like goods sold during this period. These exclusions make it more difficult to actually base normal value under Canadian legislation on actual domestic prices, and therefore favor the construction of a normal value.

As discussed earlier, EC legislation takes a different approach to the calculation of normal value, an approach that is more in keeping with *GATT Anti-Dumping Code*. The mechanism developed under Canadian legislation, along with all its exceptions is, as demonstrated above, very different and could potentially lead to higher normal value.

4.4.2.2. What is the ordinary course of trade?

There is no definition of this concept in the *GATT Anti-Dumping Code*. During the negotiations, certain contracting parties requested that the concept be defined, and that a non-exhaustive list of irregular transactions be annexed to the Agreement¹²². This proposition failed. Paragraph 2.2.1. of the *Code* brings a

¹²¹*SIMA*, Section 16(3), Cost is defined as being the cost of production of the goods and the administrative, selling and all other costs with respect to the goods.

¹²²Didier, P., *Le Code Anti-Dumping du Cycle de L' Uruguay: Impact dans la Communauté*, Cahiers de droit européen, No. 3-4, 1994, p. 259.

precision by stating that sales below costs of production plus administrative, selling and general costs may be treated as not being “in the ordinary course of trade”¹²³. Three conditions must be met in order to consider sales below cost to be outside of the ordinary course of trade: first, the sales must be made within an extended period of time¹²⁴; Second, the sales must be in substantial quantities; And third, the sales must be at prices “which do not provide for the recovery of all costs within a reasonable period of time”¹²⁵. Sales are in substantial quantities when it is established that “the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit cost, or that the volume of sales below per unit cost represents not less than twenty per cent of the volume sold in transactions under consideration for the determination of the normal value”¹²⁶. These conditions are inspired from the American system and in practice, it is very difficult for exporters to satisfy the test allowing sales below the cost of production to be considered in the ordinary course of trade. As a result, sales below cost will only be considered in exceptional circumstances¹²⁷. The exclusion of these sales from normal value calculation results in higher normal value and as a consequence, in an increased likelihood of a finding of dumping and/or a higher margin of dumping¹²⁸. The equivalent provision under EC law is Article 2(4) of *EC Regulation 384/96*, and it is almost a word for word reproduction of *GATT Code* Article 2.2.1 and its footnotes. The equivalent under Canadian legislation is found in Section 16(2)(b).

¹²³Note here that it is not required to include profit, so sales at costs would be considered; only sales below costs would be excluded from the calculation of the normal value of the product.

¹²⁴See *GATT Anti-Dumping Code* at footnote 4: the extended period of time is defined as being normally one year, but never less than six months.

¹²⁵*GATT Anti-Dumping Code*, Article 2.2.1.

¹²⁶*GATT Anti-Dumping Code*, footnote 5.

¹²⁷Didier, P., *supra* n. 122, p. 261.

¹²⁸*Ibid*, p. 260.

The formulation of the rule under Canadian law is different from the one adopted under EC legislation and the *GATT Code*. In fact a sale is considered to be below cost when it is of a volume of not less than twenty percent of the total volume of like goods sold during a predetermined period of not less than six months (notice here that EC legislation and the *GATT Code* refer to twenty percent of the volume of goods used to determine normal value and not to the total volume of sales); or when the average selling price of the like goods during that period is less than the average cost of the like goods and the sale is made at a price per unit that is not greater than the average cost of all like goods sold during that period. This last condition is similar to the recovery provision found in the text of the EC legislation and the *GATT Code*, however the difference is that under EC legislation and in the *Code*, this recovery provision is also operational when the volume of sales below unit cost is not less than twenty percent of sales being used to determine normal value and not only when the average selling price of the like goods is below the average cost of the goods. It is surprising that Canadian legislation will exclude sales below cost, despite a possibility for recovery, when the volume of such sales is over twenty percent of the total volume of like goods sold during that period, especially when we consider the position taken by Canada during the negotiation of the Uruguay Round on the issue. The position of Canada on the issue, which is stated in the submission made by Canada, is that “sales below cost should only be excluded from the calculation of normal value when made in substantial quantities and over a significant period of time. In addition, the investigating Authorities, in determining that sales below cost are to be disregarded, should take due account of the particular nature of the industry’s normal business cycle, the normal amortization period for capital and

development costs, and the degree of expectation of full recovery of costs plus profit within a reasonable period of time. In the instances where sales below costs are disregarded, the investigative Authorities should provide reasons for their decision in this regard as well as reasons for the use of an alternative method of establishing normal value”. Needless to say that this position taken by Canada during the negotiations was not adopted in the *Code* and later was not adopted in Canadian legislation.

4.4.2.3. Actual calculation of normal value

Both Canadian and EC legislation provide for a mechanism allowing for the identification of proper sales of like goods to be used as a base for the determination of normal value. Under Canadian legislation, this mechanism is found in Sections 15 and 16 of *SIMA* discussed above. Provisions to the same effect are found in Article 2(1) and 2(2) of *EC Regulation 384/96*. This ‘identification mechanism’ is only the first step in the calculation of normal value.

Canadian legislation contains provisions detailing how to calculate normal value based on prior identified sales. Section 17 of *SIMA* specifically addresses this issue providing that the normal value of goods will either be “the weighted average of the prices at which like goods were sold by the exporter to purchasers”¹²⁹ during the reference period, or a price that, in the opinion of the Commissioner, “is representative”¹³⁰ of the prices at which like goods were

¹²⁹ *SIMA*, Section 17(a).

¹³⁰ Pg. 5.2.3. of the *SIMA Handbook* states on this issue that: “Under the representative price method of paragraph 17(b), the single price chosen must be justified and reasonable and representative of the domestic selling conditions. In most cases, this method will not be the preferred option because of the need to then deal with the matter of what is a “representative” price. Generally, and certainly in most large cases, prices usually vary and it may be difficult to find a representative price to a variety of customers. Therefore, the representative price method is to be used only in those cases where it is clear that it is more “representative” than the weighted average methodology. As a general guideline, the

sold”¹³¹, again during the same reference period. With respect to the choice of which method should be used, “It should be noted that there is no hierarchical ranking. Either of the two methods (weighted average or representative price) may be used, at the option of the Commissioner. [...] The weighted average price method of paragraph 17(a) will be the most appropriate method in most investigations and will be the preferred option as it is by its very nature ‘representative’ and has less potential and less likelihood of being challenged as being unfair or unrepresentative”¹³².

Neither EC legislation nor the *GATT Anti-Dumping Code* contains a similar provision to *SIMA* Section 17. This is not surprising considering the differences outlined on the issue of normal value calculation between on one hand *SIMA* and on another hand the *GATT Anti-Dumping Code* and *EC Regulation 384/96*. Indeed *SIMA* seems to have taken a very different legislative approach; this is evident from the text and the structure of the legislation. Both texts remain silent as to how normal value should be established, however, it is the weighted average method that is used under EC law¹³³ and there is no alternative to this method. This practice of the EC is logical since, as noted above, it leads to establishing a domestic price that is less arbitrary than what would result from using other methods.

4.4.2.4. Alternative methods of calculating normal value

representative price method should only be considered where the same selling price occurs in at least 75 per cent of the sales made during the period to a variety of customers. Even where the 75 per cent threshold is met, however, it may well be that the weighted average method is still the more appropriate option.”

¹³¹ *SIMA*, Section 17(b).

¹³² *SIMA Handbook*, pg. 5.2.3.

¹³³ Didier, P., *supra* n. 13, p. 17.

Article 2.2 of the *GATT Anti-Dumping Code* provides for two alternative methods for determining normal value when it could not be established based on the price of the product in the domestic market of the exporter. The first of these two alternative methods allows normal value to be determined based on the price of the product when exported to an ‘appropriate third country’ the second allows the construction of a normal value based on the cost of production in the exporting country “plus a reasonable amount for administrative, selling and general costs and for profit”¹³⁴. Both Canadian and EC legislation integrated similar provisions.

Article 2(3) of *EC Regulation 384/96* addresses the same situations, which are addressed under Article 2(2) of the *GATT Anti-Dumping Code*. EC legislation states that in circumstances where there are insufficient sales in the ordinary course of trade, or if proper comparison is not possible because of particular market conditions¹³⁵, then “the normal value 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”. The provision of the *GATT Anti-Dumping Code* is almost identical. The *Code* does not provide for a hierarchy between these two alternative methods, neither does the text of EC legislation. However, it seems that in recent Community practice normal value has practically never been based on export prices to a third country, particularly due to the fact that

¹³⁴ *GATT Anti-Dumping Code*, Article 2(2).

¹³⁵ The *GATT Anti-Dumping Code* does not give a definition of ‘particular market conditions’, neither does *EC Regulation 384/96*, however it is stated in *EC Anti-Dumping Law*, pg. 2.51 that proper comparison is not possible where the export price and the normal value can not be both determined by reference to the first sale to an independent customer.

Community institutions have no guarantee that the goods exported to a third country are not dumped¹³⁶.

The alternative ways to calculating normal value based on the price of goods in the domestic market of the exporter, is dealt with under Canadian legislation by section 19 of *SIMA*. Similarly, the first alternative under Canadian legislation would be to establish normal value based on the “price of like goods sold by the exporter to importers in any country other than Canada”¹³⁷ subject to certain conditions. The price taken into consideration has to “fairly reflect the market value of the goods at the time of the sale of the goods to the importer in Canada, adjusted in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer in Canada and the like goods sold by the exporter to importers in the country other than Canada”¹³⁸.

Although this is in principle similar to EC *Regulation 384/96* and the *GATT Anti-Dumping Code*, a closer look shows important differences. First, Canadian legislation requires that the goods sold to a third country be sold by the same exporter who sold the goods to the Canadian importer. EC legislation and the *Code* merely require that the goods sold to a third country originate from the same country where the goods under consideration were exported to respectively the EC or the importing country. Second, neither EC legislation nor the *GATT Anti-Dumping Code* provide for an elaborate adjustment mechanism. The only condition to consider such exports under EC legislation is that the products exported to the third country are fully comparable to those exported to the

¹³⁶ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.54, p. 84 and pg. 2.58, p. 86.

¹³⁷ *SIMA*, Section 19(a).

¹³⁸ *SIMA*, Section 19(a).

Community¹³⁹. Just like under EC legislation, this method of establishing normal value is not favored under Canadian legislation for the same reasons¹⁴⁰. It is even stated in the *SIMA Handbook* “[w]hen an exporter is alleged to be dumping into Canada, there is almost an inherent allegation that the exporter could be dumping into other countries as well”¹⁴¹.

It is regrettable that this first method of establishing normal value is given a second rank, arguably if normal value is based on the price of a product when sold to a third country, then the normal value established would constitute a more proper indication of the market price of the product in an international trade forum.

The second alternative method for calculating normal value under Canadian legislation is the constructed normal value method, which is also found under EC legislation and in the *GATT Anti-Dumping Code*. The three texts provide for a similar mechanism to calculate the normal value based on the calculation of the cost of production of the goods, plus selling, general and administrative costs (SGA) and profits¹⁴². This method of calculating the normal value will be discussed in more details below. It should be noted here that the notion of ‘ordinary course of trade’ discussed in paragraph 5.4.2.2. above should be kept in mind, considering that the reconstruction of normal value will be the method used to calculate normal value if there is insufficient volumes of sales in the ordinary course of trade to allow for such a calculation.

¹³⁹ *CTV's from Malaysia, P.R. China, Korea, Singapore and Thailand/provisional*, OJ No L 255, ECJ, p.50, recital 44 et seq.

¹⁴⁰ *SIMA Handbook*, pg. 5.4.1.

¹⁴¹ *SIMA Handbook*, pg. 5.4.1.

¹⁴² *GATT Anti-Dumping Code*, Article 2.2.1; *EC Regulation 384/96*, Article 2(3); *SIMA*, Section 19.

4.4.3. Constructing normal value

Having established at this point that both Canadian and EC legislation favor the construction of normal value to establishing normal value based on actual sale price in the exporting country, this section will shed some light on the methods actually used by the authorities both in Canada and in the EC to construct normal value. The fact that Canadian and EC authorities favor this method of determining normal value is by itself inconsequential. However, a closer look at how normal value is determined using this construction method will show whether this method of calculating normal value is, as such, dumping creating. In other words does the reconstruction process allow for an accurate and fair assessment and calculation of the normal value or is it a tool which is used in order to reach a result where normal value is the highest possible in comparison with the export price, which would necessarily increase the likelihood of a finding of dumping and potentially lead to a higher dumping margin?

4.4.3.1 Calculating the cost of production

We saw that this method of determining normal value consists of two steps. In the first instance, the cost of production is determined and an amount for profit is allocated, and second, a reasonable amount for administrative, selling and general costs is added to this cost of production. Cost calculation for the purpose of determining normal value is addressed in Article 2.2.1.1 and 2.2.2 of the *GATT Anti-Dumping Code*. Article 2.2.1.1. states that cost should be calculated on the basis of records kept by the producer. These records have to be in accordance with the accounting principles of the exporting country, and must reasonably reflect the costs of production and sale of the product under consideration. This Article does

not dictate with precision what evidence should be taken into consideration, but rather states that “all available evidence on the proper allocation of cost”¹⁴³ should be taken into consideration. This gives the authorities in charge of investigation latitude in determining what evidence is required. Article 2.2.1.1 brings two precisions:

- First, evidence on the allocation of costs made available by the producer or the exporter during the course of the investigation must be taken into consideration, but only if it is proven that the allocation of costs have been utilized in the past. This relates especially to establishing appropriate amortization and depreciation periods and allowance for capital expenditures and other development costs.
- Second, the cost must be adjusted appropriately to take into consideration non-recurring costs that benefit the production and start-up costs which might affect the costs during the period of investigation.

EC legislation has a provision similar to the *GATT Anti-Dumping Code* with respect to the basis used for cost calculation. Therefore, cost in the EC will be calculated on the basis of the records kept by the party under investigation, provided that such records are in keeping with the generally accepted accounting principles of the country concerned and that they reasonably reflect the costs associated with the production and sale of the product under consideration¹⁴⁴. It is however necessary to examine EC case law to have a better idea of what is meant by ‘reasonably reflects’ the cost of production and sale of a product. Parties under investigation, in certain specific situations, will prefer that the cost of the product not be calculated on the basis of their records, considering that such

¹⁴³ *GATT Anti-Dumping Code*, Article 2.2.1.1.

¹⁴⁴ *EC Regulation 384/96*, Article 2.5.

method of calculation could lead to a product cost that is too high, and the result would not reasonably reflect the cost of the product.

In *Video cassettes and video tapes reels from Hong Kong and Korea*¹⁴⁵ the exporter argued that a flat-line depreciation method should be used instead of the accelerated method found in the exporter's books. The Community Authorities rejected this on the grounds that the exporter in question used an accelerated depreciation method throughout the investigation period and the preceding years¹⁴⁶. Similarly, in the *Urea*¹⁴⁷ case, the exporter argued that a twenty five year depreciation period should be used, which is based on the expected real life time of the plant, rather than the fifteen year period found in the books and used primarily for accounting purposes. Again, Community Authorities rejected this argument on the basis that a fifteen year period complies with the generally accepted accounting principles in the country in question¹⁴⁸. Also in the same case, one producer argued that certain costs relating to finance operations in its books should not be taken into consideration, because they were not made in the ordinary course of trade. The loans were made in Japanese Yen and the value of the Yen was unusually high at the time, and the loans were negotiated at government level. Community institutions considered these facts to be of no relevance and the cost to be incurred in the ordinary course of trade, therefore the cost was calculated based on the records of the exporter¹⁴⁹.

Community Authorities deviated from the records when calculating costs in three types of situations: when depreciation during the investigation period was

¹⁴⁵ *Video cassettes and video tapes reels from Hong Kong and Korea*, OJ No L 174, 22.6.89, p.1.

¹⁴⁶ *Video cassettes and video tapes reels from Hong Kong and Korea*, recital 27.

¹⁴⁷ *Urea from Austria, Hungary, Malaysia, Romania, the USA and Venezuela / provisional*, OJ No L 235, 25.8.88, p.5.

¹⁴⁸ *Urea from Austria, Hungary, Malaysia, Romania, the USA and Venezuela*, recital 12.

¹⁴⁹ *Urea from Austria, Hungary, Malaysia, Romania, the USA and Venezuela*, recital 12.

too low due to irregular calculation methods used for tax purposes, resulting in an artificially low depreciation during the investigation period¹⁵⁰; when the exporter sourced components from related companies at a price below the cost of production, again resulting in a lower cost based on the books, in this case cost was adjusted to reach the normal value of the product in the ordinary course of trade¹⁵¹; and when a research and development company, which is related to the producer, was involved in the development of the product, but the incurred costs from such a collaboration have not been accounted for, then such costs had to be added¹⁵².

One can not help but notice the pattern here: EC Authorities will move away from the books much more easily when it is necessary to adjust costs upwards than when costs should be adjusted downwards. The bottom line again is that the higher the normal value, the greater the chances of a finding of dumping.

With respect to the allocation of cost¹⁵³, EC legislation integrated the GATT principle entailing that evidence on the allocation of cost will be considered, provided that such allocation has been historically utilized¹⁵⁴. Neither the *Code*

¹⁵⁰ *Video cassettes and video tapes reels from Hong Kong and Korea*, OJ No L 356, 24.12.88, p.47, recital 25.

¹⁵¹ *Certain welded tubes, of iron or non-alloy steel, from Yugoslavia (except Serbia and Montenegro), Romania, Turkey and Venezuela / review*, OJ No L 308, 21.12.95, p. 65, recital 25; *Watch movement from Malaysia and Thailand / provisional*, OJ No L 120, 11.5.94, p.3, recital 9; *Video cassettes from Korea and Hong Kong / review*, OJ No L 343, 7.12.90, p.1, recital 6; *Bicycles from Indonesia, Malaysia and Thailand / definitive*, OJ No L 91, 12.4.96, p.1, recital 14.

¹⁵² *Microwave ovens from P.R. China, Korea, Thailand and Malaysia / provisional*, OJ No L 156, 7.7.95, p.5, recital 19.

¹⁵³ Cost allocation is practice consisting of imputing cost to a product when the cost are not directly generated by the product, but should be allocated to it. This is for example the case when costs are related to the production of a number of products, and only part of these costs could be attributed to the production of the product investigated. Allocating cost to a product would raise its production cost to reflect the economic realities regarding the cost of production of the product.

¹⁵⁴ *GATT Anti-Dumping Code*, Article 2.2.1.1; *EC Regulation 384/96*, Article 2.5.

nor *EC Regulation 384/96* give a definition of the phrase ‘historically used’, however it seems that a period of four years would meet the criterion¹⁵⁵.

EC legislation goes on to state, “in the absence of a more appropriate method, preference shall be given to the allocation of cost on the basis of turnover”¹⁵⁶. The *GATT Anti-Dumping Code* does not provide for any alternative rule on cost allocation when the allocation keys as provided by the exporter can not be used. However, Community case law further provides that it is possible for Community Authorities to disregard this alternative method of cost allocation, if another method gives a more accurate reflection of the costs¹⁵⁷. This discretion of the Community can be exercised in situations where the records of the exporter or the manufacturer are not in accordance with the accepted accounting principles of the country concerned; or do not reasonably reflect the costs associated with the production and sale of the product considered; or when the allocation keys have not been utilized historically. This approach is in line with the corresponding provisions of the *GATT Anti-Dumping Code*¹⁵⁸. However this discretion of the Community remains a wide discretion, in conjunction with the fact that Community authorities are only required by EC legislation to give ‘consideration’¹⁵⁹ to evidence submitted on the allocation of cost, and considering the tools to disregard such evidence based on such grounds as noted above. The Community authorities have sufficient room for disregarding cost allocation keys, which in fact reflect economic realities and which use could at the same time result in a higher normal value. Further, EC legislation adopted the *GATT Anti-*

¹⁵⁵ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.67, p. 89.

¹⁵⁶ *EC Regulation 384/96*, Article 2.5.

¹⁵⁷ *Silver Seiko Ltd. and Others v. Council*, Joined Cases 273/85 and 107/86, [1988] ECR 5927, pg. 27

¹⁵⁸ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.71, p. 90.

¹⁵⁹ *EC Regulation 384/96*, Article 2.5.

Dumping Code provision regarding adjustment of cost with respect to nonrecurring items of cost. The Text of both EC legislation and the *GATT Code*, state that “[u]nless already reflected in the cost allocation [...], cost shall be adjusted appropriately for those non-recurring cost items which benefit future and/or current production”¹⁶⁰. The effect of such a provision on cost calculation, is that the cost of the product will be unavoidably adjusted downward, if part of the production cost of that product is to be allocated to future production and adjusted upwards if it is considered that the cost of the product under investigation should include nonrecurring cost items which were allocated to the product in the past but not during the investigation period. The direct result of this practice is invariably an increased likelihood of a finding of dumping.

A further adjustment addressed by the *Code* relates to the cost of start-up operations and it is addressed in the last sentence of Article 2.2.1.1 and in footnote 6. The corresponding provision under EC law is found in the third paragraph of Article 2(5) of *EC Regulation 384/96*. Unlike the *GATT Code*, which does not provide for any definition of ‘start-up operations’, EC legislation incorporates a rather generous definition. Under this definition, start-up operations are characterized by “the use of new production facilities requiring substantial additional investment and by low capacity utilization rates”¹⁶¹. The *Code* does not give any indication as to the length of a start-up phase. EC legislation remedies this omission by stating that: “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”¹⁶². In other

¹⁶⁰ *GATT Anti-Dumping Code*, Article 2.2.1.1; *EC Regulation 384/96*, Article 2.5.

¹⁶¹ *EC Regulation 384/96*, Article 2(5).

¹⁶² *EC Regulation 384/96*, Article 2(5).

words, a start-up period covers part but not the full period of cost recovery. Beyond that initial start-up period, cost will be adjusted subject to the conditions set out in the last sentence of the second paragraph of Article 2.5 of *EC Regulation 384/96*, which means that adjustments with respect to start-up operations extending beyond the investigation period will only be made if the relevant information was submitted within three months of the initiation of the proceedings and prior to the verification visit. On this point it is stated in *EC Anti-Dumping Law* that:

“The Community’s interpretation of the GATT Anti-Dumping Code [...] is intended to reflect economic reality: the end of the start-up phase is reached at the latest when a ‘normal’ rate of capacity utilization is achieved. At this time, the exporter should also have reached the break-even point. Any interpretation, which extends the start-up phase beyond that point would mean that the exporter should not only be able to cover its actual unit cost but also to compensate for past losses. This would clearly go too far because the latter interpretation has nothing to do with the notion of start-up. Thus, the ratio legis of the GATT Anti-Dumping Code was accurately translated into the Community’s anti-dumping law”¹⁶³.

Once all of the preconditions mentioned above are met, then EC Authorities will automatically conclude that start-up operations resulted in a higher cost per unit than it would have been under normal circumstances, and the actual costs for the start-up period will be adjusted to the level prevailing at the end of such period, usually resulting in a lower calculated cost. Although the provision for start-up costs adjustment could potentially result into downward adjustment to the normal value, the scope of such adjustments are greatly limited and their effect on normal value is mitigated by the limitations to the use of such adjustments as set in the text of the legislation. Indeed, if such a downward adjustment is to be considered as reflecting economic realities then it should be used during the entire cost recovery period of a product and not limited to a fraction of the start-up operation,

¹⁶³Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.88, p. 94.

as it is the case now. Such an extension to the entire cost recovery period would effectively mean an increased likelihood of downward adjustment, which would result in a lower normal value, and a decreased likelihood of a finding of dumping. The fact that authorities limit the use of such a cost adjustment mechanism to a certain limited period of the cost recovery period shows that they seek the exact opposite result. On that very issue, Canadian legislation has adopted an identical approach¹⁶⁴.

Looking at Canadian legislation, cost calculation is also one of the alternative methods used to calculate normal value under *SIMA*¹⁶⁵. The wording of the Canadian legislation is not much different in essence from the *GATT Anti-Dumping Code* and *EC Regulation 384/96*. All three texts¹⁶⁶ state that normal value is calculated on the basis of the cost of production, a reasonable amount for administrative, selling and general¹⁶⁷ costs, and profits¹⁶⁸. One major difference between the Canadian and the EC legislation lays in how these costs are calculated. We have already discussed how such costs are calculated under EC legislation and compared that process to what is stipulated in the *GATT Anti-Dumping Code*. The corresponding provisions under Canadian legislation are found in Sections 11 to 13.1 of the *SIMR*.

Section 11(1) (a) of the *SIMR* deals with the calculation of the cost of production. ‘Cost of production’ is defined as being “the aggregate of all costs that are (i) attributable to, or in any manner related to, the production of the goods, or

¹⁶⁴ *SIMA*, Section 23.1; *SIMR*, Article 13.1.

¹⁶⁵ *SIMA*, Section 19(b).

¹⁶⁶ *GATT Anti-Dumping Code*, Article 2.2; *EC Regulation 384/96*, Article 2.3; *SIMA*, Section 19(b).

¹⁶⁷ Section 19(b) of *SIMA* does not use the term “general cost” but rather “other costs”.

¹⁶⁸ Section 19(b) refers to “a reasonable amount for profits”, EC legislation and the *Code* make no reference to “a reasonable amount”, and they only speak of profit.

(ii) directly attributable to the design or engineering of the goods”¹⁶⁹. Striking is the fact that there is no mention here of the basis on which such costs should be calculated. Both EC legislation and the *GATT Anti-Dumping Code* indicate, as a rule, that such calculations should be made on the basis of “records kept by the party under investigation”¹⁷⁰. Therefore the question, which remains under Canadian legislation, is on what basis can these costs be calculated? Canadian legislation is completely silent on this issue. Neither does the *SIMA Handbook* bring any precision on this point. Looking at how normal value was calculated in some CCRA decisions regarding the initiation of anti-dumping proceedings, we can not identify a trend in the approach taken by Canadian authorities, as they rely on a variety of sources of information in order to calculate cost. For instance, in some cases relating to steel products the CCRA relied on various studies and publications on the cost of producing these products¹⁷¹. In other cases, the cost was calculated on the basis of the complainant expertise and various publicly available information¹⁷². In other cases, cost was calculated on the basis of the cost of production in Canada, adjusted accordingly¹⁷³, practically in all cases considered, normal value was adjusted upwards or downwards to reflect differences in cost of labor only. A review of all the cases initiated by the CCRA from 2000 until now shows that the CCRA never used the books of the exporter as

¹⁶⁹ *SIMR*, Section 11(1)(a)

¹⁷⁰ *EC Regulation 384/96*, Article 2.5; The *GATT Anti-Dumping Code* speaks of “exporter or producer under investigation” at Article 2.2.1.1.

¹⁷¹ Initiation-Corrosion-resistant Steel Sheet, Ottawa, December 4, 2000: in this case the CCRA relied on studies published in Paine-Webber’s issue of *World Steel Dynamic*, on a report entitled “The US Galvanized Sheet Industry. In that case also the CCRA accepted the complainant’s approach to estimating normal value as reasonable; Initiation-Certain Hot-rolled Carbon Steel Sheet, Ottawa, January 19, 2001.

¹⁷² Initiation-Xanathates, Ottawa, June 21, 2002; Initiation-Automotive Laminated Windshields, Ottawa, December 18, 2001.

¹⁷³ Initiation- Waterproof Footwear, Ottawa, May 12, 2000; Initiation-Waterproof Footwear, Ottawa, April 26, 2002; Initiation-Stainless Steel Round Bar, Ottawa, March 31, 2000; Initiation-Pulp-dewatering Screw Presses, Ottawa, November 27, 2000; Initiation-Leather Safety Footwear, Ottawa, June 15, 2001.

a source of information for calculating cost, and further this alternative was never considered by the CCRA. Obviously, the lack of strict guidelines in the Canadian legislation eventually allows for calculation of costs using methods that are not best suited to reflect economic realities.

Another difference between Canadian and EC legislation, is that Canadian legislation, save for adjustments related to start-up costs, does not provide for any of the adjustments relating to the calculation of the cost of a product which are provided for under EC law, namely with respect to cost allocation and nonrecurring costs. Although we saw that under EC law, such cost adjustment mechanisms could be used to exercise upward influence on the normal value of the product, excluding them from the cost calculation process is not the solution to the problem. The sensible approach in this regards would be to allow producers to present evidence on these cost items and to assess the evidence using objective tools, in line with the accounting principles which are used in the country of origin and which could reasonably be used by a producer with similar production activities. A fair assessment of the cost of a product is key in the scope of a dumping investigation.

In addition, it should also be noted that, with respect to which specific costs should be included in the calculation of the cost of production, none of the legislations we are examining provide us with specific information on the issue. Under Canadian law, the *SIMA Handbook* brings a moderate precision stating that cost of production “normally includes all material, labor and factory overhead costs”¹⁷⁴.

¹⁷⁴ *SIMA Handbook*, pg. 5.4.2.1.

4.4.3.2. Calculating profit selling, general and administrative costs

Paragraph 2.2.2. of the *GATT Anti-Dumping Code* provides the rule for calculating the amounts for SGA and profits. It also provides alternative methods in situations where such calculation could not be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the producer or exporter under investigation. The first alternative is to look at the costs and profits realized by the exporter or producer in question with respect to production and sales in the country of origin of the same general category of products. The second alternative is to look at the weighted average of the amounts incurred and realized by other producers of the like product in the country of origin. The third and final alternative is to use any other reasonable method, “provided that the amount for profit does 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”¹⁷⁵.

The EC legislator adopted a very similar provision. We find the rule and the three alternatives reproduced, almost identically, in Article 2(6) of *EC Regulation 384/96*. However, the order in which the three alternative methods of calculation are presented in EC legislation is different from the order in which they appear in the *GATT Anti-Dumping Code*. Indeed the two first alternative methods are reversed. This is of importance under EC legislation, since under EC law there is a hierarchy as to which method should be applied before another. The order in which the four methods appear under EC legislation reflects this hierarchy. EC legislation gives priority to calculations based on data relating to like products by

¹⁷⁵ *GATT Anti-Dumping Code*, Article 2.2.2.

other producers, rather than to the “same general category of products”¹⁷⁶ by the same producer. A nuance should be made here relating to the fact that the community legislation does not impose a strict legal hierarchy, however the order set out in the legislation is followed in practice¹⁷⁷. The rationale behind this is found in the Community’s case law. The idea is that the constructed normal value has to correspond as closely as possible to what it would have been if the producer had sold the product in sufficient quantities on the domestic market. The hierarchy should always be followed, even if the profit margin of a producer is much lower than the one realized by other producers on the market¹⁷⁸, effectively denying the producer the benefit of having a lower profit margin and thus a lower normal value. Finally, the third alternative could be applied only when the rule and the two first alternative methods can not be used¹⁷⁹.

The most important issue regarding the calculation of profit, is in effect the Community’s practice to determine a profit margin which will be imputed to an exporter on the basis of the average profitability of only profitable sales of the product under investigation in the market where there is a sufficient number of such sales¹⁸⁰ or even to take into consideration sales of related consumables¹⁸¹.

The European Court of Justice held under *EC Basic Regulation 2423/88*, which is the predecessor of *EC Regulation 384/96*, that Community institutions enjoy a wide margin of discretion in evaluating the amount of SGA costs and the

¹⁷⁶ *GATT Anti-Dumping Code*, Article 2.2.2(i) & *EC Regulation 384/96*, Article 2.6(b).

¹⁷⁷ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.98, p. 97.

¹⁷⁸ *Goldstar Co. Ltd. v. Council*, pg. 35 et seq.

¹⁷⁹ *Goldstar Co. Ltd. v. Council*, pg. 35 et seq. & *Nakajima All Precision Co. Ltd. v. Council*, pg. 61

¹⁸⁰ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.111; Didier, P., *supra* n. 13, p. 24; Vermulst, E. & Waer, P., *supra* n. 6, p. 191.

¹⁸¹ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.120.

margin of profit¹⁸². Nevertheless, it is stipulated under EC law that the purpose of constructing normal value, is to determine as precisely as possible the selling price of a product, as it would be if the product were sold in the country of origin or in the exporting country. Thus the expenses relating to sales on the domestic market have to be taken into account¹⁸³.

Looking at the amount of profit that should be included while calculating cost, the *SIMR* provides us with six different methods to calculate this amount. There is a hierarchy between these methods. The privileged way is to take into consideration the “weighted average of profit made on the sales”¹⁸⁴ of like goods sold by the exporter for use in the country of origin. If the exporter does not sell¹⁸⁵ like goods for use in the country of origin, then sales of goods that are in the same general category¹⁸⁶ have to be taken into account. If the exporter does not sell either category of goods, then the legislation refers to sales of like goods by other producers, and if other producers do not sell like goods, then we take into consideration their sales of goods of the same general category. If such sales did

¹⁸² *TEC and Others v. Council*, Joint Cases 260/85 and 106/85, [1988] ECR 5855, pg. 33 & *Nakajima All Precision Co. Ltd. v. Council*, pg. 63.

¹⁸³ *Nakajima All Precision Co. Ltd. v. Council*, pg. 64.

¹⁸⁴ *SIMR*, Section 11(1)(b)(i), (ii), (iii), (iv), (v) & (vi).

¹⁸⁵ According to *SIMR*, Section 11(1)(b) the sales considered have to “permit a proper comparison”. This is defined in Section 13 of *SIMR* as being those goods that meet the greatest number of the conditions set out in Section 15(a) to (e) of *SIMA*. See *SIMA Handbook*, at pg. 5.4.2.2.: “[...] the CCRA must exclude sales to a single customer and those sales at a loss which paragraph 16(2)(b) of *SIMA* directs the Commissioner to disregard when determining normal value. Paragraphs 15(a) to (e) of the Act pertains to time and place of sale, quantities, and so forth. Subsection 16(1) of the Act pertains to the substitution of sales where necessary. In addition to the direction in paragraph 13(a) of the regulations, the consideration of proper comparison may include factors such as sales volumes, trends, manufacturing processes, marketing strategies, to name but a few. For example, because of significant production process differences, it might be preferable to compare a seamless pipe of one size with a seamless pipe of another size rather than comparing a seamless pipe to a welded pipe of the same size.”

¹⁸⁶ “goods of the same general category” and “goods that are of the group or range of goods that is next largest...” are not defined under *SIMA* or *SIMR*. The *SIMA Handbook* states at pg. 5.4.2.2 that these concepts “must be interpreted in a reasonable manner based on the case at hand”. The *Handbook* describes this classification as an administrative decision, and as such the important element becomes the reasonableness of the decision. Finally, the *Handbook* states that “in many cases, so long as the goods selected permit proper comparison, the issue of whether those goods are like goods sold by the exporter or goods of the same general category sold by the exporter will be of little real significance. The final result will be the same and only the applicable paragraph of the regulation will differ”.

not take place either, then the legislation considers sales that are “of the group or range of goods that is next largest to” the same general category. Finally, if this is not possible either, we look at such sales by other exporters¹⁸⁷. A common requirement to consider sales of goods under any of the six above mentioned methods is that the sales taken together must have produced a profit¹⁸⁸.

For the calculation of profits, in circumstances where it is the sales of the exporter in the country of export that are taken into account, and where the producer is not the exporter, then “a reasonable amount of profits shall also include the amounts of profits earned by the producer and any subsequent vendors in respect of sales of those goods to the exporter”¹⁸⁹.

Comparing the method of calculating profit under Canadian legislation to the corresponding method under EC law, the major difference is that under Canadian law, sales made at loss are not automatically excluded from the calculation of the margin of profit. In fact, such sales will only be excluded if the end result is a negative margin of profit or a loss. This is an improvement on the practice under EC law, which requires the exclusion of sales at loss when calculating a profit margin, however it is a limited improvement since neither legislations provide for accurate calculation of the margin of profit. Vermulst and Waer while discussing the calculation of profit margins state, “dumping margin calculations may sometimes be highly artificial and devoid of commercial reality.”¹⁹⁰ This is certainly true when authorities make it an objective to establish positive profit

¹⁸⁷ *SIMR*, Section 1(1)(b).

¹⁸⁸ See *SIMA Handbook*, pg. 5.4.2.2. : “This clause is interpreted to mean that the population of sales used to determine the profit may include sales at a loss so long as overall the sales selected show a net profit. That is, in determining the amount for profit for the purposes of this paragraph, the calculation of weighted average profit would include sales at a loss as well as the profitable sales (so long as they are not sales at a loss which paragraph 16(2)(b) directs the CCRA to ignore as noted earlier).”

¹⁸⁹ *SIMR*, Section 11(2).

¹⁹⁰ Vermulst, E. & Waer, P., *supra* n. 6, p.194.

margins regardless of economic realities, simply because positive profit margin carry with them the potential of a finding of dumping or a greater dumping margin.

The *SIMR* also deal with the calculation of “special, administrative and other costs”¹⁹¹. We saw that the EC legislation and the *GATT Anti-Dumping Code* provide for a rule and a series of alternative methods to calculate these costs, the favored one being a calculation based on actual data pertaining to production and sale in the ordinary course of trade. Canadian legislation does not contain a similar provision. As a matter of fact, Canadian legislation remains silent as to the source of the information. The *SIMA Handbook* states “[t]his amount is to be estimated by means which are not specified, but generally it should be based on an appropriate allocation of such costs by the exporter”¹⁹². This approach is vaguely similar to the first approach or the rule according to which such costs are calculated based on actual data under EC legislation and the *GATT Anti-Dumping Code*. Looking at how such costs are defined, Section 11(c)(i) of the *SIMR* states that they are all administrative, selling and other costs, including the costs of warranties, guaranties of performance and design and engineering costs, which are reasonably attributable to the production and domestic sales of like goods made by the exporter, and which satisfy the greatest number of conditions set out in Section 15(a) to (e) and taking into account Section 16(1) of *SIMA*¹⁹³. If this method of calculation can not be followed, then the provision of Section 11(c)(ii) of *SIMR* has to be followed, and this requires the costs calculated to be reasonably attributable to the production and sales of the goods which were actually shipped

¹⁹¹ Although the *SIMR* speaks of “other costs” the *SIMA Handbook* uses the term “general” costs.

¹⁹² *SIMA Handbook*, pg. 5.4.2.3.

¹⁹³ *SIMR*, Section 11(c)(i).

to Canada, as opposed to the costs reasonably attributable to the production and domestic sales of like products. Clearly, Canadian legislation favors a method of calculation based on costs attributed to production on the domestic market rather than costs attributable to exported goods. Section 11(3) of the *SIMR* brings further precision to the calculation process of SAG costs for the purpose of establishing normal value under Section 19 of *SIMA*. This section specifically refers to situations where the exporter is not the producer. It states that SAG costs will include in this case “the amounts incurred by the producer and any subsequent vendors in respect of sales of those goods to the exporter”¹⁹⁴. This can only lead to higher normal value.

Our study of the methods used in the EC and Canada to construct normal value, shows clearly that this method is favored by national authorities because it gives them more discretion in establishing the normal value and, further it provides them with tools which allow them to put upward pressure on the normal value, therefore influencing and provoking a finding of dumping. The artificiality of the process could not be overemphasized. We saw that cost is calculated using methods that, far from reflecting the production cost of a product in the exporting country, instead allowing basing the calculations on data that does not necessarily mirror the economic realities of production costs incurred by the producers under investigation. Anti-dumping duties are imposed in order to counter the unfair trade practices of certain producers, the least that could be expected from the investigations leading to the imposition of the duties is that normal value be assessed in a way reflecting the economic realities of the producers whose products are allegedly dumped. Further, the calculation of the profit and the SGA

¹⁹⁴*SIMR*, Section 11(3).

can only add to the artificiality of the process, in further contributing to inflate normal value, and thus artificially provoking a finding of dumping.

4.4.3. Export price

The second key element in the process of determining whether or not dumping exists is the calculation of the export price. As stated earlier, it is, after all, by comparing export price and normal value that a determination of dumping is made, and that precisely, is the first step towards imposing an anti-dumping duty. The *GATT Anti-Dumping Code* deals with the calculation of the export price in Article 2(3). It states that in the absence of an export price and in cases where it is unreliable, the export price may be reconstructed on the basis of the price at which the imported products are first resold to an independent buyer, or in the absence of such a price, on such reasonable basis as the authorities may determine. The *Code* does not specify how the export price should be determined and it does not define specific methods for price reconstruction. This may result in using formulas leading to arbitrary reductions of prices, such as the deduction of allegedly high profits. Both EC and Canadian legislation contain export price calculation and reconstruction mechanisms. Given the very general framework provided by the *GATT Anti-Dumping Code* on this point it would be futile to examine whether the above-mentioned legislative texts are in keeping with the *Code's* guidelines. However, it is necessary to examine the mechanisms developed in each jurisdiction for comparative purposes and in order to evaluate the symmetry existing between the calculation of normal value and export price.

EC Regulation 384/96 deals with the calculation of the export price at Articles 2(8) and 2(9). Article 2(8) sets the general rule as to which price is considered to be the export price for the purposes of the legislation and Article 2(9) provides

with methods for the reconstruction or determination of the export price when it could not be established following the first method. Article 2(8) of *EC Regulation 384/96* states that “[t]he export price shall be the price actually paid¹⁹⁵ or payable¹⁹⁶ for the product when sold for export from the exporting country to the Community”¹⁹⁷. This means that all export sales transactions made during the investigation period will be considered, unless Community institutions resort to sampling¹⁹⁸. This includes sales made to complainant Community producers¹⁹⁹. When goods are sold to importers in the Community who are related to the exporters, then sales to independent customers will be used as the basis of establishing the export price²⁰⁰. Having established which export price should be taken into account; the remaining question is whose export price should be considered? This is a matter of establishing who is the importer and who is the exporter, especially when the sale transaction went through one or several intermediaries, whether because the exporter has a sales subsidiary which coordinates the export sales to the community or because he sells via a non-related third party. What should then be determined is at which level of trade the export price has to be established: should the export price be the price charged by the sales subsidiary to the Community importer, or the price charged by the exporter to the sales subsidiary? The issue is of particular importance since the price

¹⁹⁵ *Muller, W. Khan, N., Neuman, H.-A., supra n. 20*, pg. 2.152, p. 115: as a general rule community institutions use the “price paid”, the “price payable” is used only in exceptional circumstances, because it can be more easily manipulated.

¹⁹⁶ *Ibid.*: “the price payable refers to export transactions of which: 1. the goods either have been invoiced but not yet been paid, or 2. the goods have not been invoiced although they were already shipped, or 3. the goods have not been shipped though a contract for the transaction already exists”.

¹⁹⁷ *EC Regulation 384/96*, Article 2(8).

¹⁹⁸ *Muller, W. Khan, N., Neuman, H.-A., supra n. 20*, pg. 2.139, p. 110.

¹⁹⁹ *Magnetic Disks from Japan, Taiwan and the P.R. China/definitive*, OJ No L 262, 21.10.93, p.4, recital 14.

²⁰⁰ *Muller, W. Khan, N., Neuman, H.-A., supra n. 20*, pg. 2.139, p. 111.

charged by the sales subsidiary to the Community importer is usually higher than what the sales subsidiary paid for the goods to the exporter, and considering that latter price would necessarily result in a higher value of the export price and potentially a lower dumping margin. Needless to say that this would be the method favored by exporters. The decisive factor under EC law is the functions discharged by the sales intermediate. If these functions are typically assumed by an exporter's export department, then the price considered will be the one charged by the intermediate to the importer²⁰¹ resulting in a lower dumping margin. Otherwise, the price charged by the exporter to the sales subsidiary will be considered, or it will be constructed²⁰² by adjusting downward, in accordance with Article 2(10) of *EC Regulation 384/96*, the price paid by the importer to the intermediate company²⁰³. This will potentially result in a higher dumping margin, since the export price considered will arguably be lower than the price paid by the importer to the intermediary.

If the export price cannot be determined using the above mentioned method, then Article 2(9) of *EC Regulation 384/96* provides for two alternative calculation methods. The export price will be constructed in specific cases set by the legislation, meaning if there is no export price²⁰⁴, or if "the export price is

²⁰¹ *Certain welded tubes of iron or non-alloy steel from Turkey and Venezuela/ provisional*, OJ No L 351, 15.12.90, p. 17, recital 12 et seq.

²⁰² The construction of the export price will be in accordance with Article 2(9) of *EC Regulation 384/96, which will be examined below*.

²⁰³ *Bicycles from Indonesia, Malaysia and Thailand/definitive*, p.1, recital 39 et seq.

²⁰⁴ This usually takes place when one company sells the product via another company, however the company producing the goods does not charge a price to the company actually selling the goods to the importer because of the special relationship between the two companies. The export price will be reconstructed based on the price paid by the importer to the intermediary company. See: *Certain Photo Albums from China/provisional*, OJ No L 228, 9.9.93, p. 16, recital 23 & *Microwave ovens from P.R. China, Korea, Thailand and Malaysia/definitive*, OJ No L 2, 4.1.96, p.1, recital 12. Also See *EC Anti-Dumping Law*, pg. 2.157 & 2.158, p.117: "There may also be no export price where goods are exported to related importers which resell the product having first used it as a raw material or component part for

unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party”²⁰⁵. The legislation establishes two methods for constructing the export price. Under the first one, the export price will be constructed “on the basis of the price at which the imported products are first resold to an independent buyer”²⁰⁶; otherwise the export price will be calculated on “any reasonable basis”^{207,208}. The price will be further adjusted to establish “a reliable export price, at the Community frontier level”²⁰⁹. The second and third paragraphs of Article 2(9) deal with the adjustment mechanism. This adjustment mechanism consists on deducting certain costs from the export price, precisely to arrive to the desired reliable export price. The costs in question can be “borne by the 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”²¹⁰. Article 2(9) also provides a non-exhaustive list of cost items²¹¹, incurred between importation and resale²¹² for

incorporation into other products” or “where the exports are made as part of barter trade arrangements. In such a case, the exporter receives goods in return for exports instead of direct payment of cash”.

²⁰⁵ *EC regulation 384/96*, Article 2(9).

²⁰⁶ *EC regulation 384/96*, Article 2(9).

²⁰⁷ An example where the Community institutions calculated the export price using the second method is *DRAMs from Japan*, OJ No L 20, 25.1.90, p.5, recital 63: the exporter sold to its subsidiary in the Community unfinished products which the subsidiary assembled and further processed as well as finished products which were resold unchanged. Both products were subject to the investigation. The export price of the unfinished DRAMs, which were not resold in the Community in their original state, was calculated by deducting from resale prices for the finished products the cost and profit margin attributable to the related importer’s transaction in relation to the finished DRAMs, and all costs for assembly and processing were deducted.

²⁰⁸ *EC regulation 384/96*, Article 2(9).

²⁰⁹ *EC regulation 384/96*, Article 2(9).

²¹⁰ *EC Regulation 384/96*, Article 2(9).

²¹¹ *EC Regulation 384/96*, Article 2(9): such cost items include: “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 profits”.

²¹² See Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.168, p. 120: “the necessary adjustment can in particular circumstances also cover costs which have been incurred *prior* to importation. This is due to the fact that the formula ‘between importation and resale’ does not refer to a certain period of

which an adjustment can be made. The amount of the adjustment will depend on the type of customer²¹³. Accordingly, the adjustment will be dependent on the different costs encountered in selling to different customers. The Community will consider all costs related to foreign currency exchange operations, when such costs are related to the importer's purchase and sales activities²¹⁴.

Determination of the export price under Canadian legislation is covered by Sections 24 to 28 of *SIMA* and 20 to 22 of the *SIMR*. Section 24 establishes the primary method of determining the export price. Again here, authorities are faced with a choice as to which export price to consider, especially in situations where sales transactions go through an intermediary entity. As discussed above, EC legislation resorts to the 'functions' test. Canadian legislation takes a more pragmatic approach aiming at establishing the lowest export price, and as a result a potentially higher dumping margin. The Canadian approach is to simply consider the lesser of the exporter's sale price or the importer's adjusted import price²¹⁵, regardless of whether the sale went through an intermediary company. The text of the legislation is clear: if the sale went through an intermediate and it is the exporter's sale price that is considered, then it is such sale price to an intermediate company, and when it is the importer's purchase price that is considered, it is such price paid to the intermediary company²¹⁶, the decisive factor would be the lowest export price. Once that price has been established, then

time but rather to the costs incurred by an importer". Also see: *Canon Inc. v. Council, & Gestetner Holdings plc v. Council and Commission*.

²¹³ *Ibid*, pg. 2.169, p. 120.

²¹⁴ *DRAMs from Korea/definitive*, OJ No L66, 18.3.93, p.1, recital 25.

²¹⁵ *SIMA*, Section 24.

²¹⁶ See *SIMA Handbook*, pgs. 5.9.3., 5.9.3.1 & 5.9.3.2. Also see pg. 5.9.3.3. where it is stated that : "By expressing the difference between the export price and the intermediary's sale price to the importer as a percentage of that sale price, a percentage deduction may be calculated to facilitate the determination of export price in future transactions. Export price may be calculated by deducting the above percentage from the intermediary's sale price to the importer".

it will be adjusted downward by deducting all the costs, charges and expenses related to preparing the goods for shipment²¹⁷, such as special packaging required to protect the goods during the voyage²¹⁸; all taxes and duties imposed on the goods in Canada, when they are paid by or on behalf or at the request of the exporter²¹⁹, all other costs, charges and expenses²²⁰ resulting from exporting or shipping the goods from the place of their direct shipment to Canada, and paid for by the exporter²²¹. Clearly, EC legislation does not provide for such an exhaustive list of downward adjustments. As a matter of fact, reading Article 2(8) in conjunction with Article 2(9) of *EC Regulation 384/96* shows that Community institutions will adjust the export price downward only when it is constructed. However, adjustments aiming at a fair comparison between the export price and normal value could come into play, and these are the adjustments covered earlier when discussing Article 2(10) of the EC legislation.

If the export price could not be calculated following Section 24, then Section 25 of *SIMA* provides alternative methods of determining the export price. Just like the EC legislation, Section 25(a) and (b) of *SIMA* describe the circumstances leading to the calculation of the export price using alternative methods to the rule enunciated by Section 24. These circumstances are limited to two and they are identical to those found in *EC Regulation 384/96*, meaning that these alternative

²¹⁷ *SIMA*, Section 24(a)(i).

²¹⁸ See *SIMA Handbook*, pg. 5.9.2.

²¹⁹ *SIMA*, Section 24(1)(ii).

²²⁰ The pg. 5.9.2 of the *SIMA Handbook* provides a non exhaustive list of these costs and expenses, they include: transportation cost from the point of direct shipment; insurance from the point of direct shipment; bank charges composed of handling charge; inland transportation cost from the factory to the point where goods are containerized; weight and measurement fees; containerization fees for stuffing the goods into the container; insurance on the goods from the factory to the containerization point; freight forwarding charges; wharfage; warehousing fees if the goods are required to be stored before shipment; export royalty fees; lighterage charges; customs brokers fees.

²²¹ *SIMA*, Section 24(1)(iii).

methods will be used either when there is no export²²² price, or if the export price is unreliable by reason of the relationship²²³ and agreements²²⁴ between the selling and the buying parties. Having said that, the balance of Section 25 establishes the method for calculating the export price. Section 25 provides three different methods for determining the export price, the first one deals with situations where the goods are sold in Canada in the same condition as when they were imported; the second addresses the situation when the goods are intended for assembly, packing or further manufacturing; and the third one is intended for other situations, in a manner specified by the Minister²²⁵. Under the first method, the export price is the adjusted²²⁶ price for which the goods were sold by the

²²² See *SIMA* Section 25(1)(a): it is considered that there is no export price when there is no exporter's sale price or when there is no price at which the Canadian importer purchased or agreed to purchase the goods. The use of "or" in the text of the legislation shows that the export price will be constructed when the exporter's sale price could not be compared to the importer's purchase price in order to determine an export price based on the lower of the two figure.

²²³ *SIMA*, Section 25(1)(b)(i) refers to "associated persons", this term is defined in Sections 2(2) to 2(4) of *SIMA*.

²²⁴ *SIMA*, Section 25(1)(b)(ii) uses the term "compensatory arrangements", and it is defined in pg. 5.10.1. of the *SIMA Handbook* as being : "any agreement, between or among any of the following, namely, the manufacturer, producer, vendor, exporter, the importer in Canada, subsequent purchaser or any other person, which directly or indirectly affects or relates to the price of the imported goods, the sale of those goods, the net return to the manufacturer, producer, vendor or exporter, or the net cost to the importer of the goods".

²²⁵ See *SIMA Handbook* at pg. 5.12: "Where sufficient information to calculate normal values or export prices under the specific provisions of the Act has not been furnished, is not available or is available but purposely not requested, e.g. sampling, the values will be determined in the manner that the Minister specifies (Ministerial specification) as per section 29 of *SIMA*. [...]The two subsections of section 29 of *SIMA* provide for the determination of normal values and/or export prices in a manner specified by the Minister. Subsection 29(1) covers the situations where sufficient information required for the application of the methods outlined in sections 15 to 28 of *SIMA* has either not been furnished or is simply not available to the Agency. Subsection 29(2) contemplates the situation where subject goods enter Canada on consignment and there is no known purchaser in Canada".

²²⁶ See *SIMA*, Section 25(1)(c)(i), (ii), (iii) & (iv) and *SIMA Handbook*, pg. 5.10.2.1. The adjustments here consists on deducting "all costs, including regular duties and taxes, and duty imposed under *SIMA*, incurred on or after importation and on or before their sale, and costs incurred by the importer in Canada in relation to the resale of the goods; an amount for profit which is determined in accordance with sections 20 and 22 of the *SIMR*; all costs, charges and expenses incurred by the exporter, importer or any other persons in preparing the imported goods that are in addition to those costs, charges and expenses incurred on sales for use in the country of export. This paragraph specifically identifies parties that may incur costs in preparing the imported goods for shipment to Canada. Such costs, charges and expenses would include export packing. In normal circumstances, it would be expected that only the exporter would incur these costs; and all other costs, charges and expenses incurred by the

importer to an independent customer in Canada²²⁷. The second method consists of calculating the export price when the goods are sold in Canada in a different condition from when they were imported. It is basically the same as the first method, meaning the export price is the adjusted price for which the importer sold the goods to an independent customer in Canada²²⁸, except that the adjustments are different²²⁹. The specific export price will be calculated based on a weighted average of all the export prices calculated for the sales examined during the investigation, using one of the above mentioned methods²³⁰.

Other noteworthy considerations while calculating the export price under *SIMA* are the treatment of *SIMA* duties under Section 25 calculations, and the unreliability of the export price under Section 24 by reason of payment of the dumping duty by a party other than the importer or the purchaser in Canada. With respect to the first issue, the export price is constructed on the basis of the first sale by the importer to an arm's length buyer in Canada. The *SIMA Handbook* points out the deductions provided for pursuant to Section 25(1)(c)(i) and 25(1)(d)(v) which include duties imposed by virtue of *SIMA* itself and states that one effect of this would be to have the burden of this duty passed on to the

exporter, importer or any other person resulting from the exportation of the goods or arising after their shipment from the place of direct shipment to Canada or the place substituted. Such costs include ocean freight, insurance, inland freight, wharfage and docking charges, and so forth".

²²⁷ *SIMA*, Section 25(1)(c).

²²⁸ *SIMA*, Section 25(1)(d).

²²⁹ See *SIMA*, Section 25(1)(d)(i), (ii), (iii), (iv) & (v) and *SIMA Handbook*, pg. 5.10.2.2. The adjustments here consists on deducting "an amount for profit which is calculated in the manner outlined in sections 21 and 22 of the *SIMR*; the administrative, selling and all other costs involved in selling the goods in Canada; all the costs involved in the assembly, packaging or further manufacture or the manufacture or production of the goods into which the imported goods have been incorporated; the costs, charges and expenses incurred in preparing the imported goods for shipment to Canada that are additional to those costs, charges and expenses on sales for use in the country of export; and all other costs, charges and expenses, including duty and taxes, and duty imposed under *SIMA*, resulting from the exportation of the imported goods or arising after their exportation from the place of direct shipment to Canada or the substituted place".

²³⁰ *SIMA Handbook*, pg. 5.10.2.4.

Canadian purchaser and if dumping ceases as a result of the higher price generated on the Canadian market, then no anti-dumping duty should be payable. In fact, if the anti-dumping duty were not pushed over to the purchaser, then the deduction will result in an export price lower by an amount equal to the dumping duty. A lower export price means a bigger likelihood of a finding of dumping and/or a higher dumping margin. This is to say that dumping could be found under Canadian legislation when a product is already subject to dumping duties but the exporter by reducing its profit margin for the product assumes such duties. In such a case, a new dumping duty will be payable since the first one is considered to have produced no effect. The *Handbook* goes on referring to *SIMA* Section 25(2), which stipulates that duties imposed by virtue of *SIMA* should not be deducted where, in the opinion of the Commissioner, the constructed export price is equal or higher to the normal value of the goods. In this case *SIMA* seems to recognize the remedial effect of its imposed duties and the exercise will be concluded at this point. If the export price is lower than the normal value, then the anti-dumping duties are deducted in view of getting an export price, which will serve as a basis for calculating the new duty²³¹.

As we saw earlier, although EC legislation also allows for the deduction of anti-dumping duties, it does not follow the same approach. Instead of developing a mechanism trying to push such duties into the Community, it simply looks at who paid the anti-dumping duty. If the importer paid it, then no deduction is permitted. However if the exporter or a third party paid it, then such duty is deducted from the constructed export price²³².

²³¹ *SIMA Handbook*, pg. 5.10.2.5.

²³² *EC Regulation 384/96*, Article 2(9).

The second issue enunciated earlier relates to the method to be followed when calculating the export price under *SIMA*. As discussed above, *SIMA* Section 24 is the primary method of establishing the export price. The alternate method of Section 25 is to be used, *inter alia*, when the export price established under Section 24 is considered unreliable, because someone besides the purchaser paid taxes or duties, and such payment is considered to be a compensatory arrangement by virtue of Section 25(b)(ii). If the duties in question are anti-dumping duties, then Section 26 states that the payment is not considered a compensatory arrangement and that the export price is calculated following the method of Section 24. That export price is however adjusted by deducting the amount of such duties. The purpose of this deduction according to the *SIMA Handbook* is to ensure that the importer does not avoid payment of the duty²³³.

Again EC legislation does not have an equivalent to this provision. Under EC legislation an export price is either reliable or unreliable and if it is deemed unreliable it is constructed and all compensatory payments are deducted, regardless of their nature²³⁴.

The comparison of normal value and export price is a crucial step in a dumping investigation and one of the most sensitive issues when examining anti-dumping legislation.

The process of imposing anti-dumping duties by its nature entails a presumption of anti-competitive behavior the minute it is established that the goods are sold at a price below their normal value²³⁵. Therefore, the process of calculating normal

²³³ *SIMA Handbook*, Section 5.11.1.

²³⁴ *EC Regulation 384/96*, Article 2(9).

²³⁵ Aussilloux, V. & Mourre, G., *Une révision souhaitable de la procédure antidumping à l'OMC*, *Revue française d'économie*, No 4, 2000, p.24.

value and export price, and the process of comparing them are key elements of an anti-dumping investigation. Can the adjustment mechanisms²³⁶ developed in the Canadian and EC legislation result in a fair and proper comparison of normal value and export price, leading to a just imposition of anti-dumping duties? One can hardly say so. Although the structure and wording of the legislative texts can give the impression that they aim at creating an impartial and clear framework for the determination of dumping, reality is that normal value calculation could never reflect the ideals enunciated by anti-dumping legislation. The interpretation of these legislations opens the door to all kinds of manipulations²³⁷.

The *GATT Anti-Dumping Code* requires that a fair comparison be made between the export price and normal value, and sets out the general framework of that comparison²³⁸. That framework is not elaborate enough and, as we saw earlier, it is differently transposed by Canadian and EC legislation. A crucial problem when dealing with the comparison and the adjustment process is respecting the requirement introduced by Article 2(4) of the *GATT Anti-Dumping Code*, which relates to the elimination of differences affecting price comparability and to the differences in levels of trade. As stated earlier, both Canadian and EC legislation contain provisions aiming at adjusting prices in order to eliminate differences due to trade levels. These provisions are Article 2(10)(d) of *EC Regulation 384/96* and Section 9 of the *SIMR*. Looking at EC legislation, we saw that three of the four conditions stipulated in the text of *EC Regulation 384/96* are not requirements for granting allowances under the *GATT Anti-Dumping Code*. Commenting on these conditions, Didier stated that these “conditions have led the

²³⁶ For a detailed description of the adjustment mechanisms see Annex 1 to this paper.

²³⁷ Aussilloux, V. & Mourre, G., *supra* n. 235, p.25.

²³⁸ *GATT Anti-Dumping Code*, Article 2(4).

Community to generally refuse the proper level of trade adjustments. In the case of related importers, particularly, it still compares export prices constructed at genuine ex-factory level with domestic sales prices to the first unrelated buyer (usually dealers, sometimes end-users), without effective adjustments”²³⁹. Didier further states: “[r]ecognizing the near impossibility to obtain level of trade allowances under the [...] conditions [of Article 2(d)(i)], the Community added, in December 1996, Article 2(d)(ii)”²⁴⁰. Didier also states that this formula is unsatisfactory, since it is entirely left to administrative discretion and “it is ridiculously low [...] and does not account, even by far, for the actual difference in functions and/or costs involved by the difference in level of trade”²⁴¹. Canadian legislation seems to have adopted a more sensitive approach, which was discussed earlier, since allowances are generally granted on a case-by-case basis and when they do not relate to the general cost of doing business, and they are justified and documented.

Finally, one must remember that before normal value and export price can be compared, they have to be calculated. This calculation process is far from being a precise scientific process and it is difficult to imagine anyone saying that the results of such calculations, whether based on real data or constructed using any construction method could lead to precise results clear of errors and uncertainties. One can argue that the *de minimis* rule could remedy this uncertainty since a 2% dumping margin will not lead to the imposition of anti-dumping duties. The *de minimis* rule could potentially take the function of a margin of error. In other words, when the margin of dumping is below a certain level, then there is an

²³⁹ Didier, P., *supra* n. 105, p.41.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

automatic presumption of a high error margin. A higher *de minimis* level would help attenuate the problem but would not solve it, since high dumping margins will still be subject to the error factor and the imprecision of the process.

4.5. Determining the dumping margin

Having determined the normal value of a product and its export price, national authorities can now determine the actual margin of dumping. Although one might think that given the elaborate schemes developed for calculating the normal value and the export price and, how much bias and discretion can be exercised by national authorities to influence the actual normal value and export price and effectively provoking dumping findings, comparing normal value and export price should be a straight forward operation. The reality is very different. We will look in this section at how Canadian and EC Legislation calculate the dumping margin, and whether the methods used are dumping creating or not.

Article 2.4.2 of the *GATT Anti-Dumping Code* states that dumping margins during the period of investigation should be determined based on a comparison of a weighted average normal value with a weighted average price of all comparable export transactions, or by a comparison of normal value and export price on a transaction-to-transaction basis. A comparison between a weighted average normal value and individual export transactions is justified if the authorities can explain why differences in the export price amongst purchasers, regions or time periods, can not be taken into account appropriately by the use of one of the two other comparison methods. The *GATT Code* does not favor that last alternative, considering that such a comparison would clearly result in a higher dumping margin, since it does not account for transactions, which are not dumped when

determining the dumping margin. The dumping margin is in this latter case calculated solely on the basis of dumped transactions. Comparing normal value and export prices on an average-to-average basis would correct this situation by allowing sales transactions, which are not dumped to counter the effect of dumped transactions. During the Uruguay Round negotiations exporting countries favored the adoption of a text exclusively allowing an average-to-average comparison, while the US and the EC argued that comparison of an average normal value with individual export transactions should be possible particularly when faced with ‘targeted dumping’²⁴². The result is a provision that is a compromise between the two positions.

Article 2(11) of *EC Regulation 384/96* reproduces Article 2.4.2 of the *GATT Code* almost word for word with one difference: the last sentence of EC legislation breaks away from the *Code* eliminating the explanation requirement when comparing weighted average normal value with prices of individual export transactions. EC legislation repeats the first part of the second sentence of Article 2.4.2 of the *GATT Code*, the second part is however different. Comparing the two texts, the *GATT Code* states that: “normal value established on a weighted average basis may be compared to prices of individual export transactions if the Authorities find a pattern of export prices which differ significantly amongst different purchasers, regions or time periods, and *if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to- weighted average or transaction-to-transaction comparison.*” [Emphasis added] Under EC legislation the second half of that last sentence, reproduced in italics above, is replaced by “if the methods specified in

³¹² Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, 2.255, p. 144.

the first sentence of this paragraph would not reflect the full degree of dumping being practiced”²⁴³. If this is what EC legislators consider to be an explanation, it is a pretty vague one. We could even say that it is not an explanation at all, but rather a justification of the discretionary decision of EC institutions. However, what is a valid explanation? The *GATT Anti-Dumping Code* certainly does not clearly state under which circumstances the other methods of calculating the dumping margin do not properly reflect the different pattern of export prices. As for EC regulation, it obviously reflects the position of the Community, during the Uruguay Round negotiations, to favor a weighted average normal value comparison to prices of individual transactions, precisely because such an approach is more likely to result in a finding of dumping. By eliminating the arduous requirement for an explanation, Community Authorities gave themselves a high degree of discretion when choosing the method of establishing the margin of dumping. This discretion would necessarily have to be exercised within the guidelines of Article 2(11) of *EC Regulation 384/96*²⁴⁴. The Community usually will calculate the dumping margin using the weighted average-to-weighted average comparison method and the weighted average to individual transactions comparison method. If the results are significantly different, then the community will have to decide which method to apply²⁴⁵. The Community considers that a comparison of a weighted average normal value with individual export prices is the only method to deal with ‘disguised dumping’, where different prices are charged, some of which are below the average normal value and others are above the average normal value. The Community considers the average-to-average

²⁴³ *EC Regulation 384/96*, Article 2(11).

²⁴⁴ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.256, p. 145.

²⁴⁵ *Ibid*, pg. 2.260, p. 146.

comparison inadequate, since sales made at dumped prices will be masked by the other sales made at a price higher than the average normal value. The result, according to Community institutions, is that injury will not be eliminated²⁴⁶. In *EC Anti-Dumping Law*, it is stated that the justification given by EC legislation for use of a comparison of a weighted average normal value with an individual export transaction, would correspond to the explanation requirement under the *GATT Code*. It is further stated that “[i]t would appear that the fact that an average-to-average comparison gives a result which is significantly different to that given by a comparison of an average weighted normal value with individual export prices is a legitimate reason to move to the exception if at the same time it can be shown that the price variation constituted a pattern”²⁴⁷. Although this is an interesting position to take, one could not help but notice that it is just like saying that when an average-to-average comparison results in no dumping margin, or in a lower dumping margin than the one reached if an average normal value to individual export price comparison were to be applied, then the latter method will be used. This approach is certainly not an explanation nor is it a justification; it is merely a Community policy aiming at protectionism.

‘Dumping margin’ under EC law is defined in Article 2(12) of *EC Regulation 384/96*, which states, “[t]he dumping margin shall be the amount by which the normal value exceeds the export price”²⁴⁸. This definition is straightforward. Article 2(12) goes on to say that “[w]here dumping margins vary, a weighted average dumping margin may be established”. This rule will apply to exporters

²⁴⁶ *Nippon Seiko KK v. Council*, Case 258/84, [1987] ECR 1923, pg. 25; *Nachi Fujikoshi Corp. Ltd. v. Council*, Case 255/84, [1987] ECR 1861, pg. 25; *NTN Tokyo Bearing Co. Ltd. and Others v. Council*, Case 240/84, [1987] ECR 1809, pg. 23. Also see Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.261, p. 146.

²⁴⁷ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 2.264, p. 147.

²⁴⁸ *EC Regulation 384/96*, Article 2(12).

who sell to the community different models or types of the concerned product²⁴⁹. The purpose of this provision is to discourage producers from selling at different prices under, on one hand their own brand name, and on the other to original equipment manufacturers, or by using different sale channels. If different dumping margins are imposed, then the producer will follow the path, which results in the imposition of the lowest margin. Similarly, the same reasoning applies to all related producers in the country of origin, one dumping margin will be established based on the weighted average of the dumping margins of each related exporter in question²⁵⁰.

Under Canadian legislation, the margin of dumping is determined pursuant to Section 30.1 to Section 30.3 of *SIMA*. Canadian legislation provides for two ways of calculating the margin of dumping. The first way is the comparison of weighted average normal value to weighted average export price²⁵¹. This is similar to EC legislation and the *GATT Anti-Dumping Code*. The *SIMA Handbook* states, “[a] normal value and an export price for each export transaction will be determined. For the entire period of investigation, a total normal value and total export price of both dumped and not dumped goods will be calculated. The total export price for each product subtracted from the total normal value for each product will result in a margin of dumping for that product. The margin of dumping is then expressed as a percentage of the total export price”²⁵². The margin of dumping for an exporter

²⁴⁹ *Bicycles from Indonesia, Malaysia and Thailand/definitive*, p.1, recital 71.

²⁵⁰ *Polyethylene and Polypropylene sacks and bags from India, Indonesia and Thailand/provisional*, OJ No L 12, 15.1.97, p.8, recital 2; *Certain welded tubes, of iron or non-alloy steel, from Yugoslavia (except Serbia and Montenegro), Romania, Turkey, and Venezuela/repeal*, OJ No L 308, 21.12.95, p.65, recital 39; *Ferro-silico-manganese from Russia, Ukraine, Brazil and South Africa/definitive*, OJ NoL 248, 14.10.95, p.65, recitals 8 to 10; *Urea from Austria, Hungary, Malaysia, Romania, the USA and Venezuela/provisional*, OJ No L 235, 25.8.88, p.5, recital 13 & *Bicycles from Indonesia, Malaysia and Thailand/definitive*, O.J. No L91, 12.4.96, p.1, recital 29.

²⁵¹ *SIMA*, Section 30.2(1).

²⁵² *SIMA Handbook*, Pg. 5.14.2.

cannot be negative. Not dumped products may very well offset dumped products from the same exporter, however the minimal dumping margin for an exporter will never be negative. Therefore, a negative dumping margin of an exporter cannot offset a positive dumping margin of another exporter²⁵³. This is similar to the practice of the EC. This invariably leads to higher dumping margins since negative dumping margins could not offset positive dumping margins.

Interestingly enough, this EC practice has been recently condemned by the WTO Appellate Body in the *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*²⁵⁴. Describing the contentious issue the Appellate Body stated:

The practice of “zeroing”, as applied in this dispute, can briefly be described as follows: first, the European Communities identified with respect to the product under investigation - cotton-type bed linen - a certain number of different “models” or “types” of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was higher than export price; by subtracting export price from normal value for these models, the European Communities established a “*positive* dumping margin” for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a “*negative* dumping margin” for each model. Thus, there is a “positive dumping margin” where there *is* dumping, and a “negative dumping margin” where there is *not*. The “positives” and “negatives” of the amounts in this calculation are an indication of precisely how *much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the amounts it had calculated as “dumping margins” for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any “negative dumping margin” as zero - hence the use of the word “zeroing”. Then, finally, having added up the “positive dumping margins” and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.²⁵⁵

The panel further describes this practice in the following manner:

²⁵³ *SIMA Handbook*, Pg. 5.14.2.

²⁵⁴ WT/DS141/AB/R, 1 March 2001.

²⁵⁵ *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, pg. 47.

The European Communities counted “the weighted average export price to be equal to the weighted average normal value ... despite the fact that it was, in reality, higher than the weighted average normal value.” By “zeroing” the “negative dumping margins”, the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where “negative dumping margins” were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping.²⁵⁶

The Appellate body thus concluded that “the practice of “zeroing” when establishing “the existence of margins of dumping”, as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*”²⁵⁷. Following this decision, the EC has amended the dumping margins originally imposed on imports from India and which, in certain cases were as high as 24.7%, with margins not exceeding 9.1%, and further suspended the measures concerning India, pending a coming review investigation²⁵⁸. In another Regulation, the EC went beyond that, by suspending the measures applicable to bed linen from Egypt and by removing those applicable to imports of bed linen from Pakistan. Interestingly enough, when the EC recalculated the margin of dumping without ‘zeroing’ the negative dumping margins, the result was that there was no dumping from Pakistan²⁵⁹. With respect to imports from Egypt, the Community suspended the finding of dumping and stated that, in the case of Egypt, there would still be dumping “[h]owever, the level of any dumping margins would be substantially reduced if

²⁵⁶ *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, pg. 55.

²⁵⁷ *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, pg. 66.

²⁵⁸ Council Regulation (EC) No 1644/2001 of 7 August 2001 amending Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India.

²⁵⁹ Council Regulation (EC) No 160/2002, 28 January 2002.

no 'zeroing' was applied when calculating the dumping margin for each sampled company²⁶⁰.

Also recently, the EC published a notice inviting all exporters subject to EC anti-dumping duties, where the existing measures are based on a weighted average dumping margin, established on the basis of a methodology which included 'zeroing' negative dumping margins for certain types of products, to lodge a written application for a review. However, the notice clearly states that such reviews will not have a retroactive effect, in accordance with Article 3 of the WTO enabling Regulation²⁶¹.

However, also recently, the EC initiated a partial interim review applicable to imports of cotton-type bed linen originating in India²⁶², which resulted into the imposition of dumping duties on cotton type bed-linen originating in India. The amount of the dumping duties is equal to the duties calculated without applying the zeroing technique, meaning that the dumping duties do not exceed 9.1%²⁶³.

This example shows clearly how dumping can be created artificially by employing methods to calculate dumping margins which are, far from reflecting economic realities, but distorting them instead and allowing for "cherry picking" of data in view of ensuring that a finding of dumping is made, and/or that imposed dumping margins are higher, and thus, protective of domestic markets rather than from unfair trade practices.

²⁶⁰ Council Regulation (EC) No 160/2002, 28 January 2002.

²⁶¹ Notice regarding the anti-dumping measures in force following a ruling of the Dispute Settlement Body of the World Trade Organization adopted on 12 March 2002, EC Regulation C 111/4, 8 May 2002.

²⁶² Notice of Initiation of a partial interim review of the anti-dumping measures applicable to imports of cotton-type bed linen originating in India, 2002/C39/05, 13.2.2002.

²⁶³ Council Regulation (EC) No 696/2002 of 22 April 2002 confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No 1644/2001, Official Journal L 109, 25/04/2002 P. 0003 – 0013.

We have already noted above that this ‘zeroing’ technique used in the EC and condemned by the WTO, is used in Canada. It remains to be seen whether Canadian authorities will adopt measures that would make Canadian anti-dumping law compliant with the WTO’s decision.

Going back to the methods of comparing normal value and export price under Canadian law, just like the *GATT Code* and EC legislation, *SIMA* allows for calculation of normal value based on a comparison of weighted average normal value to individual export prices²⁶⁴. In keeping with the *GATT Code* and just like its European counterpart, *SIMA* makes the use of this method conditional to the presence of “significant variations in the prices of goods [...] among purchasers, regions in Canada or time periods”²⁶⁵. However absent from that provision is the explanation requirement found in the *GATT Anti-Dumping Code*. The *SIMA Handbook* seems to remedy this situation by stating, “[a]ny decision to use this section must be clearly and completely documented in both the departmental files and the Statement of Reasons. Officers must clearly justify the rationale for not using the regular provisions to determine margins of dumping”²⁶⁶. This requirement as formulated in the *SIMA Handbook* brings the application of Canadian legislation closer to the explanation requirement found under the *GATT Anti-Dumping Code*.

It should be noted that there is an extra twist to the use of the targeting provision. Subsection 30.2(3) provides that if section 15 is being used to determine normal value, the CCRA must apply the weighted average method as specified in paragraph 17(a). This weighted average selling price is the basis for

²⁶⁴*SIMA*, Section 30.2(2).

²⁶⁵*SIMA*, Section 30.2(2).

²⁶⁶*SIMA Handbook*, Pg. 5.14.5.

normal value, which will then be, compared to individual export prices as described above. Obviously, subsection 30.2(3) has no application if normal values are determined under sections 19, 20, or 29. These results, which essentially reflect the results for only the dumped goods, will be carried forward into the overall calculation for the country. As already noted, the effect of this approach is that not dumped goods do not offset 'targeted' dumped goods. Finally, another point of difference between Canadian and EC legislation is that, unlike EC legislation, Canadian legislation does not allow for calculating the dumping margin based on the comparison of individual normal value with individual export prices on a transaction-to-transaction basis. This is a minor difference, since EC institutions practically never resorted to this method of calculating the margin of dumping²⁶⁷.

4.6. Determination of Injury

Having established the existence of dumping, and having calculated the margin of dumping, the next requirement prior to actually levying an anti-dumping duty consists of establishing the existence of injury. Article VI of the GATT states that for dumping to take place there has to be a 'material injury' or a threat of material injury to the domestic industry. Also a material retardation of a domestic industry can bring about the imposition of dumping duties. Article 3 of the *GATT Anti-Dumping Code* provides further details on the issue of material injury and material retardation. According to the *Code*, the determination of injury should be done objectively, and it involves the examination of the volume of dumped imports and their effect on prices in the domestic market for like

²⁶⁷Van Bael, I. & Bellis, J. F., *Anti-Dumping and other Trade Protection Laws of the EC*, CCH Europe, 3rd edition, 1996, pg. 339(2)(a), p.139.

products, as well as the impact of these imports on domestic producers of such products.²⁶⁸ With respect to the volume of dumped goods, significant increases in dumped goods in the importing country will be considered as relevant evidence. Also, will be taken into consideration, significant price undercutting of the dumped imports in comparison with the price of like products in the importing Member, or the potential significant price depression or significant prevention of price increase which otherwise would have occurred. The *Code* states that none of these three factors necessarily gives decisive guidance on its own²⁶⁹.

Normally injury has to result from dumping of goods from a specific country, however, the cumulative effect of dumping of goods originating from different countries will also be considered under certain circumstances. Addressing this issue, the *Code* states that, when dealing with situations where products from more than one country are subject to an anti-dumping investigation, the effect of all the imports could be assessed cumulatively, only if the dumping margin established in relation to the imports from each country is more than *de minimis*, and if the volume of imports from each country is not negligible. Second, it should be established that it is appropriate to assess the cumulative effect of the imported products in light of the conditions of competition between the imported products and the like domestic products²⁷⁰. This effectively gives investigative authorities grounds to conclude that although imports from one specific country do not cause injury on their own, they do cause injury if considered in conjunction with imports from other countries.

²⁶⁸ *GATT Anti-Dumping Code*, Article 3.1.

²⁶⁹ *GATT Anti-Dumping Code*, Article 3.2.

²⁷⁰ *GATT Anti-Dumping Code*, Article 3.3.

More specifically on what constitutes injury, the *Code* states that, while examining the impact of the dumped products on the concerned domestic industry, all the relevant economic factors and indices having a bearing on the industry should be evaluated. The *Code* provides a non-exhaustive list of factors that could be taken into consideration, they include actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilization of capacity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effect on cash flow, inventories, employment, wages, growth and ability to raise capital or investments. Again, the *Code* emphasizes that one or several of these factors do not necessarily provide guidance on their own²⁷¹. In addition, it is unequivocally stated in the *Code* that injury must result from the dumping of the imported products. There has to be a causal relationship between the dumped imports and the injury to the domestic industry. Authorities should examine all the relevant evidence presented to them in order to reach a conclusion on the causal relationship. Authorities should also examine other sources of injury, and injury caused by these other factors should not be attributed to the dumped products. The *Code* provides a non-exhaustive list of these factors which include, the volumes and prices of imports not sold at a dumped price, contractions in demand or changes in the patterns of consumption, trade restrictive practices and competition between the foreign and domestic producers, and developments in technology, and the export performance and productivity of the domestic industry²⁷². It is only after a finding of injury or a threat of injury or retardation and a causal link between the dumping activity and

²⁷¹ *GATT Anti-Dumping Code*, Article 3.4.

²⁷² *GATT Anti-Dumping Code*, Article 3.5.

this injury or threat of injury or retardation that an anti-dumping duty could be imposed and levied.

The corresponding provisions under EC law are found at Article 3 of *EC Regulation 384/96*. In short, EC legislation adopted the provisions of the Article VI of the *GATT* and the corresponding provisions of the *GATT Anti-Dumping Code* almost word for word. The minor differences found between the two texts are merely stylistic. Having said that, we will examine briefly the application of EC legislation. The first issue requiring attention is the definition of ‘material injury’. Neither the *GATT Code*, nor EC legislation provide a clear and precise definition of a ‘material injury’. Under EC law, material injury will be found if: “1. the injury is widespread in the industry concerned; and 2. the injury stems from a significant volume²⁷³ and/or price effects with a consequent significant impact on the Community industry. Consequently, it is not a precondition for an injury finding that there is both a volume and a price effect of dumped imports.”²⁷⁴ This definition of ‘material injury’ is general, but it seems fair, the requirement of a ‘consequent significant impact’ is certainly welcome, as it shows that an injury finding will not result from an insignificant to negligible impact on the domestic industry.

However, an injury investigation is affected by a number of parameters, one important issue when dealing with injury assessment is to establish which products produced by the community industry have to be taken into account for the purpose of the investigation. Article 3(8) of *EC Regulation 384/96* reproduces word for word Article 3(6) of the *GATT Anti-Dumping Code*. Further

²⁷³This is a direct reference to the *de minimis* rule under EC law, found at Article 5(7) of *EC Regulation 384/96* and discussed earlier.

²⁷⁴Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 3.10, p.184.

consideration should however be given to the treatment of certain products by Community institutions. The first issue to be addressed is the treatment of captive sales under EC law. Captive sales, by opposition to sales on the free market, are those sales made within an integrated group. Excluding captive sales would invariably result in smaller market shares for Community producers. The Community does not exclude captive sales when determining market share. This approach taken by the Community is certainly welcome and was endorsed by the European Court of Justice, who stated that the market share of the dumped products must be compared to the whole Community production or consumption and this would include captive sales, unless there was a clear separation in that specific market between captive sales and the free market²⁷⁵. On the other hand, the Community when establishing market shares will ignore sales to related parties, which do not reflect normal trading transactions and therefore, do not reflect economic reality²⁷⁶.

The second issue to be examined is the treatment of imports originating in countries not concerned by the dumping investigation. These imports will be included if they are part of the Community industry, meaning if they are imported by the Community industry to supplement its production. Therefore, injury will be determined on the basis of the Community's industry own production within the Community, together with its imports from related companies located in third countries not concerned by the dumping procedure²⁷⁷. This is also a welcome approach, since Community producers who suffer a loss of market share in locally

²⁷⁵ *Gimelec and Others v. Commission*, Case C-315/90, [1991] ECR I-5589, pg. 21 et seq.

²⁷⁶ *Isobutanol from Russia/provisional*, OJ No L 246, 2.10.93, p.12, recital 21.

²⁷⁷ *Koyo Seiko Co. Ltd. v. Council*, Case T-166/94, [1995] ECR II-2129, pg. 80 et seq.

produced products, will offset this loss by increasing their market share using these imports.

The third and final issue to be addressed in relation to determining market share is the inclusion or exclusion of not dumped imports originating from the concerned countries. In this case, the products in question will be taken into consideration during the injury analysis when examining the price effect of the dumped imports on the domestic market price²⁷⁸, which is also a welcome approach since these products are logically sold at a higher price than the allegedly dumped imports, and tend to minimize the alleged downward pressure on prices in the domestic market.

The second aspect of injury determination that requires some attention relates to evidence. Paragraphs 3(2) and 3(6) of EC Regulation 384/96, which correspond to Article 3(1) and the first part of Article 3(5) of the GATT Anti-dumping Code, deal with evidence. Just like in the *GATT Code* we find under EC law the requirement for 'positive evidence'. This reference to 'positive evidence' simply means that injury determination has to be made based on actual evidence rather than allegations²⁷⁹. EC law does not contain a presumption of injury. Injury has to be demonstrated²⁸⁰.

Having said that, a determination of injury under EC law essentially depends on an assessment of the market share of the domestic producers. To this end, what will be examined are the fluctuations of the volume of import of the product under investigation. Article 3(3) of *EC Regulation 384/96* states that consideration has to be given to whether there has been an increase in dumped imports, and this

²⁷⁸ *Dissodium Carbonate from the USA/definitive*, OJ NO L 244, 12.10.95, p. 32, recital 19.

²⁷⁹ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 3.31, p. 191.

²⁸⁰ *Ibid.*

corresponds exactly to Article 3(2) of the *GATT Anti-Dumping Code*. On the second hand the import volume will be evaluated in relation to total Community consumption in order to calculate the market share²⁸¹. Interestingly enough, a decline in the market share of Community industry constitutes enough evidence of injury and will necessarily result in the finding of injury. Even if it is relatively small, such a decline, in conjunction with other factors, could result in a finding of injury²⁸². Also, and in conjunction with other factors, a stagnating market share could result in a finding of injury, especially when growth was expected²⁸³. Even an increase of the market share of the Community industry could result in a finding of dumping in certain circumstances, for instance if it was forced to reduce selling prices due to price undercutting by the dumped imports, which resulted in considerable financial losses²⁸⁴. Finally, if the volume of imports is relatively small, but above the threshold of Article 5(7), that fact in itself does not preclude the finding of injury,²⁸⁵ neither does a decline in the market share held by the imported products²⁸⁶.

Pursuant to the second sentence of Article 3(3) of *EC Regulation 384/96*, which corresponds to the second sentence of Article 3(2) of the *GATT Anti-Dumping Code*, another issue to be examined in the context of an injury analysis is the effect of dumped imports on the prices in the Community market for the like product. An injury finding will be made if there were price undercutting or price depression. Community institutions will assess the overall trend of prices charged

²⁸¹ *Ibid*, pg. 3.38, p.193.

²⁸² See for example: *Koyo Seiko Co. Ltd v. Council*, pg. 90 et seq. The market share of the Community industry declined here from 88.8% to 85.7%, which was accompanied by a loss of turnover of 2.3%.

²⁸³ *Magnetic Disks from Japan, Taiwan and P.R. China/provisional*, p.5, recital 58.

²⁸⁴ See: *Urea Ammonium Nitrate Solution from Bulgaria and Poland/provisional*, OJ No L 162, 30.6.94, p.16, recital 39 et seq.

²⁸⁵ *Bicycles from Malaysia and Thailand/provisional*, OJ No L 248, 14.10.95, p.12, recital 81.

²⁸⁶ *Certain Magnetic Disks from Japan, Taiwan and P.R. China/provisional*, p.5, recital 54.

by the Community industry, and decreasing prices would be an indication of injury²⁸⁷. Stable prices or a low decrease will also indicate injury, if prices were expected to rise²⁸⁸. Also there will be a finding of injury, if Community industry had to maintain price levels, however the sales volumes dropped significantly²⁸⁹. When dealing with price underselling, the comparison is a hypothetical one since the price of the dumped products will not be compared to the actual price of like products in the Community, but rather to the hypothetical price of those like products if there was no dumping by either depressing the prices or preventing them from increasing²⁹⁰.

Another element to be examined in an injury analysis is the impact of the dumped imports on Community industry producing like products. Article 3(5) of EC Regulation 384/96 addresses this, which is almost identical to Article 3(4) of the *GATT Anti-Dumping Code*. This is a two-step analysis. First, the situation of the Community industry will be analyzed on the basis of the appropriate factors in order to determine if there is a significant negative trend to the detriment of the Community industry. If there were such a negative trend, then the next step would be an assessment of whether this is caused by the allegedly dumped goods²⁹¹. As mentioned earlier the *GATT Code* provides us with a non-exhaustive list of factors to be taken into account when assessing the position of the domestic industry. This list was reproduced in its integrity in EC legislation, however in practice, the Community institutions focus on five of these factors in their assessment process.

²⁸⁷ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 3.50, p.197.

²⁸⁸ *CTVs from Malaysia, P.R. China, Korea, Singapore and Thailand/provisional*, p.50, recital 113 & *Certain Asbestos Cement Pipes from Turkey/acceptance of undertaking and termination*, OJ No L 209, 31.7.91, p.37, recital 17.

²⁸⁹ *Courmarin from P.R. China/provisional*, OJ No L 239, 7.10.95, p.4, recital 30 et seq.

²⁹⁰ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20 pg. 3.60 & 3.61, p. 201.

²⁹¹ *Ibid*, pg. 3.63, p. 202.

These factors are: actual or potential decline in sales, profits, the development of market shares, Community prices and utilization of capacity. Although we saw that often showing a decrease in market share or a price undercutting or underselling leads to a finding of dumping, one can not help but notice that perhaps the most significant factor when assessing injury should be the impact of the dumped product on the Community industry producing the like product. If it is not clear and proven that this fraction of the Community industry has suffered an injury, then who did, and why should there be an anti-dumping duty levied? This obviously goes to show how anti-dumping legislation when applied based on such injury finding parameters could not possibly constitute a tool for protection against unfair trade practices, but rather as a tool to protect internal markets. If the alleged dumping has no impact or little impact on domestic producers, can we say that it is an unfair trade practice or is it simply an undesired source of competition? In the context of this study it is becoming increasingly difficult to argue in favor of the former rather than the latter.

Once it has been concluded that the Community industry suffered an injury, the next step would be to establish a causal link between the injury and the dumped imports. Article 3(5) of the *GATT Anti-Dumping Code* deals with the issue of causal link, and the corresponding provisions under EC law are found at Articles 3(6) and 3(7) of *EC Regulation 384/96*. The text of *GATT Code* Article 3(5) has been split in two parts. The first part, which consists of the first sentence of Article 3(5) of the *Code*, finds its equivalent in Article 3(6) of EC legislation, while Article 3(7) of EC legislation is quasi identical to the second sentence of *GATT Code* Article 3(5). The text of both *GATT Code* Article 3(5) and EC legislation Articles 3(6) and 3(7) envisage a two-step test. First, it has to be

established that the dumped imports have a significant negative effect on the sales volume and/or prices of the Community producers²⁹² and that such negative effect had an impact on one or several of the factors and indices listed under Article 3(5) of the EC legislation. In other words, EC Authorities must directly link the effects of the price and/or volume fluctuations of the imported goods to the fluctuations of prices and/or volumes of the domestic industry, and then the injurious effects have to be linked to the negative state of the domestic industry. Second, EC Article 3(7) requires an examination of factors other than the dumped imports, which are also injuring the community industry, and if such injury breaks the causal link between the dumped imports and the injury suffered by the domestic industry. If the injury attributed to dumping is not material, then the causal link will be broken²⁹³.

One final issue to be addressed when dealing with an injury assessment is cumulation. Article 3(4) of *EC Regulation 384/96* deals with cumulation and it is quasi-identical to *GATT Code* Article 3(3). The conditions for cumulation laid out in Article 3(3) of the *GATT Code* are reproduced in Article 3(4) of the EC legislation. The result of cumulation is, of course, that the causal link will be established between the totality of the dumped imports and the injury suffered by the domestic industry, otherwise the causal link would have to be established separately. As a reminder, the legislation requires that the dumping margin for each country be more than *de minimis* i.e. more than 2% in the case of EC law²⁹⁴, therefore, when cumulating goods for the purpose of establishing injury, it is not permitted to cumulate the margin of dumping of all the countries targeted by the

²⁹² *Regulation 384/96*, Article 3(3).

²⁹³ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 3.99 to 3.102, p. 210 et seq.

²⁹⁴ *EC Regulation 384/96*, Article 9(3).

investigation in order to obtain a margin of dumping which is more than *de minimis* and or higher than the individual dumping margins. Also the volume of dumped goods has to be more than negligible, and Article 5(7) states that such volume should be superior to 1% of Community consumption, however it also permits a cumulation of lower volumes if the total is above 3% of Community consumption.

Under Canadian legislation, ‘injury’ is defined by *SIMA* as being a ‘material injury’ affecting the domestic industry²⁹⁵. Section 42 of *SIMA* refers the injury determination process to the CITT, stating that it is the CITT who should determine if the dumping: “(i) has caused injury or retardation or is threatening to cause injury, or (ii) would have caused injury or retardation except for the fact that provisional duty was imposed in respect of the goods”²⁹⁶. Section 37.1 of the *SIMR* gives more details on the determination of injury by providing a list of factors to be taken into consideration to determine if the dumping has caused injury or retardation. These factors relate to the volume of the dumped goods, the effect of the dumped goods on prices of like goods and the impact on the state of the domestic industry²⁹⁷. The elements to be taken into consideration in assessing the effect of dumping on each of these factors is similar to what we find listed in the *GATT Anti-Dumping Code* and in *EC Regulation 384/96*. Further the *SIMR* introduces the requirement of a causal link between the dumping and the injury²⁹⁸. Finally the *SIMR* calls for an examination of factors other than the dumping which could have caused or threatened to cause injury²⁹⁹ and again here

²⁹⁵ *SIMA*, Section 2(1) ‘injury’.

²⁹⁶ *SIMA*, Section 42(1)(a)(i)&(ii).

²⁹⁷ *SIMR*, Section 37.1(1).

²⁹⁸ *SIMR*, Section 37.1(3)(a).

²⁹⁹ *SIMR*, Section 37.1(3)(b).

the list of non-exhaustive factors to be taken into consideration is quasi-identical to what is found in the *GATT Code* and under EC legislation. The *SIMA Handbook* states, “A review of various Statements of Reasons released by the CITT suggests that it focuses on the following three key indicators in making its findings. These indicators are, therefore, of particular importance in the evaluation of a properly documented complaint: market share/lost sales; price erosion/price suppression; profitability”³⁰⁰. With respect to the evidence requirement, while Canadian legislation remains silent on the topic, the *SIMA Handbook* consecrates a paragraph to “evidence of injury and retardation”³⁰¹. No reference is made here to the requirement of ‘positive evidence’. The *Handbook* simply states that it is the complainant responsibility to provide information allowing proving the injury. However in practice, a review of the CITT’ s injury findings shows that an injury determination is made based on positive evidence. The *Handbook further* states that: “the complaint must provide information to allow an analysis of the following factors before the complaint can be considered properly documented: a) the volume of the alleged dumped imports and whether the volume has increased vis-à-vis production or consumption of such goods in Canada; b) the effect of the goods in question on the prices of like goods in the Canadian market either by undercutting prices of like goods, depressing prices, or preventing price increases; and c) the impact of the goods in question on Canadian producers of like goods including the effect on profitability.”³⁰² This is identical to what is stipulated in *GATT Code* Article 3(1) and EC legislation Article 3(2). Finally, *SIMA* Section 42(3) permits cumulation under Canadian legislation. *SIMA* requires that the

³⁰⁰ *SIMA Handbook*, pg. 4.2.3.1.

³⁰¹ *SIMA Handbook*, pg. 4.1.3.4.

³⁰² *SIMA Handbook*, pg. 4.1.3.4.

volume of imports is more than negligible³⁰³ and the margin of dumping in each country is more than insignificant³⁰⁴, and that it is appropriate to examine the cumulative effect of imports under the circumstances.

Having examined the EC and Canadian injury determination process, we can say that although within both jurisdictions national authorities seem to follow the *GATT Anti-Dumping Code* and although it appears that the burden of proof is placed on the plaintiff, neither system requires that the plaintiff show clear evidence that injury or the symptoms that are associated with it are not the result of factors other than dumping. It is argued here that in the sake of accuracy, and in order to avoid that anti-dumping duties could be levied when the observed injury suffered by the domestic producers could also be reasonably attributable to other factors than dumping activities as such, it would not be unreasonable to require proof beyond any reasonable doubt that injury is not the result of factors other than the alleged dumping.

4.6.1. Determination of a threat of material injury

Article 3(7) of the *GATT Anti-Dumping Code* states that such a determination should be based on facts rather than allegations, conjuncture or remote possibility and that “[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent”³⁰⁵. Further the *GATT Code* states that when injury is threatened by

³⁰³ *SIMA*, Section 2(1) ‘negligible’: means a volume of imports of less than 3%, unless cumulative imports from three countries are more than 7%.

³⁰⁴ *SIMA*, Section 2(1) ‘insignificant’: means a margin of dumping of less than 2%.

³⁰⁵ *GATT Anti-Dumping Code*, Article 3.7.

dumped imports, special care must be given to the consideration and decision of the application of anti-dumping measures³⁰⁶.

Article 3(7) of the *GATT Code* lists the factors to be taken into consideration.

It states that the following factors should be considered in determining the existence of a threat of material injury:

- “(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing member’s market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) inventories of the product being investigated.”³⁰⁷

This Article further provides that the totality of the factors considered should lead to a conclusion that further dumped exports are imminent and that material injury will occur unless protective action is taken. Finally Article 3(8) of the *GATT Code* states that when dealing with a threat of injury, “the application of anti-dumping measures shall be considered and decided with *special care*”. [Emphasis added]

There is practically no difference between the text of Article 3(7) of the *GATT Anti-Dumping Code* and Article 3(9) of *EC Regulation 384/96*. However there is no equivalent to Article 3(8) in EC legislation. This is not to say that ‘special care’ will not be given to investigations involving a threat of material injury. As a matter of fact, it is the Community’s practice to be cautious when assessing claims of threat of material injury³⁰⁸. Canadian legislation does not contain an equivalent to Article 3(8) either. The *SIMA Handbook* states that the threat of injury has to be

³⁰⁶ *GATT Anti-Dumping Code*, Article 3.8.

³⁰⁷ *GATT Anti-Dumping Code*, Article 3.7.

³⁰⁸ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 3.161, p. 228.

clearly foreseen and it has to be imminent. Section 37.1 of the *SIMR* provides a list of indicators allowing the assessment of a threat of injury. The *SIMR* provides a non-exhaustive list of factors, similar to the list provided by the *GATT Code* and EC legislation.

4.7. Community interest & Public interest

Article 9(1) of the *GATT Anti-Dumping Code* states that when all the requirements for the imposition of a dumping duty have been fulfilled, it is the decision of the Authorities of the importing Member to impose the dumping duty or to impose a dumping duty that is less than the full margin of dumping.

EC legislation goes a step further by making the ‘community interest’³⁰⁹ a precondition to the imposition of a dumping duty. This is not a requirement under the *Anti-Dumping Code*. All the Member States of the European Communities did not receive this precondition with equal enthusiasm; in fact it was bitterly opposed by the more protectionist member states such as France, Spain, Italy, Portugal and Greece³¹⁰. This provision is unique to the Community since no other Member State systematically applies such a test before imposing an anti-dumping duty³¹¹. Canadian legislation has a public interest test, which will be discussed later, however it is not systematically applied.

Article 21(1) of *EC Regulation 384/96* states that “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; [...] In such an examination, the

³⁰⁹ *EC Regulation 384/96*, Article 21.

³¹⁰ Van Bael, I. & Bellis, J. F., *supra*, n. 267, pg. 504, p.209.

³¹¹ Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 21.3, p. 479

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 all the information submitted, 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". Article 21(2) states that the complainants, importers and their representative associations, representative users and representative consumer organizations may make themselves known to the Commission and provide it with information on their respective positions. Article 21(7) provides that information will only be taken into account where it is supported by actual evidence, which substantiates its validity. This provision gives the Community the opportunity to decide against trade protective measures, even when all the criteria to impose them are met. However, EC case law shows that it is also a Community practice to decide that the adoption of anti-dumping duties is in the interest of the Community³¹². Although at first sight Article 21 seems to indicate that the Community will not adopt anti-dumping duties in many cases where all the requirements for the adoption of such duties are met, the reality is that the Commission takes the view that imposition of anti-dumping measures is in the Community's interest unless the contrary is proven³¹³. Amongst the factors considered while determining the 'Community interest' are user interest and importer interest³¹⁴, however it was often considered that it was in the consumer's interest to impose anti-dumping duties since the consumer would benefit from the restoration of fair competitive

³¹² See *Fluorspar from China/provisional*, [1993] O.J. No L226/3.

³¹³ Vermulst, E. & Waer, P., *supra* n. 6, p.371.

³¹⁴ *Ibid*, p.371.

condition on the Community market³¹⁵, or that anti-dumping measures would not affect consumers³¹⁶ or consumer choice³¹⁷. Importer's interest are not considered very frequently by the Commission and as a matter of principle, the Community's interest is considered to lay in maintaining employment in the manufacturing sector rather than in protecting a dealer or a distributor whose business depends greatly on imports³¹⁸. Another factor considered when assessing the Community's interest is maintaining competition in the EC market, and it is not surprising that Authorities typically consider that anti-dumping measures will not have the effect of eliminating exporters from the Community or reduce competition³¹⁹.

Vermulst and Waer stated that "in general, it can be said that, unless there are submissions that point to the contrary, the Commission will assume that protective measures are in the interest of the Community if injurious dumping is found and consider the EC producer's interests to constitute the Community interest"³²⁰, and Didier stated that "by mid-2000 there were only two cases in history where the Community had concluded that Community interest justified the non-imposition of measures, yet, in both cases for part of the product only. As regards the lesser-duty rule, this is faithfully respected in the EU..."³²¹.

Section 45 of *SIMA* deals with public interest reviews. This Section of the Canadian legislation gives the CITT the ability to reduce or eliminate an anti-dumping duty following the initiation of a public interest inquiry, if the imposition

³¹⁵ *Certain Magnetic disks from Hong Kong/provisional*, [1995] OJ No L 68/5.

³¹⁶ See for example *Ammonium nitrate from Russia*, [1995], OJ No L 198/1, where a cost impact of 12% was considered not to affect Community consumers.

³¹⁷ See for example *Microwave ovens from China, Korea, Thailand, Malaysia/provisional*, [1995] OJ No. L156/5.

³¹⁸ Vermulst, E. & Waer, P., *supra* n. 6, p.371, referring to *Dot Matrix printers from Japan/provisional*, [1988] OJ No. L130/12.

³¹⁹ Vermulst, E. & Waer, P., *supra* n. 6, p.371.

³²⁰ *Ibid*, p.374.

³²¹ Didier, P., *supra* n. 105, p.54.

of such a duty is not in the public interest. The public interest inquiry may be initiated on the Tribunal's own initiative or on the initiative of any interested person. 'Interested person' is defined in the *SIMR* as being "all persons involved in the production, purchase, sale, export or import of any goods that are subject of an investigation or like goods produced in Canada, are considered persons interested. Furthermore, anyone required by the federal or provincial governments (e.g. the Director of Investigations and Research of the Bureau of Competition Policy) or users of the goods are also considered persons interested. A broad range of persons concerned with the public interest, which would include consumer groups, producers, exporters, importers and government officials, will have the opportunity to appear before the CITT."³²² The CITT will recommend a reduction or elimination of the duties " in those cases where the facts demonstrate a sufficiently compelling public interest rationale for doing so."³²³

As to the definition of 'public interest' "In the Tribunal's view, a public interest investigation conducted pursuant to SIMA permits a wide variety of factors to be taken into account in considering the appropriate level of duties."³²⁴ The tribunal specifically considered as being public interest considerations, the protection of Canadian industry from dumped imports³²⁵, preservation of fair competition in the Canadian market³²⁶, the effect on industrial users³²⁷ and consumer interest³²⁸. During a public interest investigation, it is the responsibility

³²² *SIMA Handbook*, pg. 3.3.3.

³²³ *Certain Iodinated Contrast Media (Re)*, Public Interest Investigation No.: PB-2000-001, [2000] C.I.T.T. No. 71, pg. 14 & *Certain prepared baby food (Re)*, Public Interest Investigation No.: PB-98-00, [1998] C.I.T.T. No. 90, pg. 28.

³²⁴ *Certain prepared baby food (Re)*, pg. 32.

³²⁵ *Certain prepared baby food (Re)*, pg. 14.

³²⁶ *Certain prepared baby food (Re)*, pg. 14.

³²⁷ *Refined Sugar (Re)*, Public Interest Investigation No.: PB-95-002[1996], C.I.T.T. No. 125.

³²⁸ *Certain prepared baby food (Re)*.

of the party who initiated the investigation to show that the effects or potential effects that flow from the imposition of the anti-dumping duties extend beyond the narrow commercial interests of parties to an inquiry into a broader cross-section of the public.³²⁹

This public interest provision has a limited effect in Canadian law; in fact since 1989 there has been only two instances where anti-dumping duties were reduced and none where they were eliminated. Unlike EC law, Canadian law does not make it a requirement to consider 'public interest' issues prior to imposing an anti-dumping duty, the public interest argument has to be raised and the party raising it has to demonstrate that there is such a public interest in reducing or eliminating anti-dumping duties. In reality, under EC law there is a presumption that anti-dumping duties are in the interest of the Community and therefore those parties interested in having the anti-dumping duty reduced or eliminated have to demonstrate that there is a Community interest in doing so. The result is therefore similar since the burden of proof is on the party requesting a reduction or elimination of the duty.

4.8. Anti-absorption measures

Anti-absorption provisions aim at avoiding that exporters bear the cost resulting from the imposition of anti-dumping duty and as a result the price of the goods in the importing market remain unaffected by the anti-dumping duties imposed. The *GATT Anti-Dumping Code* does not contain anti-absorption provisions. Equally, Canadian legislation does not specifically contain such measures neither, however we saw earlier that under Canadian law, normal value

³²⁹ *Certain flat hot-rolled carbon and alloy steel sheet products (Re)*, Public Interest Investigation No.: PB-99-00, [1999] C.I.T.T. No. 72, pg. 23.

and export price adjustment mechanisms contain provisions indirectly aiming at avoiding absorption, by linking the deduction of anti-dumping duties to actual payment of the duty by the importer and therefore, discouraging absorption since absorption would result in a disadvantage to the producer when determining and comparing normal value and export price.

Unlike the *GATT Code* and Canadian legislation, EC legislation contains specific anti-absorption provisions. Article 12 of *EC Regulation 384/96* states:

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 an effect on the above mentioned prices.
2. During the 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 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.

It is clear from the wording of Article 12 that an anti-absorption procedure is in fact a reopening of the original investigation but only to examine export prices. The scope of this procedure is limited to a lack of or insufficient movement in resale prices. Basically, an investigation reopened based on this provision involves a recalculation of the export price. Community Authorities will consider that there is absorption if the new export price is lower than the original export price calculated during the initial investigation, and an additional anti-dumping duty will be imposed in order to outweigh the absorption. In any event, the new export price has to be considered³³⁰.

³³⁰Muller, W. Khan, N., Neuman, H.-A., *supra* n. 20, pg. 12.13, p. 376.

In an anti-absorption reinvestigation, normal value may be recalculated. In fact, Article 12(5) sets the conditions under which normal value will be recalculated, it states that: “Alleged changes in normal value shall only be taken into account under this Article where complete information, duly substantiated by evidence, is made available to the Commission...” This is especially important if normal value declined since such a decline would potentially offset any increase in export price. However, a decrease in normal value, even if accompanied by stable export prices, will never result in a reduction of the dumping duty³³¹. The amount of reduction in the normal value has to be deducted from the amount of reduction in the export price, resulting in a smaller reduction of the export price³³². In any event, the purpose of this Article is clear, it helps increase dumping margins after the conclusion of the investigation: Article 13(3) allows the Commission to amend the dumping margin only if the anti-absorption investigation shows ‘increased dumping’, it is not a tool to fairly re-evaluate the dumping margin in general, but to increase the dumping duty if the desired effect is not reached after the imposition of the initial duty.

5. The Effect of Anti-Dumping Legislation on Free Trade Areas

5.1. Introduction

This section aims at examining the effect of anti-dumping actions and legislation on free trade within a regional free trade area. As a first step, it is necessary to define what type of regional trade agreements Member States of the GATT can implement and what are the trade implications of creating such regional trade arrangements. Having said that, we note that the creation of regional trade

³³¹ *Ibid*, pg. 12.12, p. 376.

³³² *Ibid*, pg. 12.14, p. 377.

areas is permitted and even encouraged by Article XXIV of the GATT, which first sentence reads: “ The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements”³³³. Such “closer integration” could be achieved, to various degrees, using various means. For this reason, we will also look at the different types of trade agreements that are permitted under the GATT. We will also examine the definition of a free trade area and a customs union to the extent of the relevance of such definitions to this study. We will then look at the welfare implications of free trade. Finally we will look at how the EC and NAFTA deal with anti-dumping legislation, and the compatibility of anti-dumping legislation with certain types of regional trade agreements.

5.2. Free Trade Areas

In order to establish what type of trade agreements are authorized by the GATT it is logical to refer back to its Article XXIV. Although the first sentence of Article XXIV, quoted above, is the basis upon which Member States could enter into regional trade agreements, it is not specific enough as to the precise type and nature of the regional trade agreements authorized by the GATT. On this point we refer to the text of paragraph 5 of Article XXIV, which reads: “ the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of customs union or a free trade area”. This seems to suggest that only the creation of a free trade area or a customs union is authorized under the GATT. In practice, the provisions of Article XXIV have not

³³³GATT, Article XXIV pg. 4.

been strictly interpreted, and no trading arrangement, regardless of its characteristics, has ever been rejected by the GATT³³⁴. Even *de facto* regional agreements are also tolerated if not encouraged by the GATT³³⁵. Therefore, it would have been more appropriate to use a more generic term to describe the types of regional trade agreements that are tolerated by Article XXIV considering that describing them as only free trade agreements and customs unions would limit the scope of regional trade agreements that are in reality acceptable under Article XXIV and which could be entered into by Member States. Having said that, regional trade agreements, which could be created using a formal agreement, are in fact rather diverse. Marceau stated that “economic groupings of states can be represented in five main categories based on their level of integration: free-trade area, customs union, common market, economic union, and political union”³³⁶. Frankel also breaks down regional trading arrangements into five categories, although the categories of Frankel differ slightly from Marceau’s categories. Frankel states that five levels of regional trading arrangements can be distinguished, and they are: “ preferential trade arrangements, free trade areas, customs unions, common markets, and economic unions”³³⁷. These two definitions are certainly not conflicting since neither one professes to being exhaustive. As a matter of fact these definitions are complementary. If we consider that regional trade agreements cover a spectrum of agreements ranging from the lowest level of integration to the highest level of integration, we realize that the difference between Marceau’s and Frankel’s categorization has a very simple explanation:

³³⁴ Frankel, J.U.A., *Regional Trading Blocks in the World Economic System*, Institute for International Economics, Washington, DC, 1997, P. 12.

³³⁵ Marceau, G., *supra* n. 4, p.183.

³³⁶ *Ibid*, p.167.

³³⁷ Frankel, J.U.A., *supra* n. 334, P. 12.

Marceau started her characterization with a category at a higher level of integration than Frankel, and Frankel ended his categorization with a category at a lower level of integration than Marceau.

Others consider free trade areas, customs unions and other regional trade agreements to be all sub-categories of a wider concept, the 'trade block'. A trade block would consist of more than a group of countries trading intensively together. It really implies some policy considerations aiming directly at achieving easier and more considerable flow of trade between a particular group of countries rather than other countries enjoying similar differences in comparative advantages. Examples of such policy driven trade blocks are once more free trade areas, customs unions or single markets³³⁸.

Our study being specifically geared towards the European and the North American examples, it is necessary to briefly determine and define the type of regional free trade agreements created there. Although the EC and NAFTA are both agreements, which, in principle, establish a free trade area, the level of integration aimed at and achieved is different in each case. While the EC is considered to be, at least, a customs union, NAFTA aims at creating a simple free trade area. Based on Marceau's and Frankel's classifications, a free trade area is a regional free trade agreement with a lower degree of integration than a customs union. According to Bliss, internal trade within both a free trade area and a customs union must be free of tariffs. Although external tariffs can be charged for goods entering a customs union and a free trade area, in a free trade area, external tariffs (i.e. tariffs on imports originating from outside the free trade area) can be imposed at a different rate by each country of the free trade area. In other words,

³³⁸Bliss, C., *Economic theory and policy for trading blocks*, Manchester University Press, Manchester and New York, 1994, p.6.

there is no harmonization of the external tariffs for the entire free trade area³³⁹. Frankel says that a free trade area is created when trade partners “eliminate all tariffs and quantitative import restrictions amongst themselves”³⁴⁰, while retaining varying levels of tariffs and other barriers against the products of non-members³⁴¹. When the countries members of a free trade area adopt a common external tariff, meaning that they all charge the same tariff rates on imports from outside the free trade area, then the level of integration is higher and the free trade area becomes a customs union³⁴². We conclude from this that technically, the same rules applying to free trade within a customs union also apply to free trade within a free trade area. The difference between the two agreements is the level of integration with respect to trade with entities outside the area and not within the area. This conclusion is consistent with Article XXIV of the GATT: looking at the definition of a free trade area and a customs union in paragraphs 8(a) and 8(b) of GATT Article XXIV, we note that the only difference in the given definition of each agreement is that in the case of a customs union “substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union”³⁴³. Therefore, technically the same level of trade liberalization reached within a customs union should be reached within a free trade area. If we were to apply this principle strictly, it would mean that trade liberalization within the NAFTA area should be to the same level as within the EC, at least with respect to goods originating within the free trade

³³⁹ Bliss, C., *supra* n. 338, p.7.

³⁴⁰ Frankel, J.U.A., *supra* n. 337, p. 13.

³⁴¹ *Ibid.*

³⁴² Bliss, C., *supra* n. 338, p.9; Frankel, J.U.A., *supra* n. 337, p. 15.

³⁴³ GATT, Article XXIV pg. 8(a)(ii).

area³⁴⁴. This however, is not a strictly applied principle and in practice a wide range of regional arrangements are tolerated under the GATT, in fact, we will see later that the level of liberalization in the NAFTA is different from the EC.

The second sentence of paragraph 4 of Article XXIV of the GATT is as important as the first, it reads: “ They [the contracting parties] also recognize that the purpose of a customs union or a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of contracting parties with such territories”³⁴⁵. Thus, the objective of this Article is once more emphasized, and it is: to facilitate trade within free trade areas, naturally without detrimentally affecting trade with countries outside the free trade area. In other words, it aims at improving trade within the free trade area while maintaining status quo with countries outside of the free trade area. Therefore, we can already conclude at this stage that in principle maintaining anti-dumping legislation within a free trade area is contrary to the spirit of this GATT Article, as such legislation does not help facilitate trade between members of a free trade area but it inhibits it.

5.3. The welfare implications of free trade areas

Although the welfare implications of creating free trade areas could be subject to a somewhat controversial economical discussion, with some authors arguing in favor of a trade creating result and others arguing in favor of a trade diverting result, it is not the objective of this study to consider in depth the effect of free trade areas on welfare³⁴⁶. However, we should acknowledge the obvious, and that is the fact that it is particularly undisputed that the creation of a free trade area

³⁴⁴ Rules of origins issues, which will undoubtedly arise in a free trade area will not, be addressed in this study.

³⁴⁵ GATT, Article XXIV, pg. 4.

³⁴⁶ For a detailed discussion on this topic see Bliss, C., *supra* n. 338 & Frankel, J.U.A., *supra* n. 334.

has a positive effect on welfare within the area itself, otherwise it would be hard to understand why countries, parties to these areas, are willingly entering into such agreements despite, in some cases, strong lobby opposition of certain sectors of the economy, while on the other hand these same countries are strongly resisting making significant concessions which would liberalize trade on a multilateral level. Having said that, it is important to note that the effect of free trade areas on welfare in general are measured using trade diversion versus trade creation parameters, meaning that studies consistently looked at the trade creation effect and the trade diversion effect within a given free trade area. Needless to say that we are here purposely disregarding the discourse of certain industry-related lobby groups and other groups with specific interests, who systematically oppose any increase in free trade, whether within a block or globally, for reasons that are not related to the beneficial or detrimental effect of free trade on general welfare, but rather for reasons strictly related to the loss of all or some of their competitive advantages as a result of the creation of a free trade area or as a result of any effort to liberalize trade, in comparison with their economical and competitive position in a strictly protectionist market. This type of lobby criticism against the implementation of free trade areas and the free trade, which they generate, is rather industry-specific and not necessarily representative of the effect of free trade areas on free trade within the area, or even of the hypothetically beneficial or detrimental effects of free trade on general welfare in the area.

About the effect of free trade areas on welfare within the free trade area, it is generally considered that free trade areas that are trade-creating have a positive effect on welfare while free trade areas that are trade-diverting have a negative effect on welfare. It is necessary here to understand the notions of trade creation

and trade diversion. According to Viner, trade creation results from goods being supplied from lower money-cost sources, and trade diversion results in goods being purchased in higher money-cost sources. Also according to Viner, trade creation results in free trade while trade diversion results in more effective tariff protection³⁴⁷. Economical studies show that the creation of free trade areas and the increase of free trade (in other words, trade creation) unavoidably result in an increase of welfare³⁴⁸. As such we can conclude that trade creating measures increase welfare while trade diverting measures decrease welfare.

Considering the effect of anti-dumping action on welfare within a free trade area, it seems logical to agree with Marceau's conclusion on the issue when she states that "the phasing out of anti-dumping duties, which can only increase integration, is a crucial criterion for the realization of a trade-creative rather than trade-divertive free trade area"³⁴⁹. In other words anti-dumping actions when maintained within a free trade area are trade-diverting and therefore have negative implications on welfare within the block. Marceau states that regional integration may result in "economies of scale; a better division of labor within the integrated market, bringing efficiency and better quality; an improved international bargaining position; an increase in internal competition; and a reinforcement of the international position of the Member States of the union. If the integration goes beyond the level of customs union, the co-ordination of fiscal, monetary, employment, and other related policies may bring 'higher rates of economic growth, better income distribution and full employment'³⁵⁰. In other words, the greater is the level of integration within the scope of a trade agreement, the higher

³⁴⁷ Viner, J., *Dumping*, University of Chicago Press, Chicago, 1923, p.42.

³⁴⁸ Frankel, J.U.A., *supra* n. 337, Chap. 8.

³⁴⁹ Marceau, G., *supra* n. 4, p. 178.

³⁵⁰ *Ibid*, p. 173.

is the trade creating effect and consequently, the better is welfare. Keeping in mind that maintaining anti-dumping legislation within a free trade area decreases the level of integration within the area, we can once more reach the conclusion that anti-dumping legislation within a free trade area negatively affects welfare within the area.

The conclusion reached in a World Bank study published in December 2003³⁵¹ confirms this finding. The main conclusion reached in this study is that Mexico benefited from the trade liberalization created by NAFTA, however the positive effect of trade liberalization was countered by maintaining certain trade barriers, and that countries wishing to create a similar free trade agreement will benefit from “new opportunities from growth and development [...], particularly if some improvement is achieved on certain aspects of NAFTA – such as the distorting rules of origins and anti-dumping and countervailing duties.”³⁵² The study shows that an area where the NAFTA has failed to establish free trade is anti-dumping, and recommends that reforms be made in order to remedy this situation.³⁵³

Dumping, whether defined as unlawful price discrimination or as transnational sale below cost will not stop occurring by virtue of the creation of a free trade area, however what changes is the perception of these practices within the free trade area. Free trade areas could be created, but that does not mean that dumping practices will cease, and it certainly does not mean that anti-dumping duties will be abolished. Having already established that anti-dumping duties are protectionist measures, which are trade diverting, and thus negatively affecting welfare, the question that remains to be answered is whether the creation of a free

³⁵¹ Lederman, D. I., Maloney, W. F. & Servén, L., *Lessons from NAFTA for Latin American and Caribbean Countries: A Summary of Research and Findings*, The World Bank, December 2003.

³⁵² *Ibid*, p. V.

³⁵³ *Ibid*, p. XIII, 123.

trade area is reconcilable with the imposition of anti-dumping duties within the free trade area? This question will be answered later on in this section.

5.4. Trade diverting effect of anti-dumping legislation

Having examined in detail Canadian and EC anti-dumping legislation, we will now turn to the trade creating or trade diverting effect that the use of these legislations could potentially create. Our comparison of Canadian and EC legislation allowed us to have an in depth look at the mechanism leading to the imposition of an anti-dumping duty in each jurisdiction respectively. It is argued here that the process of imposing anti-dumping duties is in itself trade diverting considering the artificiality of the process and the possibility for authorities to apply the legislation in ways that favor and facilitate dumping findings.

Turning back to our comparison of EC and Canadian anti dumping legislation, we will highlight here the various aspects of an investigation that are trade diverting by themselves as they are dumping creating. An anti-dumping investigation is initiated when there is sufficient evidence of dumping, and we have seen that both Canadian and EC legislations have adopted low standards of evidence for the initiation of an investigation, showing a strong bias in favor of initiating an investigation, rather than effectively aiming at establishing whether dumping is really taking place. The same applies to the standing requirements, which aim at ensuring that an investigation benefits from sufficient support from the domestic industry rather than ensuring that there is effectively substantial support in favor of initiating an investigation. The process of identifying the producers to be included in the definition of domestic industry or Community

industry respectively, leads to the inclusion of producers who are likely to support an investigation and the exclusion of those who are likely to oppose it.

Turning to the determination of dumping itself, both Canadian and EC legislations, and the way they are applied by the respective authorities tend to exercise upward pressure on the determination of normal value. We have seen that normal value is seldom calculated based on actual figures, in fact authorities prefer to reconstruct normal value, which allows them to reach a figure that is potentially higher than the one that would be reached using actual figures. A similar approach is taken with respect to calculating the export price, and here the legislative texts and the authorities applying them tend to disregard actual figures and reconstruct the export price, which allows them once more to reach a figure that is potentially lower. Looking at these two factors together, it is clear that if on one hand pressure is exercised in order to calculate the highest normal value, while on the other hand, similar pressure is exercised in order to reach the lowest export price possible, the process of a dumping investigation itself becomes creating of dumping and not simply a process that recognizes dumping when it is taking place. This dumping creating way of conducting an investigation is further emphasized by the methods used by the investigative authorities to calculate the margin of dumping. Once more, authorities use methods that result in artificially high margins and that contribute even more to the dumping creating effect of an investigation.

Even in the injury investigation, authorities tend to take short cuts, not placing enough emphasis on whether injury was caused by factors other than dumping.

In short, this shows clearly that a dumping investigation is in itself dumping creating and therefore trade diverting. Once more, this points out to one conclusion, the trade diverting effects of anti-dumping actions within a free trade

area are incompatible with the trade creating effects aimed at by the creation of the area.

5.5. Anti-dumping duties and GATT Article XXIV

It is clear from the text of paragraph one of Article XXIV of the GATT that, if not all, at least certain types of regional trade agreements are encouraged and permitted by the GATT. We also noted that, in practice, the GATT tolerates all types of trade agreements. We will now return to the text of Article XXIV in an attempt to determine whether the use of anti-dumping duties within free trade areas, as defined by Article XXIV, is specifically permitted or ruled out by the GATT. To answer this question it is necessary to examine the text of paragraph 8 of Article XXIV, which states that:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories so that

(i) duties and other regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between constituent territories of the union or at least with respect to substantially all the products originating in such territories, [...]

(b) A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all trade between the constituent territories in products originating in such territories.

Analyzing these provisions, Marceau states that “[most] of the doctrine centers on the interpretation of ‘substantially all’. Although this wording is ambiguous and problematic, it is argued here that the expression ‘duties and other regulations restrictive of commerce’ is also crucial. In accordance with the GATT foundations for more trade liberalization, and to ensure that a regional arrangement is a real integration arrangement, anti-dumping duties should be eliminated within a free

trade area”³⁵⁴. So far, Marceau’s affirmation of the necessity to abolish anti-dumping legislation within a free trade area (this analysis can be generalized to cover also all bilateral and multilateral trade agreements with a level of integration above the free trade area) is in line with our hypothesis: anti-dumping legislation and free trade areas are incompatible. Of course, using the ‘GATT foundations’ as an additional argument in support of this position is appropriate. Marceau goes on to say that “economists agree that most, if not all, anti-dumping measures restrict trade. Therefore, maintaining anti-dumping duties within an FTA would not respect the guidelines of the GATT ‘to eliminate duties and other regulation restricting trade’”³⁵⁵. Although it is very desirable in the context of this study to make such a statement, and to go even further by stating that maintaining anti-dumping legislation within a free trade area does not respect the GATT all together, in reality it would be rather difficult to sustain such a conclusion.

It is certainly true that when analyzing paragraph 8 of Article XXIV, special attention should be given to the words ‘to eliminate duties and other regulation restricting trade’, however this does not mean that this phrase can or should be taken out of context, and that what follows, meaning the phrase ‘substantially all the trade between the constituent territories’, can simply be disregarded. The whole paragraph should be interpreted by looking at what it says in its integrity and that includes the phrase ‘substantially all’. Any other fragmented interpretation would be partial and inaccurate. Interpreting this phrase, Jackson rightly noted that it “is just as studiously ambiguous as reasonable”³⁵⁶. In an attempt to shed some light on the exact meaning of ‘substantially all’, Jackson analyzed the preparatory work of

³⁵⁴ Marceau, G., *supra* n. 4, p.183, p. 187.

³⁵⁵ *Ibid.*

³⁵⁶ Jackson, J., *World Trade and the law of the GATT*, Bobbs-Merill, Indianapolis, 1969, p. 608.

the GATT and stated that “[t]he preparatory work is not helpful in trying to fill in the meaning of ‘substantial’, beyond the obvious point that substantial is not all, so some duties and restrictions can remain in each of the cases to which the term applies”³⁵⁷. Although it would be somewhat speculative to draw any conclusions as to the exact percentage of trade barriers to be eliminated in order to reach the ‘substantial’ level, most authors seem to agree that ‘substantially’ means a liberalization of trade of between eighty and ninety per cent³⁵⁸. Marceau interprets this result by stating that “[t]he term ‘substantial’ would seem to require that all important restrictions to most traded goods be eliminated, including anti-dumping duties”³⁵⁹. Marceau’s conclusion here is also questionable considering that it is doubtful that anti-dumping duties would constitute ten to twenty per cent of all trade restrictions between a group of countries.

Thankfully, the quantitative criteria is not considered as the only criteria to be used when evaluating whether or not ‘substantially all’ trade barriers have been eliminated, the exercise requires also the use of a qualitative criteria. During the discussions on the EFTA referred to earlier, the Report of the Working Party noted that “the phrase ‘substantially all the trade’ had a qualitative as well as quantitative aspect and that it should not be taken as allowing the exclusion of a major sector of economic activity. For this reason, the percentage of trade covered, even if it were established to be 90 per cent, was not considered to be the only factor to be taken into account”³⁶⁰. The Report goes on to say “[t]he Member States agreed that the quantitative aspect, in other words the percentage of trade freed,

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid*; Imhoof, R., *Le GATT et les Zones de Libre Echange*, Georg, Librairie de l’ Universite, Geneve, p.67; Dam, K., *The GATT law and International Economic Organization*, University of Chicago Press, Chicago, 1976, p.279.

³⁵⁹ Marceau, G., *supra* n. 4, p. 189.

³⁶⁰ L/1235, adopted on June 4 1960, 9S/70, 83-85, taken from *Guide to GATT Law and Practice*, 6th Edition, GATT, Geneva, 1994, p. 767.

was not the only consideration to be taken into account”³⁶¹. In that specific case the discussion was around the fact that the provisions of the Stockholm Convention relating to the elimination of barriers to trade in the free trade area did not apply to trade in agricultural products, and in that case it was put forward that even though trade liberalization covered 90 per cent of all trade, the quantitative factor was not sufficient alone to determine whether or not substantially all trade has been liberalized, but it was also necessary to look at the qualitative factor. Finally it was agreed that even though the total agricultural sector was not liberalized, the sector was not completely excluded from the free trade agreement. The EFTA states argued that each “individual member of a free trade area should have a certain latitude in respect of some products”³⁶² and that Article XXIV spoke of ‘substantially all trade’ and not ‘substantially all products’. No conclusion was reached at that time on the interpretation of Article XXIV.

Other Reports of Working Parties also recognized that the phrase ‘substantially all trade’ has never been defined by the GATT ³⁶³ and some others said that “Article XXIV:8(b) had to be interpreted to mean free trade in all products and not carved out by sectors; the exclusion of a whole sector, no matter what percentage of current trade it constituted was contrary to the spirit of both Article XXIV and the General Agreement”³⁶⁴.

The question which remains to be answered at this point is whether or not Article XXIV and the way it has been interpreted in the Reports of Working Parties would allow us to conclude, at least hypothetically, that maintaining anti-

³⁶¹L/1235, adopted on June 4 1960, 9S/70, 83-85, taken from *Guide to GATT Law and Practice*, 6th Edition, GATT, Geneva, 1994, p. 767.

³⁶²L/1235, adopted on June 4 1960, 9S/70, 83-85, taken from *Guide to GATT Law and Practice*, 6th Edition, GATT, Geneva, 1994, p. 767.

³⁶³18s/164; 21S/80;27S/132 taken from *Guide to GATT Law and Practice*, 6th Edition, GATT, Geneva, 1994, p. 767.

³⁶⁴21S/132 taken from *Guide to GATT Law and Practice*, 6th Edition, GATT, Geneva, 1994, p. 767.

dumping legislation within a free trade area would contravene the obligation under Article XXIV 8(a) and (b) to eliminate ‘substantially all’ trade barriers? And the answer is unfortunately no, for the following simple reason: on one hand it is not contested that the phrase ‘substantially all’ means less than all, in other words a certain level of protectionism is permitted, and on the other hand it is not realistic to sustain that anti-dumping legislation and the tariffs which are imposed by virtue of such legislation would quantitatively or qualitatively constitute a substantial trade barrier as understood by GATT Article XXIV. It is therefore unlikely that the quantitative test would be met and further it is even more unlikely that anti-dumping tariffs would be imposed on a whole sector as opposed to a product. Also, realistically, it is difficult to see any Member State of the GATT coming forward and contesting the validity of a free trade area, because anti-dumping legislation within the area was not abolished, and it is even more unlikely that such an argument would succeed under the GATT, considering that no regional trade agreement was ever refused by the contracting parties³⁶⁵.

Returning to Marceau’s analysis on the compatibility of anti-dumping duties and the GATT, she states that: “if one follows Jackson’s distinction that both the MFN (GATT Article I) and the tariff concessions (GATT Article II) are found in part I of the GATT, which refers to international obligations, and the dispositions of part II form a ‘code of conduct’ designed to protect the value of the tariffs concession, one may wonder why the ‘discipline’ of anti-dumping duties is necessary when the tariffs that they are supposed to protect have disappeared, as they do within a free trade area.”³⁶⁶ Indeed, if tariffs are no longer levied within a free trade area, the necessity of using anti-dumping legislation to regulate trade

³⁶⁵ Marceau, G., *supra* n. 4, p. 191.

³⁶⁶ Marceau, G., *supra* n. 4, p. 187.

becomes even more questionable especially if we add that to the fact that it is a trade diverting practice. Based on this analysis, it would be necessary to follow the recommendation of the GATT and to phase out all regulations restricting trade in order to achieve a trade creating free trade area. This conclusion is sufficient grounds to assert from an academic perspective that maintaining anti-dumping legislation within a free trade area is inconsistent with the spirit of trade liberalization within that same free trade area as consecrated by the GATT, and that is despite the fact that the same assertion could not be as strongly and convincingly made from a purely legal standpoint. Now we will look at the treatment of anti-dumping legislation within the EC and NAFTA.

5.6. Anti-dumping duties in the EC

The Creation of the European Communities and of the European Union have lead to a very advanced level of integration within the EC area. Before the modifications brought on by the *Amsterdam Treaty* in 1997, Article 91 of the *Treaty Establishing the European Community* provided for the possibility for a Member State or any other interested party to complain to the Commission about the dumping practices originating from another Member State. The Commission would then address recommendations to the party responsible for the dumping. If dumping persists, then the Commission would authorize the Member State subject to the dumping practices to adopt certain protective measures, which modalities and conditions it would determine. This means that even when anti-dumping legislation was maintained within the EC, its use and application were controlled by the Commission, the central body governing the EC, and not by individual Member States. This Article is not in the *EC Treaty* as modified by the *Amsterdam*

Treaty. The *Amsterdam Treaty* does not allow for any anti-dumping duties to be adopted within the EC area. Article 23 of the *Amsterdam Treaty* states that:

1. The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.
2. The provisions of Article 25 and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries, which are in free circulation in Member States.

Article 24 of the *Amsterdam Treaty* further states that products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

It is therefore not allowed to impose anti-dumping duties within the EC area. This rule will extend to the 10 new EC members, which join the EC as of the first of May 2004. As a result of their accession to the EC, all anti-dumping measures initiated by the EC against these countries will lapse; similarly, all anti-dumping measures initiated by each of these countries against the EC will also lapse. The freedom of circulation of goods within the EC is one of the most important fundamentals of the interior market³⁶⁷ and it is further believed to be a crucial fundament to any free trade or customs union agreement. Any exception to this principle in the EC is interpreted restrictively³⁶⁸. This principle is paramount under EC law. An examination of EC case law clearly shows how Member States, often unsuccessfully, tried to protect their national markets using alternative methods to

³⁶⁷Fallon, M. *supra* n. 17, p. 97.

³⁶⁸*Deutsches Milch-Kontor*, [1994] C-426/92, ECJ.

the imposition of tariff barriers within the EC³⁶⁹, this however is not a topic that will be covered in this study.

Having said earlier that a customs union is a free trade area with a higher level of integration, and that the crucial difference is not integration as it relates to free trade within the area, but rather to trade with third parties, it would not be unreasonable or premature to state at this point that a similar approach to anti-dumping action within the EC should be adopted within the NAFTA. However, our examination below of how NAFTA treats internal anti-dumping actions will show us that this is not the case.

5.7. Anti-dumping duties under the NAFTA

Just like the EC, the NAFTA is an agreement aiming at achieving regional economic integration, however NAFTA is very different from its European counterpart. While the EC is based on a quasi-federal model allocating power between Community organs and Member States, NAFTA “is in the nature of a confederation among independent sovereigns, each maintaining autonomous political decision-making authority within constraints defined by agreements”³⁷⁰. The NAFTA is described as a free trade area but not as a customs union. However, just like in a customs union, “NAFTA prescribes the elimination of tariffs and other restrictive regulations of commerce between its Parties”³⁷¹, and unlike a customs union it “does not prescribe common tariffs applicable to goods originating outside NAFTA territory”³⁷². This is a fundamental difference between

³⁶⁹Fallon, M. *supra* n. 17, p. 103 et seq.

³⁷⁰Weiler, J.H.H., *The EU, the WTO, and the NAFTA Towards a Common Law of International Trade?*, Academy of European Law, Oxford University Press, Oxford, 2000, p. 171.

³⁷¹*Ibid.*, p. 173.

³⁷²*Ibid.*

NAFTA and the EC, and as stated above, a fundamental difference between customs unions and free trade areas in general. However, referring to our prior discussion on the differences between customs unions and free trade areas we should emphasize once more that as far as it concerns free trade within the area, there should be, in theory, no difference between a customs union and a free trade area. As such it is neither surprising nor shocking to learn that the member states of NAFTA maintained non-harmonized external tariffs. The EC is without any doubt more than a free trade area considering the level of integration aimed at by the EC, and NAFTA is arguably somewhat less than a free trade area, taking into account the discussion that will follow on the elimination of tariff and non-tariff barriers within the NAFTA.

Examining the text of the NAFTA on the topic of tariffs, on one hand Article 302 provides for tariff reductions and progressive elimination of tariffs:

1. Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating good.
2. Except as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 302.2.

On the other hand, Chapter 19 explicitly allows Parties to the NAFTA to maintain and adopt new anti-dumping duties against other NAFTA Parties and to maintain and modify their legislation relating to anti-dumping. In fact, not only does NAFTA allow for the imposition of anti-dumping duties within the NAFTA area, it does not provide for the uniformity of anti-dumping legislation amongst its Parties.

Article 1902 stipulates that:

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practices and judicial precedents.
2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law [...]

From the perspective of creating a free trade area this provision is a double-edged sword: not only is the success of the free trade area jeopardized, by the mere fact of maintaining the application of anti-dumping legislation within the area, and we already saw that anti-dumping action when used within a free trade area results in trade diversion, but also it is an oxymoron to the idea of internal tariff phasing out and harmonization itself, which is the essence of a free trade area. That is especially true when we consider the fact that anti-dumping legislation is worse than not eliminated within the NAFTA, it is not even harmonized within the area itself. In other words, each Party is given the means and the tools to adopt its own anti-dumping legislation, to carry out its own investigations and to impose tariffs on goods originating from any other Party, thus, effectively reducing to nil the trade creating benefit of tariff reduction and elimination with respect to the products targeted by the anti-dumping action.

Further, the use of an anti-dumping legislation that is not harmonized throughout the area could lead to unequal tariffs imposed by different countries within the area on identical products. For example, Canada can launch an anti-dumping investigation on cold-rolled steel products originating from the United-States and end-up imposing a tariff of forty percent on all imports of cold-rolled steel originating from the US. At the same time the US would launch an investigation against Canada on the same product and in all likelihood ends up imposing a different tariff on Canadian exports of cold-rolled steel to the US, lets say a sixty five percent anti-dumping duty is levied. This simple example clearly shows the incompatibility of such a practice within a free trade area: not only would this allow for the imposition of tariffs within the area and the trade diverting

effect this practice carries with it, even worst, it allows for unequal tariff rates within the area, which goes against any harmonization and tariff elimination goals.

Since the entry into force of the NAFTA on January first 1994, fifteen dumping investigations have been opened in Canada against the United States and Mexico, twelve of which resulted in the imposition of anti-dumping duties³⁷³. In the United States there has been twelve anti-dumping cases against Canada and Mexico³⁷⁴. Mexico has initiated twenty-four anti-dumping investigations against the United States, fourteen of which have resulted in the imposition of duties³⁷⁵. These numbers clearly show that anti-dumping activity within the NAFTA is far from being theoretical or negligible, in fact it seems that the three Parties to NAFTA readily resort to the use of anti-dumping duties in order to regulate trade within the free trade area, this is indeed a major difference between NAFTA and the EC where anti-dumping action is completely abolished within the free trade area.

5.7.1. Chapter 19 of the NAFTA

Article 1904 of the NAFTA gives parties involved in an anti-dumping investigation the possibility to request that any decision to impose anti-dumping duties taken by any NAFTA Party against any other NAFTA Party be reviewed by a NAFTA Panel. The Panel may then uphold a final determination or remand it. In its review of a final determination, the Panel applies the standard of review

³⁷³The source of this information is a list compiled by the Canada Customs and Revenue Agency entitled *Dumping and Subsidy, Investigations under the Special Import Measures Act since its implementation on December 1st 1984*, @ www.ccr-aadrc.gc.ca/customs.

³⁷⁴Data obtained from the web site of the United States Department of Commerce, International Trade Administration @ www.trade.gov/ and current through January 01, 2000.

³⁷⁵Data also obtained from the United States Department of Commerce, International Trade Administration @ www.trade.gov/ and current through December 31, 2000. Data on dumping investigation initiated by Mexico against Canada is unavailable.

normally used in the importing country. The role of the Panel is to determine whether the Party imposing the anti-dumping duty has respected its national anti-dumping laws when making a particular determination. The Panel cannot question the validity of national anti-dumping legislation; it simply provides an alternative to having national courts handle reviews of final anti-dumping determinations involving two NAFTA parties.

Potentially, the creation of this regional review procedure could have the effect of dissuading NAFTA Parties from launching anti-dumping procedures against each other or abusing of their national legislation when pursuing anti-dumping action against another NAFTA Party.

5.8. The effect of anti-dumping actions on free trade areas and the NAFTA example

Perhaps one of the most interesting features of anti-dumping legislation is that it is at the same time product-specific and country-specific. An anti-dumping investigation only directly affects the country named in the investigation, in a sense that the duty is levied on certain products originating from the targeted country. The distinguishing element of free trade areas is the underlying and voluntary intention of the contracting members to eliminate trade barriers and to facilitate the flow of trade amongst each other. It is therefore by nature contradictory to want, on one hand to enhance trade flow with a specific trade partner, and on the other hand to want to continue using a tool allowing the imposition of a trade barrier against the same partner. From a purely academic stand point, creating a free trade area and maintaining anti-dumping legislation within the area is contradictory. Nevertheless, some trade partners have opted for

this arrangement and we just saw a specific example of this practice within the NAFTA.

The effect of anti-dumping actions on welfare and trade is not a problem specific to trade blocks, quite the contrary, anti-dumping actions outside a free trade area have similar effects, however it is argued here that within a free trade area the effects of anti-dumping actions have far more serious implications considering the objective underlying the creation of a free trade area, meaning trade creation that would enhance welfare within the free trade area. Therefore, maintaining and using a trade diverting policy is in itself a barrier to attaining this objective.

5.8.1. The effect of anti-dumping actions on imports

National authorities have often argued that national anti-dumping laws are necessary in order to combat predatory behavior of foreign firms and the export of unemployment. In reality the imposition of anti-dumping duties has effects that go beyond the predatory imports that they aim at stopping at the border. Anti-dumping laws “end up spreading into the importing country the high home prices of foreign goods”³⁷⁶, in other words, from a trade perspective, they are trade-diverting actions and negatively affect welfare. In fact, according to many economists, anti-dumping actions are unnecessary and damaging to society’s welfare³⁷⁷. It is also often held that national anti-dumping laws prevent the entry of much more than predatory sales³⁷⁸. Richard Dale stated that “[a]nti-dumping laws

³⁷⁶Marceau, G., *supra* n. 4, p. 42.

³⁷⁷See Dale, R., *Anti-Dumping Law in Liberal Trade Order*, Macmillan, London, 1980; Hindley, B., *Economics of Dumping*, in Tharakan, P., *Policy Implications of Antidumping Measures*, Nord-Holland, Amsterdam, 1991.

³⁷⁸Marceau, G., *supra* n. 4, p. 44

have been applied [...] for a purpose which is overtly anti-competitive [...] [They] represent a charge on public expenditure, while also imposing direct costs on these engaged in international trade³⁷⁹.

Some recent economic studies by the National Bureau of Economic Research discuss the effect of anti-dumping legislation on trade. In one of these studies entitled *On the Spread and Impact of Antidumping*³⁸⁰, Prusa points out that one of the most important features of anti-dumping is that its protection is country-specific. In a free trade area, this means that when an anti-dumping action is taken by a member state of the free trade area against another member state of the same area, the effect on trade within the free trade area is immediate and direct. This is especially true, considering that anti-dumping actions are considered to have a profound effect on imports even if they do not result in the imposition of a duty³⁸¹. Prusa further states “there is also evidence that imports are significantly restrained when the case is rejected. [...] Imports fall dramatically during the investigation period, regardless of the case’s ultimate effect. Legal scholars often refer to this as the ‘harassment’ effect of an [anti-dumping] investigation”³⁸². The effect of affirmative anti-dumping determination on imports from a named country is significant, in fact, depending on the level of duty imposed, quantities tend to fall by almost seventy percent during the first three years following the duties and prices tend to increase by thirty five percent³⁸³. However, the effect of anti-dumping duties is not limited to the countries named in an investigation, it spreads more globally to non-named countries and the result is an increase of imports from

³⁷⁹ Dale, R., *supra* n. 377, p. 191.

³⁸⁰ Prusa, T. J., *On the Spread and Impact of Antidumping*, National Bureau of Economic Research, Cambridge MA, 1999.

³⁸¹ *Ibid*, p. 14.

³⁸² *Ibid*.

³⁸³ *Ibid*, p. 17.

non-named countries, but no effect on prices³⁸⁴. Speaking about the value of imports from non named countries Prusa states by means of an example that “a 10% AD duty raises non-named imports by 6% during the first year, implying that non-named countries offset about one-third of the fall from named countries.” In more general terms Prusa states that “an affirmative determination leads to steadily increasing imports by non-named supplies: imports increase by 16% in year 1, 31% in year 2, and 45% in year 3”³⁸⁵. Referring to Prusa’ s findings on the increase of the quantities of imports from non-named countries, Prusa finds that they increase in the first year after a finding of dumping by over forty percent and in the second year by over eighty percent and in the third year by over one hundred and sixteen percent. Prusa’ s study also shows that this increase is accompanied by a decrease in the prices of goods originating from the non-named countries by up to twenty five percent. Prusa further states that “AD has a far greater effect on import quantities not prices”³⁸⁶ and concludes that “non-named suppliers respond to the affirmative duty on named countries by substantially increasing their sales”³⁸⁷. In a free trade area such as NAFTA when a member state imposes an anti-dumping duty on one of the two other member states this could potentially result in an increase of imports from outside the free trade area. The end result is that prices in the importing country on average end up increasing or remain unchanged and imports are simply coming from another source. This does not insinuate that the effect of anti-dumping duties on global trade is different, but in the context of a free trade agreement the distortions created by anti-dumping actions are such that, not only is trade within the area inhibited by the mere initiation of an anti-dumping

³⁸⁴ *Ibid*, p. 17.

³⁸⁵ *Ibid*, p. 17.

³⁸⁶ *Ibid*, p. 17.

³⁸⁷ *Ibid*, p. 18.

investigation, but regional trade is also substituted by trade between the area and third countries since goods will most likely be imported from outside the area. As a result, anti-dumping actions within the NAFTA could have a double negative effect on trade within the NAFTA. This is especially true when one NAFTA Member State names both other NAFTA Member States in its dumping investigation. This is yet another argument in support of the incompatibility of free trade areas with anti-dumping action.

5.8.2. Tariff elimination and anti-dumping actions

Moreover, maintaining anti-dumping legislation within a free trade area such as the NAFTA carries with it the potential of an increase of dumping investigation and the imposition of anti-dumping duties within the free trade area. Chapter 3 of NAFTA provides for a gradual elimination of tariffs between the Member States. Economists demonstrated that “due to the fall in tariffs countries increasingly felt the need to offer protection to import-competing industries”³⁸⁸ and they used anti-dumping laws as a tool to protect their markets. It is further stated that “the growing number of [anti-dumping] disputes is due to a combination of (1) ongoing tariff liberalization, which simply leads to more trade and hence trade tensions, (2) unsatisfactory safeguard provisions which lead trade injured industries to avoid using them, and (3) increasingly weak [anti-dumping] standards”³⁸⁹. The economic studies clearly indicate that tariff elimination leads to an increase of anti-dumping action. Looking at this reality in conjunction with another reality which is the obvious continuing intention of the three NAFTA

³⁸⁸Blonigen, B.A. & Prusa, T.J., *Antidumping*, National Bureau of Economic Research, Cambridge MA, 2001, p. 3.

³⁸⁹*Ibid*, p. 7.

Parties to use anti-dumping actions against one another within the free trade area, we can conclude that it is likely to see an increase of anti-dumping activities with the increase of trade within the area, especially when we consider that “the increase of anti-dumping activity in no way means that there has been an increase in unfair trade or, in fact that there has been any unfair trading at all”³⁹⁰ . This, in conjunction with another reality, the fact that “the mere presence of [anti-dumping] law can affect the behavior of firms and, hence, market outcomes, even if no [anti-dumping] duty is ever imposed”³⁹¹ , brings us to believe that maintaining anti-dumping legislation within a free trade area in conjunction with tariff elimination within the free trade area could lead to a negative counter effect on free trade within the free trade area, meaning that the liberalization achieved by tariff elimination will be minimized and undermined by the barriers created by anti-dumping legislation and duties. In that case the incompatibility of anti-dumping actions and trade blocks is even more patently apparent, considering that as a result of anti-dumping actions, the benefits of free trade within a free trade area are significantly reduced. In other words, anti-dumping legislation becomes even more dangerous to trade creation if maintained in a trade environment where tariffs are eliminated. Based on this conclusion, we can confidently state that in order to fully benefit from the advantages of liberalizing trade within a free trade area, tariff elimination should unavoidably be accompanied by the abolition of anti-dumping action within the free trade area.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*, p. 12.

5.8.3. Anti-dumping and retaliation

We have already concluded that a decrease in tariff barriers will generate an increase in trade and in all likelihood an increase in anti-dumping actions. This direct negative result of maintaining anti-dumping legislation within a free trade area is even worse if we consider the retaliatory effect of anti-dumping actions. Interestingly enough, a study on the topic states “[o]ne important example is the filing of Canadian antidumping cases against U.S. steel products in the fall of 1992 and 1993, ostensibly in response to the initiation and subsequent U.S. antidumping duties levied against Canadian steel products from investigations begun in June 1992”³⁹².

Some studies attempt to explain the increase of anti-dumping action over the past decade, and of particular interest is Skeath and Prusa’s study entitled *The Economic and Strategic Motives for Antidumping Filings*³⁹³. In that study the authors state that they “believe that [their] results help to reject the notion that the rise in AD activity can be solely explained by an increase in unfair trade”³⁹⁴. If unfair trade is not the reason why we have seen an increase of anti-dumping actions then what is? Prusa and Skeath argue that countries do not use anti-dumping as a tool to fight unfair trade, but rather in a strategic manner, meaning against principally big suppliers, against countries who in general have previously used anti-dumping measures and in retaliation against other countries that have initiated anti-dumping actions against them. On that last point Prusa and Skeath have found that “countries file about half of their cases against countries that

³⁹²Blonigen, B.A. & Bown, C.P., *Antidumping and retaliation threats*, National Bureau of Economic Research, Cambridge, Massachusetts, 2001, p. 1.

³⁹³Prusa, J.T. & Skeath, S., *The Economic and Strategic Motives for Antidumping Filings*, National Paper for Economic Research, Cambridge, Massachusetts, 2001.

³⁹⁴*Ibid*, p. 3.

previously had used AD against them”³⁹⁵. They further state that “[o]verall, [they] find the support for retaliation incentives quite striking. New and traditional users alike tend to file AD cases against those who have investigated them in the past”³⁹⁶. In conclusion, Prusa and Skeath state that “[t]he lesson appears to be that as countries [...] embrace AD protection, they are subjecting themselves to long run costs in the form of ongoing retaliation”³⁹⁷.

The retaliation effect is particularly relevant when looking at free trade areas. Indeed, we have already established that when tariffs are eliminated there is an increase in trade, which also results in an increase in anti-dumping actions. If we consider that an increase of anti-dumping action means also an increase in retaliation action, this would simply mean that within a free trade area, and even more specifically within a free trade area such as the NAFTA, if anti-dumping legislation is maintained, and even worst used, this results in an increase of anti-dumping action within the area, first as an immediate result of the increase of trade within the area and second as a result of the retaliation action which anti-dumping procedures trigger. Lets look at some of the specific data relevant to the three countries members of NAFTA. Prusa and Skeath have presented their findings over two different but overlapping time-frames. The first findings relate to the percentage of retaliation driven anti-dumping actions between 1980 and 1998. During this period over fifty percent of all antidumping actions initiated by the United States were in retaliation to anti-dumping actions against it. Canada and Mexico have retaliated in over sixty percent of all their anti-dumping cases. The second period observed is between 1994 and 1998. During this period the

³⁹⁵ *Ibid*, p. 15.

³⁹⁶ *Ibid*, p. 16.

³⁹⁷ *Ibid*, p. 17.

applicable figure for the USA, Canada and Mexico is respectively over sixty percent, over seventy five percent and over eighty percent. This clearly shows that all three countries use retaliation significantly when deciding on initiating an anti-dumping action³⁹⁸. This means in practical terms that every time one of these three Parties initiates an anti-dumping procedure against one other Party or the two other Parties, the risk of retaliation is significantly high and therefore the risk of seeing two or three actions initiated within the free trade area is equally significant. Of course, this risk would be completely eliminated if the use of anti-dumping legislation were to be abolished within the free trade area.

Some authors claim that retaliation generally has a dampening effect on the use of anti-dumping legislation, this hypothesis is set aside by Prusa and Skeath who state that their “results suggest that the dampening effect implied by Blinigen’ s and Bown’ s work may be statistically significant but not quantitatively important”³⁹⁹.

Finally, the last paragraph of the conclusion of Prusa’ s and Skeath’ s paper, although not directly relating to free trade areas, is nevertheless of particular relevance to this study and should be adopted in its integrity:

“Taken together, the sources of evidence on the importance of retaliatory motives underscore the importance of including AD rules on the agenda in any future WTO negotiations. The fact that so many AD cases world-wide are apparently motivated by strategic considerations indicates that the rules currently in use are too broad and too easily subjugated to other forces. Improved AD rules and tighter guidelines for the implementation of AD legislation would greatly help in limiting the use of AD protection for reasons other than that intended by the WTO”⁴⁰⁰.

5.8.4. The effect of Chapter 19 on anti-dumping activity within the NAFTA

³⁹⁸Blonigen, B.A. & Bown, C.P., *Antidumping and Retaliation Threats*, National Bureau of Economic Research, 2001.

³⁹⁹Prusa, J.T. & Skeath, S., *supra* n.393, p. 24.

⁴⁰⁰*Ibid.*

In the World Bank Report referred to earlier the effect of NAFTA and more specifically of Chapter 19 on anti-dumping activity within the free trade area was examined. The conclusion reached, although somewhat contradictory, is conclusive: anti-dumping activity should be reformed or eliminated in order for the area to benefit fully from the implementation of a free trade agreement.

The study concluded that US anti-dumping activity has not been affected by Canadian and Mexican chapter 19 filings, while the US vulnerability to Mexican anti-dumping actions has been reduced. In other words, the US seems to have benefited from Chapter 19 review mechanism, while Mexico and Canada have benefited less from this same review mechanism and remained as vulnerable to US anti-dumping activity. The study suggests that the solution to minimize the negative effect of anti-dumping on free trade would be to restrict the use of anti-dumping actions by all there NAFTA Parties against each other.

5.9. Conclusion

The only conclusion to be reached in light of the above is that anti-dumping measures should be phased out within free trade areas particularly. In fact, free trade areas are often considered to be the first step towards greater integration, and this integration is key to the success and survival of the free trade area. In other words free trade areas “either die out or lead towards further integration such as customs unions”⁴⁰¹. Marceau states that “in order to favor such increased integration within a free-trade area, the GATT recommends the abolition of ‘regulation restricting trade between member states’. Tariffs and non-tariff

⁴⁰¹Marceau, G., *supra* n. 4, p. 312.

barriers should therefore be reduced and eventually eliminated. Since there is no doubt that anti-dumping measures do restrict trade economically, they should be phased out⁴⁰². The abolition of anti-dumping measures between the member states of a free trade area, namely the NAFTA, is a necessary condition for the area to fully benefit from the process of integration⁴⁰³.

Furthermore, considering that allowing the use of anti-dumping legislation by countries members of a free trade area within the free trade area, leads to significantly adverse effects on free trade and welfare within the area, especially when we take into account the potential snow ball effect this could have on anti-dumping actions within the area, it has become clear that the elimination of anti-dumping measures is a necessary step for the success of the integration process, which starts with the elimination of tariffs within the area, and even more for the eventual survival and continuation of the free trade area.

It is further argued here that the creation of free trade areas and the greater integration which might result from such initiatives is considered to be beneficial to the free trade area itself and to global trade: "successful free-trade areas (and customs unions) also tend to spread the beneficial impact of their economic integration over their borders. Countries outside an area of economic integration tend to apply for membership of the grouping, thereby increasing the geographical zone of the integration."⁴⁰⁴ From that perspective, it is not difficult to understand why creating free trade areas is a trend that is continuously growing in popularity. The EC is a perfect example of that success story. Since its creation the number of Member States has consistently increased and the number of countries waiting to

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*, p. 311.

become a Member State of the EC has also constantly and consistently increased. This suggests that more and more countries are becoming conscious of the benefits of trade liberalization at least within a limited geographic area. Therefore, it is especially surprising to notice that some countries while liberalizing trade using one instrument, being the creation of a free trade area, and doing so in some instances despite very strong lobby and industry resistance, the same countries are simultaneously using more and more sophisticated and biased tools to create trade barriers against the same countries they chose as trade partners.

Conclusion

This study clearly shows that despite international efforts to create a uniform anti-dumping regime in an increasingly global economy, the implementation of these uniform rules by national authorities in their respective jurisdictions will invariably lead to substantial differences in anti-dumping law from jurisdiction to jurisdiction. The implementation of the *GATT Anti-Dumping Code* in the EC and in Canada has lead to different results in each jurisdiction: from the initiation of the anti-dumping investigation to the implementation of the duty, the differences between EC and Canadian law are not negligible. Despite the fact that both Canada and the EC have actively participated in the Uruguay Round negotiations leading to the adoption of the *Anti-Dumping Code*, and despite the fact that they are basically implementing the same text into their national legislation, the differences between the anti-dumping investigation process in each jurisdiction are a clear indication that authorities are concerned with protecting their internal markets and they readily resort to anti-dumping duties to block imports from entering their territory and to create trade barriers.

Our comparison of Canadian and EC Antidumping legislation shows that implementing the *GATT Anti-Dumping Code* in Canada and in the EC has resulted in some significant differences. We have noted such differences in the entire process of conducting an anti-dumping investigation, from the initiation of the procedure, to the implementation of a duty.

Our comparison showed that the *Code* as implemented in Canada and the EC favor the initiation of anti-dumping investigations and is a relaxed interpretation of the *Code's* minimum requirements. In fact, the *Code* requires that there be sufficient evidence of dumping prior to initiating an anti-dumping investigation. This requirement being not specifically defined in the *Code*, under Canadian law it is met when there is a 'reasonable indication' that dumping has caused injury or retardation or threatening to cause injury, while under EC law, the wording is identical to the *Code's* wording, without any further clarification, leaving it open for interpretation. We have also seen that under EC law, the evidence is examined to the extent possible, effectively placing a limitation on the Commission's obligation to ensure that there is sufficient evidence prior to initiating an investigation. Similarly, the elimination of the 'simple assertion' criteria under EC law opens the door to a potentially lower evidentiary standard. As stated earlier, a stricter definition of what would constitute 'sufficient evidence' under the *Code* is desirable in order to achieve certain uniformity in the process of initiating an anti-dumping investigation regardless of the jurisdiction where the investigation is launched.

This conclusion is further reinforced by the appeal mechanisms in place. In Canada an appeal of the decision to conduct or not to conduct an investigation is allowed only when an investigation is not initiated, which is a strong indication of bias in favor of initiating investigations. In the EC such a distinction is not made,

however there is no right of appeal: the only way to attack a decision to initiate an investigation is by way of judicial review, therefore making it harder to attack such a decision.

Turning to the standing requirements, we have seen that the *Code* requires an investigation to have a certain level of support by the domestic industry in the jurisdiction where an investigation is contemplated. We have seen that the definition of 'domestic industry' is transposed differently in Canadian and EC legislation: under Canadian law, although not defined in the legislation itself, this is understood to mean 25% to 30 % of the domestic production, while EC law takes account only of producers who have expressed an opinion in favor or against the launching of an investigation. Although it is required that 50% of the producers who have expressed an opinion support the investigation, this standard does not account for the domestic industry or the domestic production as a whole. Practically speaking it is hard to imagine a scenario where the majority of the producers expressing an opinion would oppose the initiation of an anti-dumping investigation knowing very well that if a duty is imposed it could only benefit them and favor the sale of their products on the domestic market.

In conclusion, although it is difficult to evaluate quantitatively the level of support required under EC law, we can still conclude that the standard is at least as low as the Canadian standard and that both legislation have implemented criteria that make it easier to conclude that there is sufficient domestic support for an investigation, and more difficult to reach the opposite conclusion. Again, the *Code* lacks specificity on this point and, as demonstrated, is prone to interpretation. This is another area where stricter guidelines should be incorporated in the *Code*.

We have already discussed the importance of defining what constitutes the domestic industry or the community industry in the case of the EC. As mentioned earlier, on one hand, an investigation must have the support of the domestic industry, and on the other, it is the injury suffered by the domestic industry that could lead to the imposition of an anti-dumping duty. It is therefore crucial to accurately define the domestic industry at this early stage of anti-dumping investigation.

The comparison between Canadian and EC law showed some differences in the approach but no material difference in the result. We have seen that the discretionary power to exclude producers was used in Canada to exclude local producers, considered not representative of the domestic industry. We have also seen that the CITT refused to exercise this discretion when doing so would deny the existence of a domestic industry and put an end to the investigation, and therefore refused in certain cases to exclude importers and producers related to exporters. In other cases the CITT excluded producers who imported allegedly dumped goods. The bottom line here is that the CITT has the discretion to decide which producers will or will not be excluded, and it will not exclude producers if doing so would weaken an investigation or deny the existence of a domestic industry. In the EC, we saw that even though authorities developed a test, which results in the exclusion of producers if the damage they suffered was self-inflicted, in reality EC legislation also introduced a justification mechanism, allowing certain producers to be included regardless. The end result is that EC authorities enjoy a discretionary power similar to the Canadian, which allows them to include or exclude producers at will.

Both EC and Canadian legislations favor the inclusion of producers likely to strengthen an investigation, thus increasing the likelihood of a finding of dumping. This is however not in contradiction with the *GATT Code*, which specifically gives

national authorities the discretion to exclude producers from the definition of domestic industry. As stated earlier, a more objective test should be introduced here barring domestic producers from self-inflicting injury or from participating into dumping activities and later on benefiting from an anti-dumping duty being introduced. With regards to producers which are excluded for their affiliations with exporters, these should not be systematically excluded either. Their exclusion should be based on evidence that these producers are acting and defending the interests of the exporters rather than their own interests.

Turning to the determination of dumping, we saw that dumping is defined in the *Code* and both legislations as the sale of goods in the importing country at a price less than the normal value of the goods. This corresponds to the classic definition of dumping. This definition creates a relationship between the 'normal value' of goods, the 'export price' of like products, and it is considered that there is dumping when the normal value exceeds the export price. Thus, the first step in an anti-dumping investigation is to establish the normal value of the product, and we saw that the higher the normal value, the higher the likelihood of a finding of dumping. The process of determining the normal value of a product is not strictly dictated by the *GATT Code*, thus Canadian and EC legislation developed their own rules and criteria allowing the identification of sales, which will be taken into account, and sales which will not. We saw that both legislative authorities would not allow for sales between related parties to be taken into account, introducing a criterion for calculating normal value that is not found in the *Code*, and which puts upward pressure on the normal value, effectively creating dumping. Another issue to be pointed out is the requirement for domestic sales to be representative in order to be taken into account in the calculation of normal value. The *GATT Code* introduced the five per cent

criterion, which was followed by EC legislation and in Canadian practice. However, Canadian legislation introduced a number of additional requirements that must be met by sales before they are considered representative, the first one requires sales to be in the same or substantially the same quantities as the sales to the importer, and the second requires the sales to have taken place in the 'place' (not the Country) where the goods were shipped to Canada. These additional requirements as introduced by Canadian legislation, simply make it more difficult for sales to qualify as representative and to be included in the normal value calculation. This in conjunction with the exclusion of certain sales by Canadian legislation makes it very difficult to calculate normal value in Canada based on actual sales figures and favors the construction of normal value. As stated earlier, these requirements and exclusions mechanisms are not found in the *GATT Code* or in EC legislation. It seems that this is one of the key differences between Canadian and EC legislation, in the sense that from early on in the investigation process Canadian law favors resorting to a constructed normal value, while EC law maintains certain neutrality.

Normal value is calculated based on the sales of goods in the ordinary course of trade, a concept enunciated but not defined in the *GATT Code*, which led to different interpretations in EC and Canadian legislations. Although EC legislation has implemented the *Code's* standards unaltered, the same could not be said about Canadian legislation, where a more restrictive approach was taken towards the inclusion of sales below cost in the calculation of normal value. As stated earlier, the exclusion of sales below cost from the calculation of normal value could result in a higher normal value being calculated and an increased likelihood of a finding of dumping.

Once the relevant sales are identified for the calculation of normal value, the remaining step is to actually proceed with the calculation. Again here Canadian legislation differs from EC legislation and the *GATT Code* by introducing a discretionary power allowing choosing between a normal value based on the weighted average of all relevant sales or by fixing a representative price. As stated earlier, this discretionary power could lead to unrepresentative or arbitrary normal values.

When normal value could not be calculated based on actual figures, alternative methods are used to calculate it. The first of these two methods consists of considering the export price of the goods sold to a third country. Both Canada and the EC contain provisions to that effect in their respective legislation. We saw that EC legislation transposed the *GATT Code*, however we also saw that authorities do not resort to this method of calculating normal value due to the risk that goods could be dumped in the foreign markets. Canadian legislation developed an elaborate set of rules that are not found neither in the *Code* nor in EC legislation for the identification of sales that would qualify for consideration, however just like in the EC, and for the same reason, this alternative method is not favored. The second alternative method, and obviously the most frequently used, is the construction of normal value. This method consists on determining the cost of production, allocating an amount of profit, and adding a reasonable amount for administrative, selling and general cost. We saw that in keeping with the *GATT Code*, EC law provides for the calculation of the cost of production based on the records of the producers, subject to the exceptions to this rule contained in the legislation. Canadian legislation does not contain such a rule, and our examination of Canadian case law, showed that Canadian Authorities never use the books of the exporter to calculate production cost but resort to the alternative methods detailed earlier. The comparison between Canadian and EC law on this issue

shows that local authorities in both jurisdictions do not allow for an objective and fair calculation process, but rely on a set of rules that they developed and which generally tend to put upward pressure on the production cost and eventually on the normal value.

The second aspect of calculating normal value is the allocation of an amount of profit. And here too we saw that both Canadian and EC legislation differ somewhat from each other and from the *Code*. We concluded that the methods used by both Canadian and EC Authorities exercise upwards pressure on the normal value, especially when we consider that sales at loss are never taken into account in the EC and excluded in Canada when the profit margin is negative. This is not a requirement of the *Code*.

Finally, we also noted differences in the calculation of special, administrative and other cost, where again Canadian legislation remained silent as to the source of the information based on which the calculation is to be made, while EC legislation and the *Code* favor the use of actual data.

Our study of the methods used in the EC and Canada to construct normal value, shows clearly that this method is favored by national authorities because it gives them more discretion in establishing the normal value and, further it provides them with tools which allow them to put upward pressure on the normal value, therefore influencing and provoking a finding of dumping.

As stated earlier, a determination of dumping involves two initial steps: the calculation of normal value, and the calculation of the export price. We will turn now to the latter. As the *Code* is not specific enough about which export price is to be used, and how to reconstruct it when necessary, Canadian and EC Legislators developed their own rules. We saw that under EC law, authorities will resort to the

functions test when deciding whether to consider the price of the goods when sold to the importer or the lower price paid by a reseller or a sales intermediate for the goods, meaning that if the reseller or the sales intermediate has taken the function of an exporter's export department, then it will be the price charged by the reseller or sales intermediate that will be taken into account, otherwise, it will be the lower price charged by the exporter to the reseller or sales intermediate that will be taken into account resulting in a lower export price and an increased likelihood of a finding of dumping or a higher margin of dumping. Canadian legislation adopted an approach simply consisting on opting for the lower of the two prices, which in effect is a way to increase the likelihood of a finding of dumping or a higher dumping margin. In addition to automatically selecting the lowest export price, Canadian legislation dictates a series of downward adjustments which when applied result in an export price that is even lower than prior to the adjustments, thus increasing even more the likelihood of dumping or the level of the potential dumping margin.

Both legislative texts provide that the export price will be constructed when there is no export price or when the export price is not reliable.

We also saw that the requirement of the *GATT Code* with respect to proper comparison of export price and normal value are not specific enough and led to the implementation of imbalanced rules in Canadian and EC legislation. In other words, the requirement to compare normal value and export price at the same level of trade is not always respected because the appropriate adjustments are often denied, although Canadian legislation seems to have the edge on EC legislation on this particular issue.

However, it is clear that the process of calculating normal value, export price and comparing them is dumping creating. Regardless of the differences between Canadian and EC legislation, we cannot reach a conclusion that one legislation is not

dumping creating and the other is or that one is more dumping creating than the other, however it is clear that both legislations are dumping creating.

Having calculated the normal value and the export price, the dumping margin is determined by comparing the normal value with the export price. The *Code* gives three methods for comparing normal value and export price. The first one consists on comparing a weighted average normal value with a weighted average export price, the second one consists on comparing a normal value and export price on a transaction-to-transaction basis, and finally in exceptional circumstances the *Code* allows for a comparison of a weighted average normal value and an individual export price.

The latter method is the least favored by the *Code*, and its use is subject to a justification requirement by the authorities using it. This justification requirement is not fully elaborated in the *Code*. EC legislation stated that authorities are justified to resort to this method when using other methods does not reflect the full degree of dumping being practiced. We considered this approach of EC authorities to be more of a discretionary power allowing them to leisurely resort to this method of comparison rather than the justification requirement of the *Code*. We have also noted that this method is dumping creating. Although Canadian legislation does not contain the justification requirement, in practice this requirement is respected when resorting to this method of comparing normal value and export price.

Another issue relating to the comparison of normal value and export price is the calculation of a weighted average normal value. As discussed earlier, the EC's practice of 'zeroing' has been condemned by the WTO and the EC has taken steps to remedy its breach, however we also saw that the same practice has been followed in Canada, where no steps have been taken to change that practice.

This comparison of EC and Canadian legislation on the determination of dumping shows once more that anti-dumping legislation as implemented in both jurisdictions is dumping creating, almost at each step of the process.

Once a margin of dumping is determined, one issue of major importance remains to be settled before a dumping duty could be imposed and that is whether or not there is injury, a threat of injury or retardation.

We saw that EC legislation transposed the text of the *GATT Code* practically word for word. However this does not resolve problems relating to the interpretation of the legislation. We saw that neither that *Code* nor EC legislation contained a clear definition of 'material injury', however the interpretation of this term in the EC seemed general but satisfactory. The determination of injury is also subject to various factors. We saw the treatment given to captive sales in the EC. Captive sales by domestic producers are taken into account, not reducing artificially their market share. The same treatment is given to imports from third countries and to goods originating from named countries, but which are not dumped.

A key element when assessing injury is the evidence considered by authorities. EC legislation contains a positive evidence requirement. Canadian legislation does not explicitly contain such a requirement, however in practice the requirement for positive evidence is respected. Will constitute sufficient evidence of injury a decline of the market share of community producers, a stagnation of their market share if growth was expected, and even under certain circumstances in a growth situation, for instance when accompanied by significant financial losses. Another element taken into consideration is the effect of imports on prices: injury will be found if there is price undercutting or underselling. Finally, The effect of the dumped imports on the domestic industry will also be examined, and a finding of a negatively affected

industry will lead to a finding of injury. We have already expressed the view that the latter approach would be the most sensitive approach to determining whether there is injury or not.

Finally we have noted that not enough emphasis is placed during an injury investigation on finding out whether injury is caused by other factors than the alleged dumping. This aspect of an investigation should, contrary to the current practice, be a key element of the investigation.

Once all the requirements for the imposition of an anti-dumping duty have been met, we saw that the *GATT Code* gives national authorities the possibility to renounce to levying a duty or to reduce the amount of that duty in the name of public interest. We saw that the EC has introduced in its legislation a more stringent requirement, making it mandatory to take into account Community interest prior to imposing a duty, however we also saw that in practice imposing a duty will be considered in the interest of the Community unless the contrary is proven. Although the legislative text is pointing in the right direction, in reality it is practically never considered to be in the Community's interest not to levy a duty if injurious dumping is taking place. Under Canadian law, the legislator introduced the 'public interest' inquiry. This is not a mandatory step prior to imposing a duty, but it could be initiated at the request of interested parties or at the initiative of the CITT. Again, duty was seldom reduced or eliminated in Canada based on this provision.

Finally, we saw that EC legislation contains a specific anti-absorption provision. Neither Canadian legislation nor the *GATT Code* contains a similar provision. This provision allows EC authorities to re-evaluate the effect of an anti-dumping duty on prices within the EC. Typically, the export price is recalculated and the anti-dumping duty is adjusted upwards. As mentioned earlier, this is a one sided tool aiming at

increasing the level of duty levied if the desired result is not reached after the imposition of the initial duty.

The anti-dumping regimes of Canada and the EC have their differences, but they both reflect the intent of authorities to facilitate the imposition of anti-dumping duties rather than achieving neutrality and impartiality when it comes to assessing whether importing the goods subject to an investigation really has an injurious effect on trade. In fact, our comparison of Canadian and EC anti-dumping law showed that anti-dumping legislation as used in Canada and in the EC is not only an inefficient protection tool against unfair trade, but also and most importantly, the investigation process in itself is dumping creating, and therefore harmful to free trade, especially in a free trade area. This reality is difficult to justify in an increasingly global trade environment. It is even more difficult to justify within free trade areas, where trade barriers by definition should be eliminated and not created. The effect of anti-dumping actions on free trade in general is negative; this reality becomes even more striking when we consider their effect on free trade areas. The mere possibility of anti-dumping actions has a negative effect on free trade within free trade areas, and using them has an immediate negative effect on trade within the free trade area.

Having examined the use of anti-dumping law within the NAFTA area and the EC, it becomes clear that a change to the anti-dumping regime currently in place within the NAFTA region is necessary in order to achieve better integration. Maintaining an anti-dumping regime, implemented and applied by individual parties within the free trade area, will invariably lead to creating trade barriers that counter the elimination of tariffs within the area: on one hand we eliminate tariffs, but on the other we create tariff barriers. We have already discussed the potential

effects of non- harmonization of anti-dumping legislation within the NAFTA region. The fact that anti-dumping legislation is not harmonized within the NAFTA is by itself a detriment to free trade within the area, considering that the application of different legislations could lead to different tariffs being imposed on similar products when in circulation within the region. The lack of harmonization is accompanied by a lack of centralization within the NAFTA. Centralization would potentially prohibit member states from using anti-dumping legislation in a retaliatory or abusive manner, since the application of anti-dumping legislation would be confined to an impartial independent central administration. Although Chapter 19 of the NAFTA provides for the possibility of review of anti-dumping measures by a central body, this mechanism did not produce significant results on reducing the vulnerability of all NAFTA Parties to anti-dumping actions initiated by other Parties and has proven insufficient. Harmonization and centralization if used together within the NAFTA could lead to an improvement of integration and limit the harmful effect of anti-dumping legislation on free trade within the area in a sense that anti-dumping law will become somewhat less of a national trade protection measure. However, harmonization and centralization would just fall short of complete liberalization. We have already seen how anti-dumping legislation is by itself dumping creating, therefore maintaining it within the NAFTA whether harmonized and centralized or not, will necessarily have a negative effect on trade within the region, therefore, although harmonization and centralization of anti-dumping legislation would have somewhat of a positive effect on trade within the area, these steps are insufficient to eliminate all the negative implications of anti-dumping measures on free trade.

The EC treaty does not allow for anti-dumping action amongst member states. Anti-dumping law is maintained as a contingent protection instrument against third countries, while trade issues related to dumping are regulated within the free trade area by a common competition regime, implemented and enforced by a central authority which is independent from any member state. Anti-dumping legislation as it exists in Canada is used against goods originating from the United States and Mexico. In fact, each one of these countries has an anti-dumping regime that it readily uses to control market access with respect to goods originating from another NAFTA Member State. Anti-dumping legislation constitutes a real impediment to free trade, and when used within a free trade area such as NAFTA it negatively affects the integration process and free trade within the area.

The elimination of anti-dumping duties and anti-dumping law within the NAFTA is essential for the long-term success of the Agreement. As a result the interest of the national governments has to shift from protecting their national markets using anti-dumping law, to protecting fair trade within the area using an integrated competition regime enforced by a central authority. However, given the present political climate it is unlikely that the governments of the NAFTA Member States will make it a priority to give up their sovereignty with respect to anti-dumping law. In this context, and considering that NAFTA is relatively young compared to the EC, it remains to be seen how the Agreement will grow and develop and whether free trade will win over protectionism in the area.

Cost calculation and normal value adjustment/ Comparison of normal value and export price

Article 2(4) of the *GATT Anti-Dumping Code* is the provision dealing with comparison of export price and normal value. This provision states that comparison should be made at the same level of trade. According to the *GATT Code* this should be done at an ex-factory level, and with respect to sales made at as nearly as possible the same time. Differences affecting price comparability should be taken into consideration¹. In the cases referred to above, where there is no export price or if the export price is unreliable and needs to be reconstructed, allowances for costs should be made and the normal value should be at a level of trade equivalent to the level of trade of the constructed export price. Footnote 7 of the *Code* warns against duplication of adjustments. Finally, the *Code* states, “[t]he Authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties”². This last sentence of Article 2(4) of the *Code* clearly states that the burden of proof is on the party claiming the adjustment. The warning against an ‘unreasonable’ burden of proof does not change that fact it is still the party claiming the adjustment that has to the onus of proving that it is appropriate in the circumstances.

Obviously, the adjustment mechanism under Canadian legislation discussed below aims at achieving this fair comparison requirement. However Canadian legislation does not contain a generic provision clearly stating that there should be a fair comparison between the export price and normal value or warning against duplication of adjustments.

¹See *GATT Anti-Dumping Code*, Article 2.4: “Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.”

Canadian legislation contains a number of provisions aiming at adjusting the cost of goods and their normal value under certain circumstances. These provisions are found in both *SIMA* and *SIMR*. Sections 20, 21, and 23 of *SIMA* contain provisions aiming at adjusting cost and normal value calculation based on specific factual considerations. Section 20 of *SIMA* deals with normal value calculation in non-market economies. Equivalent provisions are Article 2(7) of the *GATT Anti-Dumping Code*, which refers to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994, and Article 2(7) of *EC Regulation 384/96*. For the purpose of our study, these provisions will not be examined since they cover only a small portion of all anti-dumping measures and most importantly, this study aims at looking at the effect of anti-dumping provisions on market economies within free trade areas. Therefore, findings of dumping in relation to goods providing from non-market economies are of little interest here.

Section 21 of *SIMA* deals with the price calculation of goods sold on credit terms³. The objective here is to “provide[] for adjustments to ensure that a proper comparison is made”⁴ in the specific situation “when the credit terms for export sales differ from those on domestic sales”⁵. According to the *SIMA Handbook* “[t]he basic idea behind sections 21 [...] of *SIMA* is that, where the terms of payment for goods are not as simple as a single payment at time of settlement but rather involve one or more payments of principal, or principal and

² *GATT Anti-Dumping Code*, Article 2(4).

³ *SIMA Handbook*, pg. 5.7.1.2 defines “credit sales”: “The following two types of sales meet the requirements for using sections 21[...] of *SIMA*: (a) sales where there is a specific written financing agreement outlining a schedule of payment including principal and interest or of principal or interest, i.e., capital goods; and (b) sales where there is a promissory note providing for the payment of interest within a specified time frame. A promissory note generally provides that the maker (the borrower) of the note agrees to pay a fee, known as interest, for the right to use the funds provided.”

⁴ *SIMA Handbook*, pg. 5.7.1.

⁵ *SIMA Handbook*, pg. 5.7.1.

interest, over an extended period of time, then this extended financing arrangement will be reduced to its cash equivalent by means of a present value⁶ calculation”⁷. Further, Section 21(1)(ii)(A) and (B) along with section 18 of *SIMR* provide with details as to the interest rate that has to be used during this process. Section 23 of *SIMA* deals with situations where the exporter does not sell directly to the importer in Canada, but goes through an intermediate in the country of origin. A benefit⁸ is then offered by the exporter, directly or indirectly, to the Canadian importer. The amount of that benefit has to be subtracted from the normal value. The result will therefore be a normal value, which reflects this benefit.

In addition to these provisions, the *SIMR* contains a number of additional provisions aiming at adjusting normal value. Sections 3 and 4 of the *SIMR* deal with quantitative adjustments. These provisions “are intended to ensure that the sales used in determining normal value reflect the quantity discount, if any, which is generally granted by the exporter on domestic sales in the same quantities as the quantity sold to the importer”⁹. Such a discount has to be deducted from the selling price of like goods. For this deduction to take place the discount has to be considered “generally granted”¹⁰. Such a discount will be considered as generally granted when “at least 50 per cent of the domestic sales used in the determination of normal value were to customers who were actually given the discount. It should be noted that it is not necessary for the importer to have actually received a quantity

⁶*SIMA Handbook*, pg. 5.7.1.2: “Present value is the current equivalent of a sum to be received at some future point in time. This current value is known as the discounted or present value and denoted by PV. The formula for the present value of future payments, due in years, given *i* as the discount rate (i.e., interest rate), is given by:

$$PV = \sum \frac{FV}{(1 + i)^n}$$

Where: \sum = summation; FV = future value of each payment; *i* = interest rate; *n* = number of periods.

⁷*SIMA Handbook*, pg. 5.7.1.2.

⁸Section 23 of *SIMA* defines benefit as being a “rebate, service, other goods or otherwise”.

⁹*SIMA Handbook*, pg. 5.3.1.

discount in order for section 3 to apply. As long as a discount is generally granted on domestic sales, it must be taken into account in determining the normal value of the goods”¹¹. Section 4 of the *SIMR* is used when the discount cannot be ascertained. This section offers the possibility of an upward adjustment when goods sold to Canada are in smaller quantities than those generally sold locally, or downward when goods sold to Canada are in greater quantities than those generally sold locally. Section 5 of the *SIMR* deals with qualitative differences. It “is designed to allow adjustments to be made in the normal value calculation to take account of differences in quality, structure and other features between the goods sold to Canada and the goods on which normal value is based. Section 5 of the *SIMR* would be used to make appropriate adjustments where the goods are not identical in all respects but differ in some way which their values may be quantified”¹². Adjustments can be made upward or downwards. This section does not however provide rules on how the amount of adjustment has to be calculated¹³. Section 6 of the *SIMR* provides an adjustment mechanism when a rebate, a deferred discount or a discount for cash is on one hand ‘generally granted’ on the sale of like goods in the country of origin, and on the other, if the sale of goods to the Canadian importer had taken place in the domestic market, such a discount would have been granted there. This section provides for a downward adjustment in these circumstances¹⁴.

¹⁰ *SIMR*, Section 3.

¹¹ *SIMA Handbook*, pg. 5.3.1.

¹² *SIMA Handbook*, pg. 5.3.2.

¹³ *SIMA Handbook*, pg. 5.3.2.

¹⁴ Section 5.3.3. of the *SIMR* states that: “To determine whether an adjustment is warranted under section 6 of the *SIMR*, the domestic sales being used to determine normal value must be examined closely to determine if such sales are eligible and whether the purchasers have generally received the rebates, deferred discounts or cash discounts. Such rebates and discounts may or may not be shown on invoices covering the sales and recourse may be necessary to other sales records to confirm the offering and granting of rebates or discounts in the domestic market. Once it has been determined that rebates, deferred discounts or cash discounts are generally granted and taken on sales being used to determine normal value, then the purchases by the Canadian importer are examined to see if the terms and conditions would qualify these sales for any of the rebates or discounts granted in the domestic market if the importer

Sections 7 and 8 of the *SIMR* provide for downward adjustment in order to calculate the normal value of the like goods free of delivery cost. Such delivery cost will be deducted from the price of the like goods, whether the goods are sold on an individual or common delivered basis. Section 9 of the *SIMR* deals specifically with normal value calculated pursuant to Section 16(1)(b), meaning when normal value is calculated based on the sale of goods in the domestic country to purchasers who are at the nearest and subsequent trade level as the importer, precisely because there were insufficient sales to purchasers at the same trade level of the importer. In other words, this is the trade level adjustment mechanism available under Canadian law. Recognizing that considering sales at different trade levels might affect the comparability of normal value and export price, due specifically to the difference in the level of trade between the sale to the importer and the sale to the local purchaser, Canadian legislation provides us with two adjustment mechanisms to remedy this disparity. The *SIMR* does provide us with a hierarchy with respect to these methods, and it is further stated in the *SIMA Handbook* that: “[t]he method set out in paragraph 9(a) should be used whenever possible and the secondary method in paragraph 9(b) should be used only when sufficient information cannot be obtained to use the first method”¹⁵. The method set out in paragraph 9(a) of the *SIMR* is also referred to as the primary method. This method consists on deducting “the amount of any costs, charges, or expenses incurred by the vendor of the like goods in selling”¹⁶ the product on the domestic market to those purchasers who are not at the same trade level as the exporter. The *SIMA Handbook* further states, “[t]he total amount of the adjustment to be deducted under paragraph 9(a) is the sum of the separate amounts

were a domestic customer. If the importer qualifies, the discount is deducted from the price of the like goods in determining the normal value.”

¹⁵*SIMA Handbook*, pg. 5.3.5.

determined for each activity. That is, an adjustment is made only to account for activities which the exporter performs in the domestic market, but which the exporter does not perform at all in respect of selling to the importer because it is the importer's role to perform those activities in Canada, in view of his trade level"¹⁷. The *Handbook* further recognizes the difficulty associated with identifying which activities should be considered to require a normal value adjustment and which one should not. To answer this question reference is made to a CITT decision¹⁸ where it is stated that "adjustments related to general cost of doing business or circumstances of doing business in general should not be allowed"¹⁹. In this decision the CITT considered warehousing expenses to be relevant expenses and therefore required an adjustment however, bad debts and administrative expenses were not considered relevant expenses and no adjustment was granted. When the method described in Section 9(a) could not be used, then the secondary method of adjustment described in Section 9(b) is applied. This secondary way of adjusting normal value allows for a deduction equal to the discount granted, in the country of origin to purchasers who are at the same trade level as the importer, by other vendors than the exporter. The *SIMA Handbook* states that if there is no formal discount schedule, then it is possible to determine the amount of discount through the analysis of pricing patterns.²⁰ The last provision relating to normal value adjustment deals with internal taxes and duties. Section 10 of the *SIMR* states that normal value shall be adjusted by deducting such taxes and duties. The *SIMA Handbook* specifies that it is indirect taxes that are targeted by this provision, that is, taxes levied on the sale of goods and

¹⁶*SIMR*, Section 9(a).

¹⁷*SIMA Handbook*, pg. 5.3.5.1.

¹⁸*Madison Industrial Equipments Ltd. v. Deputy Minister for Customs and Excise*, [1991] C.I.T.T. No 13, Appeal No 2936.

¹⁹*Madison Industrial Equipments Ltd. v. Deputy Minister for Customs and Excise*.

materials, and only when these taxes and duties are included in the price of the like goods on the domestic market but not borne by the goods sold to the importer²¹.

EC legislation addresses the issue in Article 2(10) of *EC Regulation 384/96*. Just like Article 2(4) of the *GATT Anti-Dumping Code*, Article 2(10) provides that “[a] fair comparison shall be made between the export price and the normal value. This comparison should be made at nearly as possible the same time and with due account taken of other differences which affect price comparability”²². This part of EC legislation reproduces word for word Article 2(4) of the *GATT Anti-Dumping Code*. EC legislation goes on to say that adjustments will be made on merits on a case-by-case basis for factors claimed and demonstrated to affect price comparability, but also avoiding duplications. The legislation then lists the adjustments, which could be made. Differences in physical characteristics, which affect the market value of the product, will result in an adjustment equivalent to the difference in the market value of the products²³. An adjustment is also available to counter the effect of import charges and indirect taxes. The adjustments for indirect taxes covers essential value added taxes, and the adjustment for import charges relates to those charges borne by the like product when intended for consumption in the exporting country and either not collected or refunded with respect to the product exported. The import charges need to have actually been paid in the exporting country and the adjustment will be equivalent to the amount actually paid²⁴. The third adjustment in the EC legislation relates to discounts,

²⁰ *SIMA Handbook*, pg. 5.3.5.2.

²¹ *SIMA Handbook*, pg. 5.3.6.

²² *GATT Anti-Dumping Code*, Article 2(10) *chapeau*.

²³ *Magnetic Discs from Hong Kong and Korea/provisional*, OJ No L 68, 11.3.94, p.5, recital 18.

²⁴ *Polyethylene/polypropylene bags and sacks from India, Indonesia and Thailand/definitive*, O.J. No L 276, 9.10.97, p.1, recital 19.

rebates and quantities. Such discounts and rebates have to be directly linked to the sales under consideration. The discounts and rebates could be linked to the quantities purchased. The legislation also contains an adjustment mechanism when sales in the domestic market and the export market are made at different trade levels. Article 2(10)(d)(i) stipulates four conditions that must be met in order for an exporter to qualify for a level of trade adjustment. The first of these conditions consists on demonstrating that the export price or the constructed export price is at a different level of trade from the normal value. The second condition requires proof that the difference between the levels of trade has affected price comparability. In EC law, this requires proof of how much prices are affected by the difference considered²⁵. This is not a requirement of the *GATT Anti-Dumping Code* and a very difficult requirement to meet. The third condition states that the difference in the level of trade must be demonstrated by consistent and distinct differences of functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. This either is not a requirement set out in the *Code* and it is also very difficult to meet since operators on the market place rarely work within a specific consistent scheme²⁶. The fourth and final condition requires a clear distinction of functions and prices between the different levels of trade in the domestic market, since the amount of the adjustment will be based on the domestic value of the difference. This also is not a requirement found in the *Anti-Dumping Code* and results in the refusal of the allowances, since it requires that sales at the

²⁵Didier, Pierre: *The WTO Anti-Dumping Code and EC Practice, Issues for review in trade negotiations*, Journal of World Trade, 35(1), 2001., p. 40.

²⁶*Ibid*, p.41.

same level of trade as the export sales take place in the domestic market²⁷. These sales in the domestic market will be used to calculate the impact of the difference.

The exporter has to prove these facts, when he is capable of doing so, then the amount of the adjustment will be based on the market value of the difference. Alternatively, if the exporter cannot meet the requirements of Article 2(10)(d)(i), an adjustment could still be granted if the conditions of Article 2(10)(d)(ii) are met. This last provision applies specifically when an existing 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. Under these circumstances a special adjustment will be granted. In this situation, the level of adjustment will necessarily have to be based on an estimate²⁸. It is stated in *EC Anti-dumping Law* that this Article is “a recognition that level of trade adjustments cannot be refused simply on the grounds that the exporter is not in a position to quantify his claim. In other words, a situation can exist where the existence of a difference is manifest and in these cases a ‘special’ adjustment should be made.”²⁹

Article 2(10)(e) deals with adjustments relating to transport, insurance, handling, loading and ancillary costs. An adjustment will be made in the costs directly related to the transport of the goods from the premises of the exporter to an independent buyer, on the condition that such costs were included in the prices charged, and that the selling and buying entities are not

²⁷ *Ibid.*

²⁸ Muller, W., Khan, N., Neuman, H.-A., *EC Anti-Dumping Law - A commentary on Regulation 384/96*, John Wiley & Sons, West Sussex, 1998,, pg. 2.212, p. 132.

²⁹ *Ibid.*

related³⁰. The idea here is to make an ex-factory comparison therefore, transport expenses, which are contained in the normal value, or the export price shall be deducted in order to make a comparison on an ex-factory basis³¹.

EC legislation also provides for adjustments with respect to expenses related to packing, credit, after-sales cost and commissions in Articles 2(10)(f) to (i). With respect to packing, only packing expenses directly related to the sales under consideration can be taken into account.

Credit costs will also trigger adjustments if they affect price comparability, in other words, if it can be demonstrated that such credit terms affect the customer's decision to make a purchase³².

The value of the adjustment will be the market value of the credit advantage granted. The allowances for after-sales costs cover the expenses for warranties, guaranties and product support which have to be borne by the exporter in accordance with the terms of the sale contract or the law of the country concerned. Only the guarantee costs for transactions falling within the investigation period will be taken into account³³. Finally an adjustment will be granted for commissions to traders and agents, when these commissions are directly linked to sales under consideration.

EC legislation also deals with currency conversions. This will be addressed below. However special attention should be given to the final paragraph of Article 2(10) of *EC Regulation 384/96*. This paragraph is a general provision, which aims at all other adjustments not covered by other provisions of *EC Regulation 384/96*, and the goal here is to avoid any asymmetry between export price and normal value. Canadian legislation does not contain a similar provision, in fact

³⁰ *Matsushita Electric Industrial Co. Ltd. and Another v. Council*, Case C-175/87, [1992] ECR I-1409, pg. 37 et seq. & *Cannon Inc. v. Council*, Case C-171/87, ECR I-1237, pg. 39.

³¹ Muller, W., Khan, N., Neuman, H.-A., *supra* n. 28, pg. 2.220, p. 134.

³² *Ibid*, pg. 2.225, p. 135.

³³ *Compact Disc Players from Japan/refund*, OJ No L 150, 22.6.93, p. 44, recital 10.

adjustments under *SIMA* and the *SIMR* are limited to those listed in the legislation and discussed above. Paragraph 2(10)(k) of *EC Regulation 384/96* provides for adjustments for all differences, provided 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”³⁴. The adoption of this paragraph by the Community clearly shows that the Community’s position is to be the least restrictive by not exclusively limiting adjustments to an exhaustive list. Community Authorities seem to acknowledge that it is possible to conceive of other circumstances where it could be demonstrated that unlisted cost factors are responsible for a different price level³⁵.

The adjustments under EC legislation could be made either on the initiative of the Community’s institutions or upon request of a party concerned³⁶. The onus of proof in the latter situation will be on the party claiming the adjustment³⁷, and the following three criteria must be met: first the difference must concern one of the factors listed in Article 2(10); second, price comparability must be affected and third, the difference must be directly linked to the sales under consideration³⁸. However, there is no mention in EC legislation of the last sentence of Article 2(4) of the *GATT Anti-Dumping Code* stating that “[t]he Authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison [...]”. With respect to adjustments made by the Community’s institutions on their own initiative, these adjustments will

³⁴ *EC Regulation 384/96*, Article 2(10)(k).

³⁵ Muller, W., Khan, N., Neuman, H.-A., *supra* n. 28, pg. 2.237, p. 139.

³⁶ *Ibid*, pg. 2.244, p. 142.

³⁷ *Nakajima All Precision Co. Ltd. v. Council*, pg. 73; *Calcium Metal from P.R. of China and Russia/provisional*, O.J. No L 104, 23.4.94, p.5, recital 21; *Gestelner Holdings plc v. Council and Commission*, Case C-156-87, [1990] ECR I-781, pg. 38.

³⁸ *Cannon Inc. v. Council*, pg. 32; With respect to the third requirement it is stated in *EC Anti-Dumping Law* at pg. 2.247, p. 143 that this criterion refers to direct selling expenses and does not apply to adjustments falling under subparagraphs (d) and (k).

be made if it is demonstrated that there are differences in factors, which affect prices and price comparability³⁹.

A final factor, which may trigger an adjustment, relates to the conversion of currencies. This adjustment is specifically and separately addressed in the *GATT Anti-Dumping code* at Article 2.4.1. The *Code* states that if the comparison between the export price and the normal value requires a conversion of currencies, the rate to be used should be the one of the date of sale⁴⁰. The fluctuations in exchange rates should not be considered and exporters should be given by the Authorities a period of at least 60 days to adjust their export prices to reflect sustained movements in exchange rates during the period of investigation.

Article 2(10)(j) of *EC Regulation 384/96* is the corresponding provision under EC law. EC legislation reproduces almost word for word Article 2.4.1 of the *GATT Anti-Dumping Code*. Looking at Canadian legislation, no similar provision can be found. In fact, neither *SIMA* nor the *SIMR* provide for an adjustment mechanism to take into account differences in currencies. That does not mean however that Canadian legislation ignores the issue of currency conversions, it is however addressed differently. Section 44 and 45 of the *SIMR* deal with currency conversions in general terms and not specifically in relation to proper comparison of normal value and export price. The Regulation simply states that “where an amount is used or taken into account for any purpose in the administration or enforcement of the Act is expressed in the currency of a country other than Canada, the equivalent dollar value of that amount shall be calculated by multiplying that other currency amount by the prevailing rate of exchange [...] for that currency for the date of

³⁹ Muller, W., Khan, N., Neuman, H.-A., *supra* n. 28, pg. 2.248, p. 143.

⁴⁰ The date of sale is defined in footnote 8 of the *GATT Anti-Dumping Code* as being normally “the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of the sale”.

sale”⁴¹. ‘Sale’ is defined under *SIMA* as being “an agreement to sell, lease or rent and an irrevocable tender”⁴². This definition does not provide a clear indication as to the appropriate date of sale to be used. The *SIMA Handbook* vaguely addresses the issue, referring to this definition of ‘sale’, it states that the date of sale “could mean taking the date of such tender, as opposed to the contract date or purchase order date as the date of sale”⁴³. This is very different from the definition of the date of sale under the *GATT Anti-Dumping Code* and EC legislation, which clearly prefer the date of invoice, or the date of contract or purchase order. Further on that issue, Section 45 of the *SIMR* provides an alternative when the date of sale is not known, it states that the date of shipment to Canada is used instead. The second paragraph of Section 44 deals with the sale of currencies on forward markets and it is similar to the equivalent Articles in the *GATT Anti-Dumping Code* and EC legislation. Finally, it is certainly noteworthy to mention that Canadian legislation does not contain a stipulation similar to the one found in the *GATT Anti-Dumping Code* and EC legislation relating to ignoring currency fluctuations. This could potentially lead to flawed comparisons between the export price and normal value, and this is especially true under Canadian legislation since normal value is not calculated at the time closest to the sale transaction to Canada but rather during a sixty day period which could have started as far as one year and sixty days before the sale transaction⁴⁴ making the normal value calculation even more vulnerable to fluctuation in the exchange rate. Logically, this would have required Canadian legislation to provide for an adjustment mechanism at least equivalent to what is found in the *Code* and EC legislation and to allow exporters sufficient time to adjust their export prices to the fluctuations of exchange rates.

⁴¹ *SIMR*, Section 44(1).

⁴² *SIMA*, Section 2(1) “sale”.

⁴³ *SIMA Handbook*, pg. 5.7.3. “Currency Conversion”.

Although both Canadian and EC legislation contain some mechanisms aiming at adjusting the normal value and export price in order to ensure a better comparability of the two figures, neither legislative text has developed a truly comprehensive and non-bias adjustment mechanism in order to achieve that result. Comparability of normal value and export price is crucial in a dumping investigation since it is the result of this comparison that will eventually show whether or not dumping is effectively taking place, and as such the adjustment process deserves utmost attention in order to insure that the figures which are being compared are actually comparable and to avoid arbitrary results. The adjustment process contained in Canadian and EC legislation is not automatic and places the burden of proof on those claiming the adjustment. This, along with other conditions discussed above make it very difficult for foreign producers to claim adjustments and easier for the investigating authorities to compare figures which are not really comparable. This process best serves the purposes of the investigation in order to reach a finding of dumping. The results reached by the investigation under these conditions do not necessarily reflect economic reality and do not necessarily mean that dumping activities are actually taking place.

⁴⁴See *SIMA Handbook*, pg. 4.4.3.

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