

The EEC Antidumping Policy: New Developments†

Introduction

The intense competition and rivalry of international trade have prompted nations to increasingly protect themselves by adopting defensive measures. This concern has recently preoccupied the 'European Economic Community's (EEC) different institutions' which in particular are under the pressure of an increasingly large number of dumping complaints from EEC industrial associations who feel they are suffering from distorted competition. Another important development relevant to this problem are the first decisions handed down by the Court of Justice of the European Community (hereinafter, the Court) on this subject on March 29, 1979.²

Most of the defensive measures taken by the nations' parties in response to the General Agreement on Tariff and Trade (GATT) are supposed to be in line with the principles contained either in the agreement itself or in the modifications to it. The same is the case for the EEC dumping rules principally contained in EEC Regulation 459/68 of April 5, 1968,³ which have been recently modified in EEC Regulation 1681/79 of August 1, 1979.⁴ The later

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†EDITOR'S NOTE: This article was prepared in the fall of 1979. An EEC Regulation on the same subject was released on December 20, 1979. A paper is under preparation to discuss the major provisions contained in this regulation and will appear in one of the next issues.

¹See, e.g., the European Parliament Resolution of May 8, 1978, O.J. EUR. COMM. (No. C 108/23) — (1978), urging the Commission to, *inter alia*, achieve the following aim in the Tokyo round of the multilateral trade negotiations: ". . . in the field of safeguarding action against dumping and subsidies under Article VI (of the GATT): to eliminate the existing discrepancies between the practices of States, thereby equalizing the obligations and rights of all GATT members."

²NTN Toyo Bearing Co. v. Council, Case No. 113/77; Import Standard Office S.A. v. Council, Case No. 118/77; Nippon Seiko K.K. v. Council, Case No. 119/77; Toyo Seiko Co. v. Council, Case No. 120/77; Nachi Fujikoshi Co. v. Council, Case No. 121/77 (not yet reported) [hereinafter cited as the Japanese Roller Bearings Case].

³11 O.J. EUR. COMM. (No. L 93) 1 (1968) [hereinafter cited as Reg. 459/68].

⁴22 O.J. EUR. COMM. (No. L 196) 1 (1979) [hereinafter cited as Reg. 1681/79].

modification has resulted principally from the need to clarify several concepts contained in Regulation 459/68 which proved to be inconsistent or imprecise in their application and also because of the Court's first rulings on the subject.

Regulation 459/68 provides that antidumping duties will be imposed whenever an investigation into a particular case demonstrates: (1) that dumping or subsidization is or has been taking place; (2) that such dumping or subsidization is causing or threatening to cause material injury to an established EEC industry or is materially retarding the establishment of an EEC industry; and (3) that the interest of the EEC calls for immediate intervention.⁵

This rule applies to all products imported from non-EEC countries.⁶ This implies that the dumping regulations can have a cumulative effect with specific provisions applicable to certain products such as agricultural products, although, until now, no dumping procedure has involved imports of agricultural products. With respect to products covered by the European Coal and Steel Community Treaty of 1952, the Commission has taken special protective measures against dumping which are very similar to the provisions contained in Regulation 459/68.⁷

I. The New Definitions under Regulation 1681/79

A. Dumping

Regulation 1681/79 has introduced a number of clarifications and new definitions, principally with respect to the concept of dumping. It provides that a product shall be considered to have been dumped if its export price to the EEC is below the normal value of the like product.⁸

B. Normal Value

The general rule to be followed in determining the "normal value" is to refer to the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country of origin.⁹ There are two cases where this general rule will not apply because the necessary comparison is rendered difficult or biased:

⁵Reg. 459/68, *supra* note 3, art. 15, § 1(a).

⁶*Id.*, art. 1, § 3.

⁷Commission Recommendation No. 77/329/ECSC, 20 O.J. EUR. COMM. (No. L 114) 6 (1977), *as modified* by Recommendation No. 3004/77/ECSC, 20 O.J. EUR. COMM. (No. L 352) 13 (1977).

⁸Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 1).

⁹Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 2 (a) (aa)). On the question of the meaning of "in the ordinary course of trade" and whether persistent selling at a loss could be considered to be "in the ordinary course of trade," see the opinion of Mr. Advocate General J.-P. Warner in the Japanese Roller Bearings Case, Case No. 121/77 (not yet reported). See also Part IC *infra*.

1. when there are no sales of the like product in the ordinary course of trade on the domestic market or in the exporting country;
2. when, because of the particular market situation, such sales do not permit a proper comparison.

In such cases, the normal value will be determined by the price of the like product when exported to any third country. Although the Commission has almost never used this method so far, the chosen exporting price to a third country may be the highest alternative provided that it is representative.¹⁰ In the two alternatives where no valid comparison on the domestic market is possible, the Commission may also choose to use the constructed value. For various reasons, this method has been frequently used by the Commission.¹¹

The constructed value is determined as being the cost of production. This includes the overhead costs in the country of origin plus a reasonable profit margin. Usually the profit is determined by comparison with the profit normally realized on the sales of products of the same general category in the domestic market of the country of origin. If such a reference is unavailable, the profit margin to be added to the cost of production will be left to the Commission's discretion and will be based upon the "available information."¹²

C. Normal Commercial Transaction

Regulation 1681/79 offers as an example of a situation in which sales can be considered as not having been effected in the course of a normal commercial transaction or "in the ordinary course of trade" in the country of origin, the case where a product is sold at a lower price than the production cost. If the Commission believes or suspects that sales in the country of origin have taken place, "in substantial quantities," at prices below the cost of production, without any chance of recovery of the cost in the normal course of trade and within a reasonable period of time, and if such situation has continued during an "extended period of time," then the Commission will have the choice of assessing the normal value in one of four ways:

1. by referring to the remaining sales on the domestic market at a price which is not less than the cost of production;
2. by referring to the export sales to third countries;

¹⁰Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 2 (a) (bb) (i)).

¹¹In the case of bicycle chains originating in Taiwan, the reason was the particular situation on the Taiwan market. Council Regulation No. 316/77, 20 O.J. EUR. COMM. (No. L 45) 41 (1977). In the case of ferrochromium, the reason was the disproportion between the sale volume which represented a small portion of the total turnover. Council Regulation No. 1355/78, 21 O.J. EUR. COMM. (No. L 165) — (1978). The same method was also used in the case of roller bearings originating in Japan. Council Regulation No. 1778/77, 20 O.J. EUR. COMM. (No. L 196) 1 (1977).

¹²Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 2 (a) (bb) (ii)).

3. by referring to the constructed value; or
4. by adjusting the price below cost of production in order to eliminate loss and to provide for a reasonable profit¹³

D. *State Trading Countries*

In the case of imports from state trading countries, the EEC has now codified the method used previously:¹⁴ the normal value will be determined on the basis of the price at which a similar product is actually sold for consumption in a market economy country or actually sold by such country to other countries, including those of the EEC.¹⁵ If more appropriate, the Commission can use the constructed value of the similar product in a market economy country.¹⁶ A third alternative is available when neither the price nor the constructed value is available: the price actually paid or payable in the EEC for the like product, duly adjusted if necessary to ensure a reasonable profit margin.¹⁷

E. *Intermediate Country*

Should a product not be imported directly from the country of origin to the EEC but from an intermediate country, then the Commission will consider the normal value as being the price paid for a similar product on the domestic market of either the country of origin or the intermediate country. The price being paid on the domestic market in the country of origin for the similar product will be used for comparison, when the product is either merely transhipped through the intermediate country (where it is not produced), or when no comparable price exists in such a country.¹⁸

F. *Export Price*

The normal value will then be compared to the export price. The export price is deemed to be the price actually paid or payable for the product sold for export to the EEC.¹⁹ However, there are two exceptions to this general rule:

1. when there is no such export price;
2. when it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party.

The Commission relied on this second form of what is generally under-

¹³Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 4, art. 3, § 2 (b)).

¹⁴*See, e.g.*, Council Regulation No. 322/79 of February 16, 1979, 22 O.J. EUR. COMM. (No. L 44) — (1979) (imposing a provisional antidumping duty on herbicides originating in Rumania).

¹⁵Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 2 (c) (aa)).

¹⁶Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 2 (c) (bb)).

¹⁷Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 2 (c) (cc)).

¹⁸Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 2 (d)).

¹⁹Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 3 (a)).

stood as “occult” dumping in the *Japanese Roller Bearings Case*²⁰ because, *inter alia*, of the existence of a mere exclusive distribution agreement. This position was attacked when the case came before the European Court of Justice, Mr. Advocate General J.-P. Warner arguing that a distribution relationship could not as such constitute an association within the concept of occult dumping.²¹

In these two forms of occult dumping, the export price will be constructed on the basis of the price at which the product is first resold to an independent purchaser, with an adjustment for selling costs and profit between the importer and buyer.

The same constructed export price will apply if the product is not resold to an independent buyer, or is reconditioned before resale. In this case, the constructed value will be established on any “reasonable basis,” subject to the usual adjustment for selling costs and profit.

This adjustment will include:

1. the usual transport, insurance, handling, loading and related costs;
2. the customs duties, any antidumping duty and other taxes payable in the importing country by reason of the importation or sale of the products;
3. a reasonable margin for overheads and profit and/or any usual commission.²²

For comparability purposes, the prices must be at the same commercial level, which in principle is the ex-factory price, and “the dates should be as close as possible.”²³ Regulation 1681/79 does not clarify this vague requirement, leaving wide discretion to the EEC authorities.²⁴

G. *Due Allowances*

The EEC has, however, greatly developed the concept of “due allowances” for differences in conditions and terms of sale which may affect price comparability.

Regulation 1681/79 gives some indication of the allowances which may be taken into consideration for differences in circumstances of sale. It is to be noted that the burden of proof on such differences will lie with the person who asserts them.²⁵

By and large, there are three categories of allowances: differences in (1) merchandise, (2) quantities and (3) conditions and terms of sale.

The effect of differences in merchandise on the market value in the country of origin or export will be examined. If the necessary elements are not avail-

²⁰Nachi Fujikoshi Co. v. Council, Case No. 121/77 (not yet reported).

²¹*Id.* (opinion of Mr. Advocate General J.-P. Warner).

²²Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 3 (b)).

²³Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 4 (a)).

²⁴Van Bael, *The EEC Antidumping Rules*, 12 INT'L LAW. 523, 527 (1978).

²⁵Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 4 (b)).

able or do not permit a fair comparison, the effect of differences in merchandise will be calculated from the different production costs of the elements that make such differences.²⁶

Differences in price due to variation in quantities will be accepted if such differences result from price discounts for quantity sales on the domestic market. To qualify, such discounts must have been freely granted "in the normal course of trade" over a period of at least six months and for at least twenty percent of the total sale of the product in the domestic market or, alternatively, in a third country market.²⁷ Differences in price due to quantities may also result from savings in the cost of producing different quantities.²⁸ There is one limitation in the allowances for differences in quantities: when the export price is calculated with reference to export quantities which are less than the smallest quantity sold on the domestic market, then the higher price for such small quantity on the domestic market will be taken into consideration for the allowances.²⁹

In order to be taken into account, the differences in conditions and terms of sale must bear a direct relationship to the litigious sales. These will include, *inter alia*, differences in credit terms, guarantees, warranties, technical assistance, servicing and commissions. The amount of such differences will be determined normally by reference to their cost to the seller or exporter, and rarely in terms of the component of the product value.³⁰

On a question which has given rise to much controversy,³¹ Regulation 1681/79 expressly provides that, in accordance with the GATT principles, imported products which have received an exemption from an indirect tax in the export country will not be considered to have been dumped in the Common Market.³²

²⁶Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 4 (b) (aa)).

²⁷Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 4 (b) (bb) (i)).

²⁸Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 4 (b) (bb) (ii)).

²⁹Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 4 (b) (bb)).

³⁰Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 4 (b) (cc)).

³¹In *Zenith Radio Corporation v. United States*, 98 S. Ct. 2441 (1978), the United States Supreme Court ruled on June 21, 1978 that Japan's practice of exempting her exports from commodity taxes did not require the Treasury Department to impose countervailing duties. The United States Treasury Department had traditionally taken the view that tax concessions of this sort did not qualify as an export "bounty" or "grant" which, under United States legislation, requires the imposition of countervailing duties. The United States Supreme Court decision upheld the reversal of a decision of the United States Customs Court requiring the United States to impose a countervailing duty on Japanese electronic products which had received an exemption from commodity taxes in Japan. The significance of the Supreme Court decision extended beyond the *Zenith* case itself. Had the decision gone the other way, challenges to the European practice of rebating value added taxes with respect to exports would have been certain. One such challenge brought by the United States Steel Company was pending in the lower courts when the Supreme Court ruled.

³²Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 4 (c)).

H. Dumping Margin

According to the GATT requirements, any antidumping duty may not be greater in amount than the margin of dumping.³³ Regulation 459/68 had already confirmed this principle.³⁴ Regulation 1681/79 further defines the notion of "dumping margin." The margin of dumping is the difference between the normal value and the export price. Difficulty may arise when prices vary. In that case, the Commission is entitled to establish the dumping margin on a transaction-by-transaction basis or by reference to weighted³⁵ or representative³⁶ average prices.

When there is a variation in the dumping margins, the Commission will rely on the average margin.³⁷

II. Determination of Injury

Dumping must cause or threaten to cause material injury to an established community industry or materially retard the setting up of an industry whose establishment in the EEC is envisaged.³⁸ The new rules do not change this basic concept of material injury. The injury caused by factors other than dumping must be isolated; no injury can be attributed to dumping if the latter is not manifestly the main cause of it. When considering the factors other than dumping which might have an adverse effect on the EEC industry, the consequences of proven dumping are compared with these other factors in order to determine if dumping is the principal cause of injury.³⁹ These other factors include the volume and prices of other imports of the product in question, competition between the EEC producers themselves or the contraction in demand which is caused, *inter alia*, by the substitution of other products, the changes in consumer tastes or the variation in export trade.⁴⁰

³³General Agreement on Tariffs and Trade (GATT) Oct. 30, 1947, Art. VI, § 2.61 Stat. (5) and (6), T.I.A.S. No. 1700.

³⁴Reg. 459/68, *supra* note 3, art. 19, § 3.

³⁵Concerning the method of weighted average prices, see the opinion of Mr. Advocate General J.-P. Warner in the Japanese Roller Bearings Case, Case No. 121/77 (not yet reported):

. . . the prices used by the Commission for the purposes of its calculation were, both in the case of export prices and in the case of domestic prices, weighted average prices, in other words for each product an average was calculated by dividing the total amount obtained on sales by the total amount of units sold. This method was chosen because there were considerable price variations on individual transactions even in respect to the same product from the same supplier.

³⁶When there is a very large number of different types of the litigious product being sold in the EEC, it is impracticable to calculate dumping margins for all of them and the calculation is done therefore for the representative types only. This was the method adopted in the Japanese Roller Bearings Case, Case No. 121/77 (not yet reported).

³⁷Reg. 1681/79, *supra* note 4, art. 1 (amending Reg. 459/68, *supra* note 3, art. 3, § 5).

³⁸Reg. 459/68, *supra* note 3, art. 2, § 1.

³⁹Reg. 1681/79, *supra* note 4, art. 2 (amending Reg. 459/68, *supra* note 3, art. 4, § 3 (a)).

⁴⁰Reg. 1681/79, *supra* note 4, art. 2 (amending Reg. 459/68, *supra* note 3, art. 4, § 2).

Historically, the factors most frequently relied upon by the Commission to impose antidumping duties were:

1. a price level for the imported products which was slightly below the EEC's price;
2. an increase in imports:
 - cycle chains (Taiwan): increased by fifteen percent⁴¹
 - ferrochromium (South Africa, Sweden): increased by forty-five percent⁴²
 - kraft liner (U.S.A.): increased by seventy to eighty percent⁴³
3. a decrease in the EEC's production.

Besides the establishment of dumping and injury, a third condition has to be met before the Commission or Council can levy duties: "The interest of the EEC should call for EEC intervention."⁴⁴ The concept of EEC interest covers a wide range of factors including consumer's interest, the interests of the producers of the product and the necessity to maintain competition in the EEC.⁴⁵

III. Refinements in Procedure

An important safeguard for parties charged with dumping are the new rules concerning their right to be informed and to due process. This is mainly a consequence of the Court decision in the *Japanese Roller Bearings Case*. In short, a dumping proceeding is initiated either by the filing of a complaint by an EEC individual or industry, or, in the absence of a complaint, by a direct communication by a Member State to the Commission.⁴⁶ As of yet, all of the proceedings have been opened by the filing of a complaint.

When a complaint is filed, it is examined to insure that there is sufficient *prima facie* evidence of dumping and of material injury or threat thereof. When a *prima facie* case has been established, the Commission takes over the full investigation following publication of a notice in the *Official Journal*.⁴⁷

The Commission has broad investigatory powers both within and outside the EEC. It may hold hearings in which the parties directly concerned—the complainant, the exporters and importers of the product in question, and the official representatives of the exporting country—present their written or verbal opinions. Alternatively, the Commission may organize adversary hearings at which the parties may present their arguments and be cross-examined.⁴⁸

⁴¹Council Reg. 316/77, 20 O.J. EUR. COMM. (No. L 45) 4 (1977).

⁴²Council Reg. 1355/78, 21 O.J. EUR. COMM. (No. L 165) 20 (1978).

⁴³Council Reg. 572/79, 22 O.J. EUR. COMM. (No. L 77) 1 (1979).

⁴⁴Reg. 459/68, *supra* note 3, art. 15, § 1 (a).

⁴⁵DIRECTOR GENERAL FOR EXTERNAL RELATIONS, EEC COMMISSION, GUIDANCE FOR APPLICANTS SEEKING ACTION AGAINST DUMPED OR SUBSIDISED IMPORTS (Jan. 11, 1978).

⁴⁶Reg. 459/68, *supra* note 3 art. 6.

⁴⁷*Id.*, art. 10, §§ 1, 2.

⁴⁸*Id.*, art. 10, § 6 (a, b).

This latter method has been used in most cases so far. Under the former rule, the Commission had limited the parties' access to information and refused to disclose either the details of the dumping margin calculation or the motive for its findings.⁴⁹ It took the view that imposition of dumping duties was a matter of regulation (antidumping duties are imposed pursuant to a Council Regulation),⁵⁰ and that restricting the scope of cross-examination was a matter of legislative discretion.⁵¹ However, under the pressure of the Court of Justice decision in the *Japanese Roller Bearings Case*, the rules have been modified in order to better preserve the right of a party's access to information used against him.⁵² Regulation 1681/79 provides that the parties concerned may obtain information relating to any essential facts or considerations that might prompt the Commission to recommend definitive measures.⁵³ The parties are requested to address their detailed questions to the Commission in writing, not later than one month after the publication of the notice of initiation of the proceeding, or, in the case where a temporary duty has been imposed, within two weeks from the date of publication of the duty's imposition.⁵⁴ Regulation 1681/79 provides that the requested information may be given either orally or in writing, at the Commission's discretion.⁵⁵

IV. Outcomes of Proceeding

At the time of the investigation of a complaint by the Commission, a temporary antidumping duty may be imposed if it is feared that counter action will be taken by the exporters or if the allegedly dumped imports have already obtained a substantial share of the market and are rapidly increasing. Thus, if a preliminary examination shows that dumping has occurred, that there is sufficient evidence of injury and that the interest of the EEC calls for immediate action, a temporary duty will be imposed.⁵⁶ The amount of this temporary

⁴⁹On the fact-finding approach used by the Commission so far, see Bellstedt, *Antidumpingverfahren der Kommission der Europäischen Gemeinschaften*, 8 RECHT DER INTERNATIONALEN WIRTSCHAFT. 534 (1979).

⁵⁰Reg. 459/68, *supra* note 3 art. 19, § 1.

⁵¹On the legal consequences of imposing antidumping duties by means of regulation, see Lesguillons, *Le Régime Anti-Dumping de la Communauté Européenne*, 4 INT'L TRADE L. PRAC. 502 n.35 (1978).

⁵²See the opinion of Mr. Advocate General J.-P. Warner in the *Japanese Rolling Bearing Case*, Case No. 121/77 (not yet reported).

It is a fundamental principle of Community law that, before any individual measure or decision is taken, of such a nature as directly to affect the interests of a particular person, that person has a right to be heard by the responsible authority; and it is part and parcel of that principle that, in order to enable him effectively to exercise that right, the person concerned is entitled to be informed to the facts and considerations on the basis of which the authority is minded to act.

Id.

⁵³Reg 1681/79, *supra* note 4, art. 3 (amending Reg. 459/68, *supra* note 3, art. 10, § 4 (b)).

⁵⁴Reg 1681/79, *supra* note 4, art. 3 (amending Reg. 459/68, *supra* note 3, art. 10, § 4 (c) (aa)).

⁵⁵Reg 1681/79, *supra* note 4, art. 3 (amending Reg. 459/68, *supra* note 3, art. 10, § 4 (c) (bb)).

⁵⁶Reg. 459/68, *supra* note 3, art. 15, § 1.

duty is not payable if, for instance, security in the form of a bank guaranty can be lodged by the importers with the proper customs authorities.⁵⁷ This measure is valid for three months and may be renewed up to a maximum of six months if the investigation has not been completed and the exporters and importers who represent a substantial proportion of the litigious imports either request or do not object to such extension.⁵⁸

If no dumping or injury is found, the proceeding is terminated. In such case, the Commission submits a report to the Council who in turn approves the proposition and the proceeding is ended.⁵⁹

The proceeding may also be closed if the exporter undertakes to cease dumping, that is, agrees to raise his prices or ceases to export the product in question to the EEC, provided that the Commission, after hearing from the *ad hoc* Antidumping Committee, finds these actions sufficient.⁶⁰ Difficulties may arise if a settlement agreement to raise prices or to stop exports is not complied with by the exporter. For this reason, the Commission is entitled to control the exports and to monitor compliance with the settlement agreement.⁶¹ Also, if the obligation of the exporters is being evaded or no longer observed, the Commission, after informing the Member States, is entitled to reopen the file and, after a new examination of the facts, to impose a provisional duty immediately.⁶²

An important issue in the *Japanese Roller Bearings Case* concerned the legality of imposing a definitive antidumping duty in spite of a voluntary undertaking signed on July 19, 1977 by the four major Japanese producers that obligated the producers to revise their prices in order to eliminate the dumping margin. (This undertaking resulted in an increase of twenty percent in their export prices.)

Despite this voluntary agreement, the Council issued a regulation on July 26, 1977:⁶³

1. To impose a definitive antidumping duty of fifteen percent on the products in question and to suspend the application of such duty;
2. To provide a right for the Commission to terminate the suspension of the duty application if it finds that the undertaking assumed by the Japanese producers is being evaded, not being observed or has been withdrawn;
3. To provide for the definitive collection of the amounts secured by way of a temporary antidumping duty previously imposed.

⁵⁷Lesguillons, *supra* note 51, at 500.

⁵⁸Reg. 1681/79, *supra* note 4, art. 5 (amending Reg. 459/68, *supra* note 3, art. 16, § 2).

⁵⁹Reg. 459/68, *supra* note 3, art. 14, § 1 (a).

⁶⁰Reg. 1681/79, *supra* note 4, art. 4 (amending Reg. 459/68, *supra* note 3, art. 14, § 2).

⁶¹See how the Commission exercised its control right on the imports into the EEC of bicycle tires and tubes from South Korea and Taiwan. Comm. Dec. 77/710, 20 O.J. EUR. COMM. (No. L 292) - (1977), *as extended by* Comm. Dec. 79/31, 22 O.J. EUR. COMM. (No. L 9) - (1979).

⁶²Reg. 459/68, *supra* note 3, art. 14, § 2 (d).

⁶³Reg. 1778/77, 20 O.J. EUR. COMM. (No. L 196) - (1977).

The Court decided that the Council's decision was a clear violation of Regulation 459/68, article 17. It held that since an undertaking by an importer to revise his prices leads to the termination of the proceeding, it is impossible thereafter to apply article 17 of the Regulation, which provides for the collection of amounts secured by way of temporary duty. The Court voided Council Regulation no. 1778/77. Regulation 1681/79 now contains the statutory basis for retaining a temporary antidumping duty should there be similar cases.⁶⁴

The power to retain temporary duties already levied independent from any decision by the Council to impose a definitive antidumping duty, has been reinforced in the redraft of article 17. It now provides that, when a temporary duty has been applied, the Council shall be free to decide, "irrespective of whether a definitive antidumping duty is to be imposed, what proportion of the temporary duty is to be definitely collected." Of course, any definitive collection signifies that either material injury and dumping have been established or that EEC industries would have suffered such injury had the temporary action not been taken.

This new possibility to definitely collect the amounts secured by way of a temporary duty after a voluntary undertaking to revise the prices has been concluded is important since the Commission has exhibited a distinct preference for such settlements. The number of cases where a definitive antidumping duty has been imposed is small (only thirteen cases up until August 1979, including those cases where the duties were thereafter annulled or suspended).

V. Recourses

Another question raised in the *Japanese Roller Bearings Case* was how and when to defeat a measure taken in an antidumping matter. The recourse provided in Regulation 459/68 was very limited and has been narrowed even further in Regulation 1681/79.⁶⁵ This recourse is reserved solely to the importer and does not permit questioning of the legality of a measure.

Regulation 459/68 expressly provided the possibility for an importer to show that no dumping had taken place. The consequence being that, if successful, he had the chance to recover the entire antidumping duty. Regulation 1681/79 provides that an importer can only recover the amount of duty in excess of the actual dumping margin if he can show that the collected duty exceeded such margin.

Another recourse that was pursued in the *Japanese Roller Bearings Case* was the annulment proceeding based on article 173 of the Treaty of Rome. According to this provision, any person may institute a proceeding against "a decision addressed to him or against a decision which, although in the form

⁶⁴Reg 1681/79, *supra* note 4, art. 6 (amending Reg. 459/68, *supra* note 3, art. 17, § 2 (a)).

⁶⁵Reg 1681/79, *supra* note 4, art. 7 (amending Reg. 459/68, *supra* note 3, art. 19, § 4 (a)).

of a regulation or a decision addressed to another person, is of direct and individual concern to him." The limited applicability of this recourse when applied to antidumping proceedings results from the fact that antidumping measures, such as the imposition of a duty, are taken by virtue of Council regulations,⁶⁶ and thus reliance on the annulment recourse requires a showing that the antidumping measure was an actual "decision in the form of a regulation." In the *Japanese Roller Bearings Case*, the Court ruled that the litigious regulation did not contain the normative features inherent to regulations and, in fact, was a real "decision" directed to four exporters and importers specifically designated:

Thus, although drafted in general terms, article 1 (of Regulation 1778/77) in fact concerns only the situation of the major Japanese producers . . . who are directly and individually concerned by reason of the undertakings which they have given to revise their prices. . . .⁶⁷ Although, the collection of the amounts secured by way of temporary antidumping duty is *per se* of direct concern to any importer who has imported the products in question subject to such a duty, the special feature of article 3 (of Regulation 1778/77) which sets it apart from all the other articles is that it does not concern all importers but only those who have imported the products manufactured by the four major Japanese producers named in that article.⁶⁸

As mentioned earlier, the Commission is increasingly engaged in antidumping proceedings involving a variety of products. In the past, there were no more than six or seven antidumping proceedings opened each year; now, this number has soared substantially and further developments in this area are expected, primarily as a result of the GATT multilateral trade negotiations.⁶⁹

From January through June 1979, the break down per country for proceedings opened by the Commission is as follows: Spain, 14; Czechoslovakia, 10; Poland and Rumania, 9; Japan and East Germany, 8; the Soviet Union, 6; Hungary, the United States, and Canada, 5; Bulgaria, Sweden, and Brazil, 4; Australia, South Korea, and Finland, 3; South Africa, Austria, and Greece, 2; Portugal, Norway, Yugoslavia and Turkey, 1.

The ever-increasing application of antidumping measures showed that the basic Regulation 459/68 had many weaknesses and needed to be more sharply defined. The new Regulation 1681/79 is supposed to fill the gaps and permit the Common Market to deal more effectively with dumping. Its future application by the EEC will prove whether or not this requirement has been satisfied.

⁶⁶Reg. 1681/79, *supra* note 4, art. 7 (amending Reg. 459/68, *supra* note 3, art. 19, § 4 (a)).

⁶⁷See *Nippon Seiko K.K. v. Council*, Case No. 119/77, § 3.

⁶⁸*Id.* § 14.

⁶⁹See the last paragraph to the Preamble, Reg 1681/79, *supra* note 4. Whereas the EEC's new legislation seems to meet much of the GATT antidumping provisions and, therefore, will not need extensive modification in the future, some GATT members are faced with some fundamental legislation work. For example, Canada still proves to be deficient in implementing the Antidumping Code requirements with respect to the right to information and representation and the faculty to enter into price undertakings. (Antidumping Code arts. 6, 7).