The Anti-Circumvention provision in the light of the WTO framework

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Table of contents

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I. Introduction

The first part of this work analyzes the functioning of the current European Anti-Circumvention Provision (the Provision). Where possible, the description of the various elements contained in the text of the Provision has been completed by examples of concrete application borrowed from the EC Commission's practice. In the second part, the author attempts to answer the question of the compatibility of the European Anti-Circumvention Provision with the WTO obligations accepted by the Community and its Members States as part of their WTO Membership. The absence of any specific reference to anti-circumvention in the WTO legal texts and jurisprudence are major obstacles to such an exercise. The author concludes that, despite the fact that the current European Anti-Circumvention Provision significantly differs from the one first introduced in 1987 and found incompatible with several of the EEC's GATT obligations, its consistency 'as itself and as applied' with the GATT and WTO Anti-Dumping Agreement deserves to be investigated. In particular, the incongruence between the Provision's procedures leading to determine whether dumping and injury has taken place on one hand, and the precise requirements contained in the WTO Anti-Dumping Agreement on the other, makes certain sections of the EC Anti-Circumvention Provision vulnerable to a panel ruling against the current regime. Finally, this work sets forth a concise description of the pertinent Uruguay Round negotiations, as well as those that are ongoing within the Informal Group on Anti-Circumvention.

II. Notion and examples of circumvention

To circumvent means "to avoid by or as by going around", or "to bypass".[1] In the context of trade remedies (anti-dumping and countervailing duties), the term "circumvention" refers to exporters' attempts to avoid or get around the payment of

the extra-duty imposed on a given product in order to offset the unfair advantage the product in question would otherwise enjoy. Anti-circumvention of anti-dumping duties, as explained by the word itself, is an action taken by governments and aimed to prevent that such situations may occur. It generally consists in the extension of the anti-dumping duty originally established after investigations on the products (or part thereof), which, in different ways, are found to circumvent the effective application of such extra duties.[2] While the WTO multilateral framework provides in its agreements a precise and detailed definition of "dumping"[3] or "subsidy"[4], a commonly agreed definition of the circumstances that may constitute "circumvention" does not exist. A definition of circumvention cannot be found in any of the GATT or the Agreement on Implementation of Article VI of GATT 1994 (thereafter "WTO Anti-Dumping Agreement") provisions.[5]

The situations in which circumvention may occur are "numerous, fact specific and unpredictable".[6] The following are examples of situations potentially resulting in the evasion of the scope of the application of anti-dumping duties: (i) the minor modification of a product to an extent that anti-dumping duties are not collected, although the slightly modified product retains its basic essential characteristics and is sold to similar groups of customers or for similar purposes. Such modifications could be a change in the form, the physical shape, or the composition of the product; (ii) the assembly operation of a like product in a third country or in an importing country, if the setting up of this operation, for instance, coincides with or follows an anti-dumping investigation and is of a non-substantial nature;

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1 See Webster's Concise Dictionary of the English Language, Könemann, 1997. The German expression "*umgehen*" and the French one "*contourner*" are also expressive of the meaning of this word.

2 A similar provision can be found at Art. 23 of Regulation 2026/97 on Protection against Subsidized Imports from Countries not Members of the European Community. An alternative solution to the imposition of anti-circumvention duties, envisaged by European legislation, consists of the parties agreeing on satisfactory voluntary undertakings according to which exporters revise the prices or cease exports to the area in question at dumped prices. See Art. 8 of the EC Regulation of 22 December 1995 on Protection against Dumped Imports from Countries not Members of the European Community, OJ L 56 of 6.3.1996, p. 1.

3 See Art. 2 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (in brief the Anti-Dumping Agreement).

4 See Art. 1 of the Subsidies and Countervailing Measures Agreement (in brief the SCM Agreement).

5 Since circumvention (at least in major proportions) is a relatively recent phenomenon, it is not surprising to note the absence of any reference to anti-circumvention in the GATT 1947. On the contrary, the fact that this issue is not regulated in the Antidumping Agreement which entered into force in 1995 is itself indicative of the difficulties Members encountered in their attempt to find a satisfactory and acceptable solution to it.

6 WTO Doc. G/ADP/IG/W/2, 8 October 1997, Paper by the United States.

(iii) the transshipment of goods subject to anti-dumping duties through a third country, and (iv) incorrect customs declarations concerning the origin, tariff classification or value of the goods imported.[7]

III. Multilateral negotiations on anti-cirumvention

Unexpectedly, anti-circumvention became a highly contested issue during the Uruguay Round (UR) negotiations.[8] The inclusion of a provision on anti-circumvention among the disciplines on anti-dumping was mainly supported by the US and the EC, both of whom pushed hard to retain, and in the best scenario even expand their discretion to meet "what they saw as much-changed patterns of international trade, in which new practices were being used by companies to avoid the present rules of the Tokyo Anti-Dumping Code and thereby causing injury to the domestic industry".[9]

The Dunkel Draft[10] contained in Art. 12 the following provision on anti-circumvention: "Parts or components may be included within the scope of an existing anti-dumping duty if assembly of these parts is carried out by a related party, in the importing country, from parts sourced from the country subject to the anti-dumping order, and the total cost of the parts or components at issue is not less than 70 % of the total cost of all parts/components, but in no case shall the

7 These examples of circumvention have been provided by several Member countries during the Informal Group negotiations. See e.g. WTO Doc. G/ADP/IG/W/1, 3 October 1997, Paper by the European Community; WTO Doc. G/ADP/IG/W/2, 8 October 1997, Paper by the United States; and WTO Doc. G/ADP/IG/W/4, 29 October 1997, Paper by Japan. This list is not intended to provide an exhaustive description of all possible methods exporters can use in order to circumvent anti-dumping duties. Additionally, it does not necessarily imply that all Members recognize the listed measures as situations deserving intervention.

8 See *Vermulst/Driessen*, Commercial Defense Actions and Other International Trade Developments in the European Communities IX: 1 July 1994-31 December 1994, European Journal of International Law, No. 6, 1995, p. 291, and *Stewart*, The GATT Uruguay Round: A Negotiating History (1986-1992), in III volumes. Kluwer Law and Taxation Publishers, Deventer, Boston 1993, Vol. II, p. 1512.

9 See *Croome*, Reshaping the World Trading System: A History of the Uruguay Round, WTO, Geneva, 1995, p. 68. As illustrated *infra*, both countries unilaterally introduced anti-circumvention provisions during the Uruguay Round negotiations. See also *Vermulst/Waer*, Anti-Diversion Rules in Antidumping Procedures: Interface or Short-circuit for the Management of Interdependence? Michigan Journal of International Law, 1990, Vol. 11, No. 4, pp. 1119-1120.

10 The Dunkel Draft (named for GATT's Secretary-General *Arthur Dunkel*) consisted of a comprehensive Final Act's Draft presented in December 1991 and aimed to bring the Round closer to a conclusion. See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, reproduced in *Stewart*, (fn. 8), Vol. III, p. 457 ff.

parts/components be included if the assembly's value added exceeds 25 % of the ex factory cost". There was no consensus on support for this provision. On the one hand, countries such as Japan, Hong Kong, Korea, Singapore and the European Nordic Countries could not accept the insertion of a provision allowing the extension of an anti-dumping duty without new investigation, and emphasized the absence of clear rules in determining the like character of parts and end-products potentially concerned by such an extension. On the other hand, the US and the EC, which already had in place disciplines on anti-circumvention, and had therefore fiercely pushed for the inclusion of a provision on anti-circumvention in the future multilateral instrument regulating anti-dumping, could not accept it either. They considered the anti-circumvention provision contained in the Dunkel Draft to be too complicated to apply to practical cases, and therefore largely ineffective.[11] The widely divergent opinions and the lack of additional time at the disposal of the negotiators made it impossible for the parties to reach an agreement. At the end of the Round, a Ministerial Decision was nevertheless agreed on which recognized the problem of circumvention and referred the matter to the Committee for Antidumping Practices for resolution.[12]

Whether the Ministerial Decision itself allows Members to adopt unilateral measures in this field is questionable.[13] The opinions of the Members on this issue are, as it is easy to imagine, divergent. In the EU and US view, the Decision permits individual Members to deal with the circumvention problem unilaterally, waiting for a multilateral solution to be found during the mandated negotiations. On the contrary, in Japan's opinion, in the absence of multilateral rules, the exceptional nature of anti-dumping makes the adoption of anti-circumvention mea-

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11 For a detailed description of the different positions of the main trading partners, see *Stewart*, (fn. 8), Vol. I, pp. 97-101.

12 The Ministerial Decision has the following text: "*Ministers, Noting* that while the problems of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text, *Mindful*, of the desirability of the applicability of uniform rules in this area as soon as possible, *Decide* to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution". The Ministerial Decision on Anti-Circumvention was adopted by Governments in Marrakesh and forms an integral part of the Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations.

13 In this regard it is interesting to consider that the GATT Panel on case of *EEC-Regulation on imports of parts and components* did not take into account the negotiations on anti-circumvention that took place during the Uruguay Round as a relevant element in the analysis of the EEC anti-circumvention provision's consistency with the GATT obligations. The Panel solely stated that "[it] was aware that a number of participants in the ongoing multilateral trade negotiations consider that the increased internationalization of production processes has led to certain problems in the administration of their anti-dumping laws, and that these issues are presently the subject of these negotiations." See Panel Report on *EEC-Regulation on imports of parts and components*, para. 5.28.

sures unlawful. Negotiations, which started in 1997 within the Informal Group, have so far failed to produce any concrete results. The reports of the Group's meetings show how essential questions such as the necessity to find a workable definition of circumvention still remain unresolved, and how the Members' positions, similar to what happened during the Uruguay Round, are still split on "dogmatic" issues.[14] In the meanwhile, taking advantage of the uncertain legal environment, several WTO Members, including a significant number of developing countries, have unilaterally 'armed' themselves to counteract circumvention of antidumping duties.[15]

IV. The EC Anti-Circumvention provision: evolution towards a more complex instrument

1. The first legislative step: the EEC Regulation 1761/87 ("Screwdriver Regulation") and the GATT Panel Report "EEC-Regulation on Imports of Parts and Components"

The Community undertook the first legislative steps to counteract circumvention of antidumping duties in 1987. In brief, the reasons motivating this initiative can be summarized as follows. From the mid 1980's, high-tech products such as photocopiers, electronic scales, hydraulic excavators, and printers increasingly substituted basic products (e.g. iron, steel and chemicals) as subject of anti-dumping cases. The import of such high-tech products did usually not take place in the form of finished products. Rather parts and components of products subject to antidumping duties were imported into the Community and subsequently assem-

14 The submissions made by Member countries during the meetings of the Informal Group on Anti-Circumvention can be consulted through the WTO website search engine (G/ADP/IG/W/...). Contributions on anti-circumvention have also been submitted in the context of the Negotiating Group on Rules Meetings, and include circumvention of antidumping and countervailing duties. See WTO Doc. TN/RL/GEN/71, 14 October 2005, Submission on Circumvention, Communication from the United States. The Ministerial Declaration agreed by the WTO Members at the end of the Sixth Ministerial Conference held in Hong Kong in December 2005 reaffirms the Members' commitment to the negotiations on anti-circumvention proceedings. See WT/MIN(05)/W/3/Rev.2, 18 December 2005, Annex D, para. 4.

15 Besides the United States and the European Union, the anti-dumping legislation of Armenia, Argentina, China, Colombia, Ecuador, Egypt, Iceland, Moldova, Malaysia, Mexico, Pakistan, Panama, Peru, South Africa, Turkey and Venezuela contains anti-circumvention provisions.

16 See *Stanbrook/Bentley*, Dumping and Subsidies, The Law Governing the Imposition of Anti-Dumping and Countervailing Duties in the European Community, 1996, p. 77. Growing globalization and the consequent lowering of transport costs and better possibilities to relocate production facilities from one country to another strongly facilitated and encouraged this business strategy.

bled.[16] According to the European authorities, this process, presenting extremely low levels of both employment and transfer of technological know-how, rendered the normal anti-dumping measures imposed by the Community on the finished products inefficient or, in other words, circumvented.[17] Based on these elements, the EEC amended in 1987 its 1984 Anti-Dumping basic Regulation and introduced the first anti-circumvention provision.[18] Article 13 para. 10 (a) of the 1987 Regulation allows for the extension of an anti-dumping duty, if three cumulative conditions are fulfilled[19]: (i) the assembly or production is carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to a definitive anti-dumping duty; (ii) the assembly or production operation was started or substantially increased after the opening of the anti-dumping investigation, and (iii) the value of parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty exceeds the value of all other parts or materials used by at least 50 percent. As one can see, the pioneering step made by the European Communities was a quite timid one, with the provision of Art. 13 para. 10 designed to counteract only circumvention by assembly-dumping taking place in the Community. Third country circumvention, on the contrary, continued to be dealt with by the provisions on rules of origin.[20]

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17 See OJ C 67 of 14.3.1987, p. 100. That is the reason why it is commonly referred to the regulation containing this provision as to the "Screwdriver Regulation", or "*Réglement tournevis*" and "*Schraubenzieher-Verordnung*" in French and German respectively. The question of the appropriateness of such a nickname has been questioned. Indeed, as pointed out by *Glashoff*, the expressions of assembling and other processing procedures comprise not only simple assembling procedures or other simple processing procedures (e.g. diluting, blending, bottling of paint or simple sewing proceedings), but also all single- and more stages assembling procedures which require a particular technical expertise, craftsmanship or special tools, devices or facilities, including chemical conversions. See *Glashoff*, Antidumpingzoll auf in der Europäischen Wirtschaftsgemeinschaft montierte oder hergestellte Waren, RIW, Heft 10, 1987, p. 777.

18 OJ L 167 of 26.6.1987, amending the Council Regulation (EEC) 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ L 201 of 30.7.1984, p. 1. This amendment was then consolidated in 1988 by the Council Regulation (EEC) 2423/88 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ L 209 of 2.9.1988, p. 1-17. In order to avoid confusion, this work refers to the first European provision on anti-circumvention as to the "1987 Regulation".

19 The other three items of paragraph 10 of Art. 13 (b, c and d) contain procedural prescriptions and require proportionality in the imposition of the original anti-dumping duty on imports found to be constitutive of circumvention.

20 In this regard, it seems meaningful to mention how the United States addressed the issue of circumvention. The US introduced its anti-circumvention provision after the European Communities, but the delay was widely compensated by its wider scope. Indeed, Section 1321 of the Omnibus Trade and Competitiveness Act of 1988 targets four types of circumvention (circumvention by assembly-dumping in the US, third country circumvention, import of slightly altered merchandise and of later-developed products), and for this reason Section 1321 has been

The first European anti-circumvention provision had a short life (1987-1990) and was applied in relatively few cases.[21] Reactions to its introduction were both supportive and critical.[22] It is important to note that among the few who considered the question of the compatibility of this new instrument with the GATT obligations binding the EEC, a pessimistic view was prevalent.[23] The accurateness of the

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defined as "four anti-circumvention provisions in one". For a detailed description of this provision, see *Clinton/Porter*, "The United States' New Anti-Circumvention Provision and its application by the Commerce Department", in Journal of World Trade, Vol. 24, N. 3, 1990, p. 10; *Vermulst/Waer*, (fn. 9), p. 1150-1157; and *Komuro*, US anti-circumvention measures and the GATT rules, Journal of World Trade, Vol. 28, N. 3, 1994. At the European level, however, the "split-system" (distinguishing between Community and third country circumvention), as discussed *infra*, continued until the introduction of the new provision on anti-circumvention in 1994. The most significant difference between the European and the US provision is the fact that the latter is levied on the import of parts and not on the finished product at a later stage. Other differences are the absence in the US provision of a maximum percentage of parts coming from the exporting country and the fact that the relationship between exporter and assembler is not a prerequisite of a finding of circumvention.

21 Part of the case law developed under the first anti-circumvention provision, however, represents an important source of information on the Community authorities' view of the matter, and contains reasoning and elaborations that are still applicable to the current provision. See e.g. *Electronic typewriters*, (EEC) Regulation 1022/88 of April 18, 1988, OJ L 101 of 20.4.1988, p. 4; the *Electronic scales* case, (EEC) Regulation 1021/88 of April 18, 1988, OJ L 101 of 20.4.1988, p. 1; *Ball bearings*, Commission Decision of January 20, 1989, OJ L 25 of 28.1.1989, p. 90; *Plain paper photocopiers*, (EEC) Regulation 3205/88 of October 17, 1988, OJ L 284 of 19.10.1988, p. 36; *Serial-Impact Dot-Matrix Printers*, (EEC) Regulation 3042/89 of October 6, 1989, OJ L 291 of 10.10.1989, p. 52. For a brief description of these cases see *Voillemot*, La Réglementation CEE anti-dumping et anti-subsidies, Paris, 1993, p. 142-145. It is interesting to notice that all the producers involved in these cases were Japanese. Annex 1 to the GATT Panel Report on *EEC-Regulation on imports of parts and components* provides a complete list of investigations carried out under Article 13 para. 10 of the Council Regulation (EEC) No. 2176/84 and later under the same article contained in Council Regulation 2423/88.

22 The changes made to the 1984 Regulation have been confronted with tremendous criticism from EC companies imminently affected. Indeed, they feared unwanted side effects or considered the changes to be legally questionable, incompatible with the system, unclear, impracticable or simply inefficient. Some individual EEC manufacturers have broadly supported the changes, given their interest in protection against dumping, but also their interest in an additional restriction of competition. However, the interests of many companies are split as their exports might be exposed to similar measures by third countries while providing themselves with goods from countries found guilty of dumping. Similarly, several Member States were concerned by the negative impact of the new Regulation on the investment climate by discouraging the establishment of assembly operations in the Community. See *Glashoff*, (fn. 16), p. 774, and *Steenebergen*, Circumvention of Antidumping Duties by Importation of Parts and Materials: Recent EEC Antidumping Rules, Fordham International Law Journal, 1988, (11), pp. 332-346. For a critical analysis of Regulation 1761/87 see *Landsittel*, Die EG-Antidumpingregelungen für "Schraubenzieherfabriken" nach der Entscheidung des GATT-Panel, EuZW, Heft 6, 1990, p. 177.

23 *See Steinbrook/Bentley*, Dumping and Subsidies, The Law governing the imposition of anti-dumping and countervailing duties in the European Community, Third Edition, Kluwer Law International, 1996, p. 78.

latter was confirmed in 1990, only three years after the entry into force of the anti-circumvention provision, when the GATT Panel released its report on the *EEC Regulation on import of parts and components* case brought by Japan. The GATT Panel's negative outcome *de facto* put an end to the application of the anti-circumvention provision of EEC Regulation 1761/87.[24] Several commentators accurately described this dispute.[25] References to the GATT Panel have nevertheless been included in this work to set forth the differences between the new and old anti-circumvention regimes where deemed particularly relevant in analyzing the compatibility of the current anti-circumvention provision with pertinent WTO requirements.

2. The anti-circumvention provisions of the EC Regulations 3283/94 and 384/96.

The anti-circumvention provision currently in force was adopted in its original form in 1994 through EC Regulation 3283/94. Its introduction aimed to fill the legal vacuum created by the decision to suspend the application of the first anti-circumvention provision as a result of the GATT 1990 Panel report.[26] Article 13 of EC Regulation 3283/94 presents significant differences from its predecessor. As stated in the recitals at the beginning of the Regulation, the introduction of the WTO Anti-Dumping-Agreement as a result of the Uruguay Round made such changes necessary.[27] EC Regulation 3283/94, was repealed *in toto* after less than two years by EC Regulation 384/96, however without changes relevant for this work.[28] Since its entry into force, the Provision underwent several minor amend-

24 In this regard it is important to point out that the EU decided, not without reluctance, to make its acceptance of the Panel report conditional upon a satisfactory solution in the Uruguay Round on the problem of circumvention. See Commission's Ninth Annual Report on Anti-Dumping Activity and Anti-Subsidies Policies (1990), SEC (1) 974 final, at pp. 23-24; *Holmes*, Anti-Circumvention under the European Union's New Anti-Dumping Rules, Journal of World Trade, Vol. 29, N. 3, 1995, at p. 164, and *Voillemot*, (fn. 21), p. 145. As reported *supra*, the Uruguay Round of Multilateral Negotiations failed to provide such satisfactory solution.

25 See the detailed contribution of *Hahn*, Assembly-Dumping in der EG und den USA, die Entscheidung des GATT-Rats im "Screwdriver"-Fall, RIW, Heft 9, 1991, pp. 739-745 and *Landsittel* (fn. 22).

26 OJ L 349 of 31.12.1994, pp. 1-2.

27 See Council Regulation No. 3283/94, OJ L 349 of 31.12.1994, p. 1, rec. 3. Ironically, doubts on its compatibility with the WTO obligations precisely arise from the differences between several elements contained in the Provision and the WTO Anti-Dumping Agreement.

28 The Council based this decision on the arguments that the 1994 Regulation contained significant text errors, that it had been amended twice already, and that it should be repealed and replaced in the interest of clarity, transparency and legal certainty. (See EC Regulation 384/96, OJ L 56 of 6.3.1996, p. 1 recs. 32, 33, 34). Since the two regulations contain exactly the same provision on anti-circumvention, in order to avoid confusion, this work refers to Regulation 384/96 only.

ments.[29] The following section provides a description of the technical aspect of the anti-circumvention provision of Art. 13 of EC Regulation 384/96.[30] Its consistency with the WTO multilateral obligations will be discussed, *infra*.

Article 13 of EC Regulation 384/96 contains two definitions of circumvention: (i) a general definition of circumvention in the second sentence of Art. 13 para. 1, and (ii) a description of assembly operations which typically amount to circumvention of anti-dumping duties in Art. 13 para. 2.

3. The general definition of Art. 13 para. 1

This definition, termed a "catch all" in light of its wide scope, is intended to apply to all practices, process or work resulting in circumvention.[31] As pointed out by *Didier*, by the provision of Art. 13 para. 1, the EC Legislature wanted to protect itself against "any form of circumvention which human imagination – infinitely fertile as regards avoidance of taxes and duties – could invent".[32] Notwithstanding the absence of an illustrative list of practices that constitute circumvention, the wording of para. 1 suggests that the intention of this legislation was mainly to cover simple cases of circumvention such as transshipment, repacking, reversible or slight product alterations, plain customs fraud,[33] and the imports of knockdown kits.[34]

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29 The amendments have been illustrated *infra*. None of them, however, can be considered important for the compatibility question at the heart of this work.

30 OJ L 56 of 6.3.1996, p. 1.

31 Given the provision is much more wide-ranging than the previous one, it was initially opposed (unsuccessfully) by the northern, more "liberal" States. It has been suggested that they accepted the inclusion of this provision in return for the southern "protectionist" States' accepting the introduction of an expanded "Community interest" requirement before anti-dumping duties can be imposed. (See Art. 21 of the EC Regulations 3283/94 and 384/96). It is interesting to note the similarities between this provision and the one contained in the Dunkel Draft reported *supra*.

32 *Didier*, "WTO Trade Instrument in the European Union Law", London, 1999, p. 159-160.

33 For instance false origin declarations of the product or of components; to some extent, the importation of "discrete components", i.e. kits imported via different customs entry-points or in different consignments and the erroneous description of the product involving another customs classification.

34 The amendments introduced by EC Regulation 461/2004, discussed *infra*, partially filled this gap. Interestingly, an illustrative list of practices that constitute circumvention cannot even be found in the Explanatory Memorandum to the Draft Anti-Dumping Regulation. See in this regard *Vermulst/Waer*, E.C. Anti-Dumping Law and Practice, Sweet & Maxwell Ltd., London, 1996, at p. 379; and *Van Bael/Bellis*, Anti-Dumping and Other Trade Protection Laws of the EC", 3rd Edition, CCH Eds., Bicester, 1996, p. 351.

According to Art. 13 para. 1, in order to establish the circumvention of anti-dumping duties the following conditions need to be met cumulatively: (a) a change in the pattern of trade between third countries and the Community; (b) which results from a practice, process or work; (c) for which there is insufficient due cause or economic justification other than the imposition of anti-dumping duty; (d) the remedial effects of the anti-dumping duty are being undermined in terms of the prices and/or quantities of the like products, and (e) evidence of dumping in relation to the normal values previously established for the like or similar products. In the following a description of the single elements of the definition is given. Where possible, examples of practical application of the different elements by the European Commission have been provided.

a) Change in the pattern of trade

The analysis of the change in the pattern of trade implies the consideration of two elements: (i) a decrease of the imports from the country targeted with anti-dumping duties, and (ii) the "substitution of these imports" in the form of an increase in imports from a third country after imposition of anti-dumping duties on other countries or increase in imports of a slightly different product from either a third country or the country in question. The *Bicycles from People's Republic China* case provides a practical example of how, in the Commission's practice, for this condition to be fulfilled, the change in the pattern of trade has to be a clear and consistent trend of substitution over a long period.[35]

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35 As stated in the Council Regulation extending the definitive anti-dumping duty on bicycles originating in the People's Republic of China to imports of certain bicycle parts from the same country. "Between 1992 and the investigation period, imports of bicycles (in units) from China into the Community decreased by more than 98 percent, which represents a decrease of 1,5 million units, whereas, for example, imports of finished bicycle frames, the main bicycle part imported by assembly operations, increased by more than 139 percent (in units) in the same period, which represents an increase of about 450 000 units. This substitution effect is corroborated by the data gathered during the on-the-spot investigation: the output of bicycles assembled from sets from the People's Republic of China by the five investigated companies – based on the practice described above at recital 10 – increased by 80 percent, which represents for these assemblers alone an increase of about 110 000 units between 1992 and the investigation period", *Bicycles from the P.R. China*, OJ L 16 of 18.1.1997, p. 555, rec. 13. However, as stated in *Polyester staple fibre/polyester filaments tow originating in Belarus*, the level of trade does not need to reach the level existing immediately before the anti-dumping measure. See Council Regulation (EC) No 2513/97 of 15 December 1997 extending the definitive anti-dumping duty imposed by Regulation (EC) No 1490/96 on polyester staple fiber originating in Belarus to imports of polyester filament tow from Belarus and levying the extended duty on the latter imports as registered under Commission Regulation (EC) No 693/97 OJ L 346 of 17.12.1997, p. 1, rec. 12.

b) Practice, process or work

The range of operations covered by the definition of Art. 13 para. 1 is very large including simple operations like slight alteration, repackaging and transshipment, only to mention a few of them.[36] In the absence of clear guidelines in the text of the Regulation itself, *Mueller*, *Kahn* and *Neumann* state that "a common feature of such practice, process or work, is that it does not trigger automatically the collection of the anti-dumping duty by the customs authorities".[37] The need to establish a causal link between a "practice, process or work" on the one hand and the change in the pattern of trade discussed *supra* on the other hand is an element that contributes to narrowing down the wideness of this element of the provision.

c) Insufficient due cause or economic justification

The change in the pattern of trade has to result from a practice, process or work for which there is insufficient due cause or economic justification, other than the imposition of the duty. This means that the EC authorities must examine the exact nature and motives for the practice, process or work performed in the third country and must take into account the import patterns, the functions of the articles in question, their marketing, packaging, and their expected use.[38] It is not clear, however, what exactly constitutes "insufficient due cause or economic justification". On the one hand, if one merely considers the wording of Art. 13 para. 1, it seems unlikely that the Commission will not find circumvention where it can be shown that there are also other factors providing due cause or economic justification.[39] An opposite conclusion is reached, on the other hand, if the concept of "insufficient due cause and economic justification" is interpreted by taking into account the fact that Art. 13 is rooted in customs law.[40] By following this second approach, the provision would only apply where there is no reason to do something other than to circumvent anti-dumping measures, and thus, if there are sev-

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36 This gap has partially been filled by the 2004 amendment through EC Regulation 461/2004, which introduces an illustrative list of activities considered as constitutive of circumvention. See *infra*, pp. 17-18.

37 *Müller/Kahn/Neumann*, EC Anti-Dumping Law, a Commentary on Regulation 384/96, Chichester, 1998, para. 13.21.

38 *Gas-fuelled, non-refillable pocket flint lighters and disposable refillable pocket flint lighters originating in China*, OJ L 22 of 29.1.1999, p. 1 recs. 15 *et seq*.

39 According to the text of the provision, it seems therefore possible that even if companies presented elements supporting the existence of due cause or economic justification, the Commission could nevertheless consider these elements as insufficient.

40 In particular see the approach adopted in the Customs Code, where legal recognition is not granted to acts whose only economic justification is to avoid the payment of duties. See Art. 25 of Regulation 2913/92.

eral valid reasons, including the circumvention of an anti-dumping duty, Art. 13 para. 1 does not apply.[41] The practice does not provide any clear guidance on this controversial issue. As pointed out by *Vermulst* and *Waer*, it is more likely that the Commission will require evidence that other factors than the imposition of the anti-dumping duty were the crucial factors motivating the operations in the third country and therefore constitute sufficient due cause or economic justification.[42]

d) Undermining the remedial effects of the duty

The definition of Art. 13 para. 1 requires the Commission to establish that the remedial effects of the duty are being undermined in terms of prices and/or quantities of the like products.[43] The analysis of the undermined effects represents a simplified version of the injury analysis carried out in the initial anti-dumping investigation under Art. 3 para. 2 item (b) of Regulation 384/96.[44] Under Art. 13 para. 1, the Commission simply compares the "undumped" export price of the original product (export price plus customs and anti-dumping duties) with the average sales price of the new product in the Community, and then estimates the extent to which imports of the new product have replaced those of the original.[45]

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41 *Müller/Kahn/Neumann*, (fn. 37), paras. 13.30-31; and *Holmes*, (fn. 50), p. 172. This approach is consistent with the Commission's comments in para. 10 (b) (ii) of the Explanatory Memorandum: "The measures could only be imposed under narrowly defined circumstances [...]".

42 *Vermulst/Waer*, (fn. 34), p. 382. Still unclear also remains the question of who is carrying the burden of proving the fulfillment of this condition. See in this regard the contradicting approaches taken in *Brother International GmbH v. Hauptzollamt Giessen*, 1989, ECR 4235 para. 28-29, and in the investigations in *Microdisks form various countries and Bicycles from China*, respectively OJ L 252 of 20.10.1995, p. 9 rec. 5 and OJ L 16 of 18.1.1997, p. 55, rec. 12.

43 The wording of Art. 13 para. 1 "and/or" suggests that this is an alternative test. In other words, when the prices are found not to undermine the remedial effects, this criterion may nevertheless be satisfied if it is found that the quantities exported undermine the remedial effects of the duty. About that issue, some authors point out that it would have been more logical to require the cumulative fulfillment of both the prices and quantities requirements. See *Vermulst/Waer*, (fn. 34), p. 382.

44 Indeed, Art. 13 para. 1 does not require repeating the full injury analysis carried out in the initial anti-dumping investigation. In general, the undermining of the remedial effect of a the duty is established where it is found that the allegedly circumventing products are sold on the Community market at prices equal to those of the injury determination in the initial investigation.

45 *Polyester staple fiber/polyester filament tow originating in Belarus*, OJ L 346 of 17.12.1997, p. 1, rec. 18.

e) Evidence of dumping

The last condition set out by Art. 13 para. 1 requires the establishment of dumping in relation to the normal values previously established for the like or similar products.[46] The Regulation does not require the calculation of a new normal value, but simply compares the price of the good under circumvention investigation with the normal value of the like (or similar) product subject to the anti-dumping duty. Where the Commission makes a finding of dumping (and, of course, where all the four other conditions illustrated *supra* are fulfilled), the existing anti-dumping duty may be extended to the goods found to circumvent the anti-dumping measure in question.[47]

Through the two last elements, not present in the first European anti-circumvention provision, the legislator attempted to reinforce the fact that anti-circumvention measures are not a separate and independent anti-dumping measure, but that, on the contrary, they are meant to ensure the enforcement of definitive measures already adopted after completion of accurate investigations compliant with the WTO Anti-Dumping Agreements. However, as discussed in the second part of this work, serious doubts remain on whether the anti-dumping determination and injury finding mandated by Art. 13 para. 1 can be considered as sufficient to satisfy the requirements set out in the WTO Anti-Dumping Agreement.

4. Art. 13 para. 2: "Circumvention through assembly operations"

Alongside the purported breadth of the "catch all" provision of Art. 13 para. 1, circumvention in the form of assembly operations, which was the sole target of the "restricted" circumvention provision of the 1987 Regulation, remains one of the main objectives pursued by the drafters of the 1996 Regulation. According to Art. 13 para. 2, circumvention of anti-dumping measures caused by assembly operations occurs if the following conditions are cumulatively met: (i) the operation started or substantially increased since, or just prior to, the initiation of the anti-

46 It is interesting to note that this last condition was not planned to be inserted in the 3823/94 Regulation. On the contrary, the Commission's Explanatory Note defines the additional anti-dumping test contained in the Dunkel Draft as the "more burdensome and, in some cases, illogical conditions contained in the Dunkel Draft". As suggested by *Van Bael and Bellis*, the EC authorities decided at the very last moment to insert this requirement in the Regulation Draft, "presumably in an effort to increase the consistency of its provision with the multilateral obligations". See *Van Bael/Bellis*, (fn. 34), pp. 357-358.

47 This does not mean, however, that the dumping margin has to be identical with those established in the original anti-dumping investigation. See *Müller/Kahn/Neumann*, (fn. 37), para. 13.26. The provision does not provide any guidance on how to proceed in the event that the dumping margin determined in respect of the assembled product is less than the amount of the anti-dumping duty imposed in the initial investigation. Should the full duty rate be nevertheless applied? No question to this answer has been provided so far.

dumping investigation and the parts concerned are from the country subject to measures; (ii) the parts constitute 60 percent or more of the total value of the parts of the assembled product, except circumvention is established where the value added to the parts brought in, during the assembling or completion operation, is greater than 25 percent of the manufacturing cost; (iii) the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like products, and (iv) there is evidence of dumping in relation to the normal values previously established for the like or similar products.[48]

a) Substantial increase test

The first aspects that have to be analyzed when investigating circumvention by assembly operations are: (i) whether or not the operation started or substantially increased since, or just prior to, the initiation of the anti-dumping investigation,[49] and (ii) whether the parts concerned are from the country subject to anti-dumping duties.[50] The practical application of element (i) of the substantial interest test has been discussed in several cases under the anti-circumvention provision Art. 13 para. 10 of the 1987 Regulation. Particularly indicative of the way in which the Commission carries out the substantial increase test are the *Plain Paper Photocopiers* and the *Ball Bearings* cases.[51] As underscored by element (ii), the substantial

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48 The third and fourth conditions contained in the definition of assembly operations of Art. 13 para. 2 are identical as those of para. 1 and have therefore already been analyzed *supra*.

49 This provision adds to the one already contained in Art. 13 para. 10 of the 1987 Regulation the possibility that the operation started or increased *just prior*, to the initiation of the anti-dumping investigation.

50 The term "initiation" refers to the publication of the notice of initiation pursuant to Art. 5 para. 10 of Regulation 384/96. Some authors underline the fact that as this condition refers to an "initiation of anti-dumping investigation" and not to an anti-dumping proceeding, it would consequently appear that Art. 13 para. 2 is also applicable if the operation started or substantially increased in connection with a review investigation. For a support to this view see *Müller/Kahn/Neumann*, (fn. 37), para. 13.31.

51 In the case *Photocopiers from Japan* (*Plain paper photocopiers*), both Canon plants (Bretagne and Gießen) had increased production by 30 percent after the investigation began. Considering the fact that the 30 percent increase was from a large base and therefore greater in absolute terms, and that, in addition, at the Gießen plant the increase followed a period of relative stability in production (increases of "only 4,6 %"), the Community authorities concluded "on balance", that it would not be reasonable to consider the respective increases at the Canon plants as constituting less than substantial increases. Rank Xerox (the other Japanese photocopier producer), on the other hand, was held not to have substantially increased production, since the total annual number of PPC's produced in 1987 was only 4 percent higher than when production began in 1983. See Council Regulation (EEC) No 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No 535/87 to certain plain paper photocopiers assembled in the Community, OJ L 284 of 19.10.1988, pp. 36-40. In *Ball bearings*, both companies were also found to have established plants in the community prior the relevant anti-

increase test requires an examination of the provenance or origin of the parts. On this issue, the different linguistic versions of the Regulation cause uncertainty. While the English and French versions of the EC Regulation 384/96 merely require that parts "are from" the country subject to the measure, the explanatory memorandum uses the word "originated" and the German version of the Regulation uses the word "*Ursprung*".[52] How should this linguistic differences be dealt with? If one makes use of the term "originated", it would be sufficient if parts originating in the dumping country to be transited via a third country to circumvent the anti-circumvention measure. Conversely, if parts originating in a third country were transited via the dumping country, they would be assimilated to parts originating in the latter, which is clearly not acceptable for third countries.[53]

b) The 60 percent value of parts test

The second aspect that has to be examined by the Commission when investigating situations of circumvention through assembly is whether or not the parts assembled represent more than 60 percent of the total value of the parts of the assembled product. In practice, the test starts with the submission made by the company concerned of a parts list with purchase prices during the investigation period at the so-called "assembly factory gate" stage or "into-factory basis".[54] Information on the origin of each part in the form of certificates of origin and

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dumping case. In respect to these plants, it was found that volumes of ball bearings assembled "increased by more than 24 % in the year following the opening of the original investigation, and if the subsequent year is used as the basis, the increases [...] were [...] more than 40 % for the two year period". This situation, together with a finding that those increases "followed a period of relative stability in production" during which the number of ball bearings produced from 1980 through 1983 increased by 2,3 percent in one plant and not at all in the other, was considered to show that the increases in production constituted "substantial increases" under Art. 13 para. 10 item (a) of the 1988 EEC Regulation. See Commission Decision of 20 January 1989 terminating the proceedings under Article 13 (10) of Regulation (EEC) No 2423/88 concerning certain ball bearings assembled in the Community, OJ L 25 of 28.1.1989, pp. 90-91.

52 "*Ursprung*" means "origin" in English.

53 See *Didier*, (fn. 30), p. 167. In *Bicycle Parts from China*, the Community recognized in substance that the condition is one of origin, not of provenance. However, it presumes to originate from China all parts in provenance from that country unless the importer brings proof of a third country origin. See Council Regulation (EC) No 71/97 of 10 January 1997 extending the definitive anti-dumping duty imposed by Regulation (EEC) No 2474/93 on bicycles originating in the People's Republic of China to imports of certain bicycle parts from the People's Republic of China, and levying the extended duty on such imports registered under Regulation (EC) No 703/96, OJ L 16 of 18.1.1997, para. 5, al 2.

54 This includes transport costs, customs duties, custom clearance fees, etc., all elements that are not negligible in the calculation.

cost breakdowns are also collected.[55] For the calculation of the 60 percent threshold, the Commission adds up the value of all parts from the dumping country procured by the alleged assembler and by his related suppliers of subassemblies. Despite the fact that the text of Art. 13 para. 2 makes use of the singular mode when referring to the country subjected to the anti-dumping measures, in the event that the parts have multiple sources, the ceiling of 60 percent is calculated by adding parts originating from these several countries.[56] The rationale for this approach can be explained with the fact that, in the absence of such an addition, 100 percent of the parts could potentially originate from several dumping countries and, nevertheless, escape anti-circumvention as long as one single country intervenes for more than 60 percent.

c) The 25 percent value-added test

The third test is akin to a "safe harbor test"[57], and constitutes an exception to the 60 percent value of parts test. Even where the parts from the country subject to the anti-dumping measure constitute 60 percent or more of the total value of the parts of the assembled product, in no case shall circumvention be considered to be taking place where the value added to the parts brought in, during the assembly or completion operation, is greater than 25 percent of the manufacturing cost. This provision aims to exclude from a finding of circumvention assembly operations, which, despite a strong reliance on parts imported from the country subject to measures, are so labor and/or capital-intensive that the value added to the parts in the local manufacturing operations is significant.[58]

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55 *Vermulst/Waer*, (fn. 34), p. 383. It is therefore possible to distinguish between situations in which the parts come from one and only one country and situations where, on the contrary, the parts are imported from two or more countries subject to anti-dumping measures. It is commonly referred to the latter scenario as to "multi-country" – or "multiple sources" – cases.

56 An example of addition of parts originating from several countries can be found in the case *Electronic scales*, (EEC) Regulation 1021/88 of April 18, 1988, OJ L 101 of 20.4.1988, p. 1.

57 *See Vermulst/Waer*, (fn. 34), p. 384.

58 *Van Bael/Bellis*, (fn. 34), p. 357. In order to apply the 25 percent value-added test, the total cost of manufacture has to be established. The cost of manufacturing consists of the arm's length value of all parts used (whether imported, locally sourced or manufactured internally). In addition, labor costs and factory overheads are considered, but Selling, General and Administrative (SGA) expenses and profit are excluded. The 25 percent refer to value added to the assembled product within the factory and may cover such items as labor costs, manufacturing overhead and the value of the parts manufactured internally by the company carrying out the assembly operation. Parts purchased from suppliers will not, however, be taken into consideration for the purpose of this test unless the supplier and assembler are related parties operating within a single economic entity. See *Certain retail weighing scales from Japan and Singapore*, OJ L 141 of 31.5.97, p. 57 rec. 11.

V. The substantial differences between the 1987 and the 1994 anti-circumvention provisions

The most apparent difference between the two provisions consists of the extended coverage of Regulation 384/96, dealing with assembly operations taking place not only in the Community but also in any third or "intermediate" country.[59] As a result of such an extension, the recourse to rules of origin to tackle third-country circumvention was drastically reduced.[60] Second, and more relevant for this work, the outcome of the GATT Panel Report on *EEC-Regulation on imports of parts and components* induced the Community to assess anti-circumvention measures over the parts imported and not over the value of the product leaving the premises of the Community assembler as done under the 1987 provision. The consequence of this major change is significant. Contrary to what was done by the Panel in 1990, anti-circumvention duties applied on the base of the new anti-circumvention provision can no longer be found to be discriminative internal taxes within the meaning of Art. III para. 2 first sentence GATT.[61] Third, Art. 13 para. 2 no longer contains a condition that appeared in Art. 13 para. 10 of the 1987 Regulation, namely the condition that the assembly must be carried out by a party which is related to or associated with any of the manufacturers whose exports of the like product are subject to a definitive duty. This amendment allows the EC authorities to intervene in cases where the assembler is totally unrelated to the exporter but where the remedial effects of the duty are nevertheless undermined by import flows which have no other justification than the avoidance of the anti-dumping duty, and excludes discriminatory treatment between "related" and "non-related" assemblers.

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59 This extension of the scope of the anti-circumvention provision can be read as an attempt of the European Legislator not to provide incentives to foreign producers to set up plants in third countries rather than in the Community.

60 However, as noted by *Van Bael/Bellis*, (fn. 34), pp. 360-371, the relevance of rules of origin did not completely disappear. Additionally, products covered by anti-dumping duties remain subject to the Community origin rules, directly enforceable by the Member States' customs authorities. In the Communitarian rules of origin legislation, the anti-circumvention provision is contained in Art. 25 of Regulation 2913/92 establishing the Community Customs Code. This provision states: "Any processing or working in respect of which it is established, or in respect of which the facts as ascertained justify the presumption, that the sole object was to circumvent the provisions applicable in the Community to goods from specific countries shall under no circumstances be deemed to confer on the goods thus produced the origin of the country where it is carried out within the meaning of Article 24". However, contrary to Art. 13 para. 1 of Regulation 384/96, which merely refers to "insufficient due case and justifications", the wording of Art. 25 of Regulation 2913/92 is more restrictive ("[...] the sole object was to circumvent [...]"). This makes the recourse to the anti-circumvention provision of the Community origin rules more difficult.

61 Panel report on *EEC-Regulation on imports of parts and components*, para. 6.1.

VI. The minor modifications introduced by EC Regulation 461/2004[62]

The most recent amendment to Regulation 384/96 led to some minor modifications of Art. 13. First, in order to provide a higher degree of precision and legal certainty with regard to the identification of practices constitutive of that circumvention, para. 1 now contains an illustrative list of activities considered as "practice process of work process" within the meaning of Art. 13.[63] This list *inter alia* includes (i) the slight modification of the product concerned to make it fall under the customs codes, which are normally not subject to the measures, provided that the modification does not alter its essential characteristics; (ii) the consignment of the product subject to measures via third countries; and (iii) the reorganization by exporters or producers of their patterns and channels of sales in the country subject to measures in order to eventually have their products exported to the Community through producers benefiting from an individual duty rate lower than that applicable to the products of the manufacturers. Despite the fact that the list has an illustrative character, and that the Commission's practice developed since 1994 confirmed the circumventing character of some of the above-mentioned activities, its introduction nevertheless represents a step in the direction of a more precise and predictable definition of circumvention. Additionally, para. 1, as amended by the 462/2004 Regulation, also provides a clarification of the relationship between para. 1 and 2 of Art. 13. The original text contained in the 384/96 Regulation remained ambiguous in that regard, leaving it open to interpretation whether circumvention by assembly only takes place where the conditions set out by both paragraphs are cumulatively met. Secondly, it was not clear whether in the event that assembly operations do not meet all the conditions set out by Art. 13 para. 2 (e.g. non-fulfillment of the 60 percent parts test) they could, nevertheless, be considered a circumvention if they meet all the requirements of the general definition of para. 1. Besides the ambiguity of the legal text, the Commission's practice never provided a clear answer to these questions, and can even be defined as quite contradictory. In the case *Parts of bicycle from China*[64], involving allegations of assembly circumvention, the Commission conducted its analysis by taking all six conditions contained in the two paragraphs into consideration. On the contrary, in a later published Implementation Regulation, the Com-

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62 Council Regulation (EC) 461/2004, of 8 March 2004 amending Regulation (EC) 384/96 on protection against dumped imports from countries not members of the European Community and Regulation (EC) 2026/97 on protection against subsidized imports from countries not members of the European Community, OJ L 77 of 13.3.2004, p. 12.

63 The illustrative and not exhaustive character of the list contained in Art. 13 is confirmed by the use of the expression "*inter alia*" at the beginning of the list.

64 OJ L 16 of 18.1.1997, p. 55.

mission argues to be "charged with examining whether a party's assembly operations fall within the scope of Art. 13.2 of Regulation 384/96", thus implicitly recognizing the distinct and independent nature of the definitions of Art. 13.[65] The amendments to Art. 13 para. 1, introduced by EC Regulation 461/2004, puts an end to these interpretative ambiguities. The fact that para. 1, when referring to assembly operations, now explicitly mentions Art. 13 para. 2 ([...] in the circumstances indicated below under Article 13(2)) makes clear that the two provisions cover distinct circumstances and, consequently, that assembly dumping must exclusively be dealt with under para. 2.

Regulation 461/2004 resulted in some additional amendments to Art. 13. Article 13 para. 3 of Regulation 84/96 lays down the elements that a request for the initiation of anti-circumvention investigations must contain and some procedural guidelines on its conduct, without expressly mentioning the parties who have the right to introduce such request. The amended version of para. 3 remedied this situation and expressly mentions the Commission, the Member States and other interested parties as parties entitled to request the initiation of an anti-circumvention investigation. Lastly, the amendment of paragraph 4, dealing with exemptions, aims at clarifying the difference between the situations in which circumventing practices take place inside/outside the Community and when requests for exemption are submitted during/after the anti-circumvention investigation. All in all, it seems appropriate to conclude that despite the introduction of some helpful clarifications that certainly contributed to increase the instrument's overall transparency the 2004 amendments do not have any relevant impact on the central question of the compatibility of the EC circumvention provision with the WTO obligations.

VII. Some observations on the consistency of the current European Anti-Circumvention provision with the GATT and WTO Anti-Dumping Agreement requirements

Before turning to the specific question of the consistency of the European Anti-circumvention provision with the GATT and WTO requirements, some general observations are necessary. Essential to the outcome of an analysis of specific anti-circumvention legislation and of instances of application, is the question of whether WTO Members are allowed to impose anti-circumvention duties. Indeed, questioning the legitimacy of the anti-circumvention duties instrument *tout court* logically precedes any consideration of its compatibility with the WTO require-

65 Regulation (EC) 88/97, OJ L 17 of 21.1.1997, para. 5. The doctrine seems to favor this second approach. See *Holmes*, (fn. 23), p. 172 and *Didier*, (fn. 30), p. 162.

ments on the base on its specific characteristics. As one can imagine, Members' positions on this question are clearly split and show how differently the Ministerial Decision on Anti-Circumvention has been interpreted. Countries traditionally averse to anti-dumping, such as Japan, find it "highly regrettable" that some WTO Members have unilaterally introduced anti-circumvention regulations in their domestic law. In Japan's view, for instance, because of the exceptional character of Art. VI GATT, the imposition of anti-dumping duties must be verified very stringently.[66] Any effort to enlarge its range of applicability, as done by anti-circumvention duties, must therefore be fiercely opposed. On the contrary, the EC and the US consider such measures as absolutely necessary to preserve the efficacy of the anti-dumping orders allowed under GATT Art. VI, and underscore the fact that nothing prohibiting the application of anti-circumvention duties can be found anywhere in the GATT nor in the WTO Anti-Dumping Agreement.

Despite the impressive number of disputes brought before the WTO dispute settlement authorities since 1995,[67] none of them ever involved anti-circumvention. The Appellate Body's conclusions in two disputes dealing with anti-dumping nevertheless show its position on some aspects indirectly related to the question of the legitimacy of anti-circumvention measures. According to the Appellate Body in the *US-Offset Act* case[68], which confirmed and further elaborated positions previously adopted in the *US-Anti-Dumping Act of 1916* case[69], Art. VI and the WTO Anti-Dumping Agreement are interpreted as exhaustive.[70] This implies that any specific action taken against dumping other than (i) the imposition of definitive anti-dumping duties, (ii) provisional measures or (iii) price undertakings, is not in accordance with GATT Art. VI, as interpreted by the WTO Anti-Dumping Agreement, and inconsistent with Art. 18 para. 1 WTO Anti-Dumping Agreement.[71]

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66 See G/ADP/IG/W/4, Paper by Japan, 29 October 1997.

67 As of 1.1.2006, 335 disputes were initiated under the DSU.

68 Appellate Body Report, *United States - Continued Dumping and Subsidy Offset Act of 2000*, (WT/DS/217, 234/AB/R). This case is better known as the "*Byrd Amendment*" case, after the name of Senator *Robert C. Byrd*, the West Virginia Democrat who proposed it in 2000. The law, giving American companies the proceeds from duties levied on foreign rivals deemed to be dumping products in the United States at below-market prices was found by both a WTO panel and Appellate Body to be a non-permissible "specific action against" dumping or a subsidy, contrary to Art. 18 para. 1 of the WTO Anti Dumping and Art. 32 para. 1 of the WTO Subsidies and Countervailing Duties Agreement.

69 Appellate Body Report, *United States - Anti-Dumping Act of 1916*, (WT/DS131, 162/AB/R).

70 See also *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, (DS7/R-38S/30) where the Panel stated at para. 4.4. that "Article VI:3 [GATT], an exception to the basic principles of the General Agreement, ha[s] to be interpreted narrowly".

71 Appellate Body Report, *United States - Continued Dumping and Subsidy Offset Act of 2000*, paras. 264-265.

The latter states: "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." The pivotal question therefore turns out to be whether anti-circumvention duties can be considered as anti-dumping duties, and therefore consistent with the restrictive provisions of Art. VI GATT and Art. 18 para. 1 of the Anti-Dumping Agreement.[72] Answering negatively, in the light of the absence of alternative measures available to offset the effects of dumped imports besides those mentioned in Art. 18 para. 1 WTO Anti-Dumping Agreement, would forcedly lead to the conclusion that anti-circumvention duties are inconsistent with the WTO multilateral obligations, regardless of the specificities of the procedures leading to their application.

In the specific case of the current EC anti-circumvention provision, two elements particularly contribute to obfuscate the consistency of Art. 13 "as a measure in itself" and "as applied" with the due process requirement of the WTO Anti-Dumping Agreement. First, one of the two parameters used in the dumping test of Art. 13 para. 1 and 2 is the normal value previously established during the investigations that led to the imposition of the anti-dumping duty. Nothing in Art. 13 requests the establishment of a new normal value for the producer suspected to circumvent a given anti-dumping measure. The Commission's practice seems to confirm this suggestion. For instance, in the case concerning *Imports of Certain Tube and Pipe Fittings, of Iron or Steel, Originating in the People's Republic of China*[73], the Commission explicitly pointed out that Regulation 384/96 "requires the establishment of evidence of dumping in relation to the normal values established in the original investigation, but does not require a new dumping margin to be established."[74] In practical terms this means that the export price of the Taiwanese product subject to anti-circumvention investigation is compared with the normal value established in the original anti-dumping proceeding against Chinese domestic prices. In the event that the latter is found to be lower than the first, the anti-dumping duty applicable to products originating in China is then simply extended to the imports from Taiwan.[75] Under such circumstances, a risk exists that the rate of duty levied may be in excess of the effective dumping margin that would have been found if the comparison had been done with the Taiwanese producer's domestic price in Taiwan. The fact that intervals of possibly several years can elapse between the original anti-dumping investigation and the extension of the duties as a result of a finding of circumvention introduces an additional aspect of

72 It is interesting to note that in the GATT dispute between Japan and the EEC, the latter decided not to make use of Art. VI as a defense, but solely relied on the general exception of Art XX (d). See *EEC - Regulation on imports of parts and components*, para. 5.18.

73 OJ L 94 of 14.4.2000.

74 Ibid., rec. 25.

75 Ibid., rec. 36 and Art. 1.

imprecision in the administration of anti-circumvention investigations.[76] Therefore, the procedure used to calculate the dumping margin in the context of anti-circumvention investigations clearly contrasts with the attempt to prevent arbitrary use of anti-dumping duties pursued through the detailed and precise procedure set out in Art. 2 of the WTO Anti-Dumping Agreement.

Second, Art. 13 does not require a finding of injury. The simple requirement of showing that the remedial effects of the duty are being undermined cannot be equated with the detailed finding of injury mandated by Art. 3 of the WTO Anti-Dumping Agreement specifying that a determination of injury shall be based on positive evidence and involve an objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices on the domestic market for like products; and the consequent impact of these imports on domestic producers of such products.[77]

Following the approach adopted by the GATT Panel *EEC-Regulation on imports of parts and components*, the second part of the analysis is dedicated to the question whether the potential inconsistencies illustrated *supra* might be justified under the general exception of Art. XX (d) GATT. Article XX (d) allows Members to introduce or maintain measures necessary to secure compliance with laws or regulations which are not inconsistent with the GATT provisions.[78] The applicability of

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76 Moreover, it is possible that models exported during the original investigation are no longer exported during the anti-circumvention investigation carried out subsequently. See for instance *Electronic scales*, (EEC) Regulation 1021/88 of April 18, 1988, OJ L 101 of 20.4.1988.

77 The Appellate Body underscored the necessity to stick to the literal interpretation of the terms contained in the agreements. For instance, in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the Appellate Body stated at para. 45 "The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into treaty of words that are not there or the importation into a treaty of concepts that were not intended". (WT/DS50/AB/R).

78 In this regard it is important to remind that Art. XX item (d) did not save the first European anti-circumvention provision in 1990. The inconsistencies found by the GATT Panel in 1990 flowed from the characterization of the anti-circumvention duties as a discriminatory internal tax within the meaning of Art. III GATT. However, after the changes introduced in 1994 this element of inconsistency can no longer be reproached to the Community anti-circumvention provision. Also, it is interesting to note that the EC decided not to defend the anti-circumvention duties as anti-dumping duties within the meaning of Art. VI GATT. To this regard the United States, acting as interested party, submitted the following reasoning: "Article VI of the General Agreement established the clear right of any contracting party to take action in the form of the imposition of anti-dumping in an amount not greater than the margin of dumping in order to counteract the effects of the dumping found to be causing injury. This right would be undermined if a firm which had been found to have dumped a product, imports of which had been found to cause material injury to a domestic industry, were able to evade those duties simply by shifting assembly operations of minimal or no commercial significance from

Art. XX item (d) to the EC anti-circumvention regime requires the traditional two-steps-examination common to all the general exceptions of Art. XX, i.e. the determination of whether the challenged measure falls within the scope of one of the paragraphs of Art. XX and, if it does, whether that measure satisfies the requirements of the introductory clause (*chapeau*) of Article XX para. 1. According to the practice developed under the *US-Gasoline* case, the party invoking an exception under Art. XX bears the burden of proving that the inconsistent measures fall within its scope.[79] In this specific case, the EC would therefore have to demonstrate the fulfillment of the following conditions: (i) Do anti-circumvention duties secure compliance with the EC anti-dumping regulation? (ii) Are they necessary to secure compliance? and (iii) Are anti-circumvention duties applied in conformity with the requirements of the introductory clause of GATT Art. XX or do they represent a disguised restriction on international trade?

The first question was already analyzed in 1990 by the GATT Panel *EEC-Regulation on imports of parts and components* which, on the base of the specific circumstances of the case, gave a negative answer.[80] The Panel could not establish that the anti-circumvention duties were necessary to "secure compliance with" obligations under the EEC's anti-dumping regulations. The Panel's conclusion was based on the fact that the general (or basic) anti-dumping Regulation of the EEC does not establish obligations that require enforcement, but merely establishes a legal framework for the authorities of the EEC. Only the individual regulations imposing definitive anti-dumping duties give rise to obligations that require enforcement, namely the obligation to pay a specified amount of anti-dumping duties. In applying this reasoning, the anti-circumvention duties did not serve to enforce the payment of anti-dumping duties.[81] The EEC suggested a broad interpretation of the

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the country of importation to the country of exportation. It was a paradigm of customs legislation that actions leading to evasion of validly imposed duties were generally actionable. Thus, the counteracting circumvention of anti-dumping duty finding was a justifiable and proper exercise of the rights of a Contracting Party under Article VI of the General Agreement" (see *EEC-Regulation on imports of parts and components*, para. 4.35). However, in line with the practice of not examining exceptions under the GATT which have not been invoked by the contracting party complaining about and not examining issues brought only by third parties, the Panel decided not to examine whether the anti-circumvention duties could be justified under Art. VI GATT (see Panel report on *EEC-Regulation on imports of parts and components*, para. 5.11). Questions in relation to the choice of the EEC not to defend the anti-circumvention duties as anti-dumping duties within the meaning of Art. VI GATT have been raised by *Hahn*, (fn. 24), p. 744.

79 See Panel Report *United States - Standards for Reformulated and Conventional Gasoline* (WT/DS2/R), para. 6.31. The three steps approach for the examination of the general exceptions of Art. XX GATT has been confirmed in later decisions. See e.g. *US-Import of Certain Shrimp and Shrimp products*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB.

80 See Panel Report on *EEC-Regulation on imports of parts and components*, para. 5.18.

81 See Panel Report on *EEC-Regulation on imports of parts and components*, para. 5.18.

term "to secure compliance with" covering not only the enforcement of laws and regulations *per se* but also the prevention of actions which have the effect of undermining the objectives of laws and regulations.[82] The Panel did not share the EEC's views. It noted that Art. XX (d) does not refer to objectives of laws or regulations but only to laws or regulations and added that accepting a broader interpretation would be contrary to the purpose of the provision itself.[83] None of the modifications made to the regime in force at the time of the GATT Panel suggests that the position of a hypothetic Panel on this specific question would significantly differ from the one of the GATT Panel *EEC-Regulation on imports of parts and components*.[84]

The second question concerns the "necessary character of the measure". According to the *Korea-Beef* jurisprudence, "whether a measure is 'necessary' should be determined through a process of weighing and balancing a series of factors".[85] According to the Appellate Body, this process is "comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'".[86] In this regard it must be noted that the Community may open ordinary new anti-dumping proceedings against imports of concerned essential parts or against the product originating in an intermediate country. As pointed out by *Didier*, it is questionable whether, in many situations, a completely new proceeding on the parts deemed to circumvent anti-dumping duties would be less burdensome and time consuming than anti-circumvention investigations.[87] Besides the possibility of opening a new anti-dumping procedure, customs techniques remain at the disposal of customs

82 See Panel Report on *EEC-Regulation on imports of parts and components*, para. 5.14.

83 See Panel Report on *EEC-Regulation on imports of parts and components*, para. 5.16 and 5.17. The Panel further added "Whenever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement could then be justified under Article XX (d) on the grounds that this secures compliance with the objectives of that law." See Panel Report on *EEC-Regulation on imports of parts and components*, para. 5.17.

84 *Didier* reaches similar conclusions. See *Didier*, (fn. 30), pp. 176-177.

85 *Korea-Measures Affecting Imports of Fresh, Chilled and frozen Beef*, (WT/DS161,169/AB/R), para. 165. See also Appellate Body Report *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes* (WT/DS302/AB/R), paras.57-73, and Panel Report *European Communities-Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (WT/DS174/R, WT/DS290/R). See paras. 7.328-341 and 7.293-306.

86 See Appellate Body Report, *Korea-Measures Affecting Imports of Fresh, Chilled and frozen Beef*, para. 165.

87 See *Didier*, (fn. 30), p. 177.

authorities to fight against fraud regarding origin or product classification used as a means of avoiding payment of anti-dumping duties.[88]

The third question implies examining if the measure constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction to international trade". In several circumstances, the application of the anti-circumvention provision may result in an arbitrary or unjustifiable discrimination or a disguised restriction to trade. Examples in this regard are the extension of an anti-dumping duty to non-originating products, to non-like products; to multi-purpose components (whose exporters were possibly never involved in the original anti-dumping proceedings); or to components caught on the basis of their end use.[89]

VIII. Conclusion

The yearly reports provided by the Commission's Directorate-General Trade (DG Trade) show an increased use of anti-circumvention during the last few years. While in 2000 no anti-circumvention investigations were initiated, the number grew to one in 2001, two in 2002, three in 2003 and eight in 2004.[90] This trend has the unavoidable effect of increasing the frictions between the EC and its trading partners and, consequently the potential for disputes in the future. Therefore, it cannot be excluded that before Members agree on multilateral rules on anti-circumvention within the Informal Group, a dispute involving Art. 13 of EC Regulation 384/96 (or similar provisions maintained by other Members) may arise. If this occurs, a finding that declares the European anti-circumvention provision and its practical applications as inconsistent with some of the GATT (Art. II and VI) and WTO Anti-Dumping Agreement obligations (in particular Art. 2, 3 and Art. 18), is quite foreseeable. As illustrated *supra*, negotiations on anti-circumvention did not prove to be particularly productive so far, and the fundamental rift of opinions among Members remains too wide to be filled.[91] In order to solve the

88 See fn. 60.

89 Also, the presumption that products in provenance from a country also originate there seems not to pass the introductory clause test of Art. XX. See *Didier*, (fn. 30), pp. 174-178.

90 See the Annual Reports from the Commission to the Parliament on the Community's Anti-Dumping and Anti-Subsidy Activity, available at http://europa.eu.int/comm/trade/issues/respectrules/anti_dumping/legis/index_en.htm (access date: 15.2.2006).

91 It cannot be excluded, however, that debates might gain fresh momentum in the future. In the light of the increased use of anti-dumping and anti-circumvention duties from the part of developing countries against imports from developed and other developing countries, an

problem of circumvention and anti-circumvention duties, a broader perspective must be considered. In this context, a more comprehensive re-negotiation of the multilateral rules governing anti-dumping, including an in-depth analysis of its purpose and desirability, is necessary.[92]

increase in the number of WTO Members interested in introducing multilateral rules on the application of anti-circumvention can be expected. See in particular WTO Doc. TN/RL/GEN/71, 14 October 2005, Submission on Circumvention, Communication from the United States.

92 See in this regard the critical analysis of the anti-dumping instrument provide by *Mankiw/Swagel*, Antidumping: The Third Rail of Trade Policy, Foreign Affairs, July/August 2005, p. 107.