Pham Thi Trang

The EC Anti-dumping Regulations
Their application with respect to Vietnam

Dr. Bui Xuan Nhu
Prof. Moëll, Christina
Preface and Acknowledgements

First of all, I would like to express my thanks to both of my supervisors, Professor Christina Moell, Faculty of Law, Lund University, Sweden and Dr. Bui Xuan Nhu, Faculty of International Law, Hanoi Law University. They have given me many good pieces of advice and supported me during my research. Professor Moell spent a great deal of time reading my thesis, even during her holiday, and made many valuable comments. She also helped me find the necessary material for the thesis.

I also express my thanks to the librarians working in the libraries of the Faculty of Law, Lund University and Hanoi Law University, especially Ms. Huong and Ms. Anna. Without their kind help, I could not have finished my thesis.

I also would like to thank Deputy Professor Hoang Phuoc Hiep – the international law department, Ministry of Justice, Vietnam for his suggestions when I choose the topic of my thesis and his answers to my queries.

Last of all, I want to thank all the members of my family and all of my friends for their support.
Table of Content

Preface and Acknowledgements ................................................................. 1
Table of Content ................................................................................. 2
Abbreviations ....................................................................................... 4
1. Introduction .................................................................................... 5
  1.1 Background ............................................................................... 5
  1.2 Purpose .................................................................................... 6
  1.3 Method ..................................................................................... 6
  1.4 Material ................................................................................... 6
  1.5 Delimitations ............................................................................ 6
2. Dumping, anti-dumping and overview on EC anti-dumping investigation against Vietnam ............................................................ 7
  2.1 Dumping and anti-dumping ......................................................... 7
    2.1.1 What is “dumping”? ......................................................... 7
    2.1.2 History of dumping and at present .................................... 7
    2.1.3 Anti-dumping in international law ...................................... 8
    2.1.4 The relation between EC law and WTO law .................... 8
    2.1.5 Anti-dumping evolution in EC ........................................... 9
  2.2 Overview on EC anti-dumping investigations against Vietnam ...... 10
3. Determination of dumping ................................................................ 12
  3.1 For the market economy countries .............................................. 13
    3.1.1 Normal value ................................................................. 13
    3.1.2 Export price .................................................................. 20
    3.1.3 Comparison .................................................................... 23
    3.1.4 Dumping margin .......................................................... 26
    3.1.5 Zeroing .......................................................................... 27
  3.2 For the non-market economy country ....................................... 28
4. Determination of injury .................................................................. 31
  4.1 Like product ............................................................................. 31
    4.1.1 Product concerned ....................................................... 31
    4.1.2 Like product ................................................................. 33
  4.2 Community industry ............................................................... 33
    4.2.1 Notion of Community industry ...................................... 33
    4.2.2 Determination of Community industry ......................... 34
  4.3 Injury ....................................................................................... 36
    4.3.1 Notion of “injury” ......................................................... 36
  4.4 The causal link between dumped import and injury .................... 39
  4.5 Community interest ............................................................... 40
5. Procedure ...................................................................................... 41
5.1 The advantages of cooperation ................................................................. 42
5.2 Terminating the proceeding ................................................................... 42
5.3 Circumvention ....................................................................................... 42

6. Conclusion: .............................................................................................. 44

International Treaties and Conventions .................................................. 45
National Legislations ................................................................................ 45
Vietnam 45

Table of Cases ............................................................................................. 46
EC Decision .................................................................................................. 46

Bibliography ................................................................................................. 49
Official Reports and other Documents ..................................................... 49
Monographs ................................................................................................. 49
Articles in Journals, Anthologies etc. ......................................................... 49
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AD Agreement</td>
<td>Agreement on Implementation of Article VI of General Agreement on Tariffs ans Trade</td>
</tr>
<tr>
<td>APEC</td>
<td>Asian – Pacific Economic Conference</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of South East Asia Nations</td>
</tr>
<tr>
<td>CIF</td>
<td>Costs of Insurance and Freight</td>
</tr>
<tr>
<td>e.g.</td>
<td>For example</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECJ</td>
<td>Court of Justice of the European Communities</td>
</tr>
<tr>
<td>etc</td>
<td>Et cetera</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>Eurostat</td>
<td>European statistic</td>
</tr>
<tr>
<td>FOB</td>
<td>Free on Board</td>
</tr>
<tr>
<td>GATT</td>
<td>General agreement on the Trade and Tariffs</td>
</tr>
<tr>
<td>IP</td>
<td>Investigation period</td>
</tr>
<tr>
<td>IT</td>
<td>Individual treatment</td>
</tr>
<tr>
<td>IZ</td>
<td>Industrial Zone</td>
</tr>
<tr>
<td>LEFASO</td>
<td>Leather and Footwear Association</td>
</tr>
<tr>
<td>MET</td>
<td>Market economy treatment</td>
</tr>
<tr>
<td>MSG</td>
<td>Monosodium Glutamate</td>
</tr>
<tr>
<td>No.</td>
<td>Number</td>
</tr>
<tr>
<td>OEM</td>
<td>Original Equipment Manufacturer</td>
</tr>
<tr>
<td>PCN</td>
<td>Product concerned</td>
</tr>
<tr>
<td>RBM</td>
<td>Ring-binder mechanisms</td>
</tr>
<tr>
<td>SGA</td>
<td>Selling, General and Administration costs</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organizarion</td>
</tr>
</tbody>
</table>
1. Introduction

1.1 Background

As a result of globalisation, economic integration has become a major tendency in every country and Vietnam is no exception. Vietnam is now a member of many international and regional associations and organisations, such as: the World Trade Organisation (WTO), the Association of South East Asia Nations (ASEAN), the Asian-Pacific Economic Conference (APEC)...The economy of Vietnam is gradually accessing global trade.

When taking part in international trade, Vietnamese enterprises have had many good opportunities of dealing with other foreign companies in order to market their products, get profit and broaden their market share. However, there have been many challenges to face. And one of these is the imposing of anti-dumping duties on Vietnamese goods. Up to May, 2008, there had been 27 anti-dumping investigations of Vietnamese goods, 10 of them from the EU.¹

No one can count the exact damage which the economy, the society and the people of Vietnam has suffered as a result of these investigations. For example, due to the EC anti-dumping investigation of Vietnamese footwear with uppers of leather, exports will decline and foreign investment will move to other countries according to the report from the Leather and Footwear Association (LEFASO) and the Ministry of Trade. From the website: http://www.vietnamnet.vn, and the article: “Vietnam oppose EC’s 10% tax on its shoes” 7th October, 2006 “Many foreign partners have left Vietnamese enterprises and decided to place orders with producers from other countries. Local companies have become less competitive in the EU market. This has resulted in low sales of products and lower incomes for Vietnamese workers, which were very low already”.

To avoid being subjected to such loss and damage, Vietnamese enterprises need to know about anti-dumping regulations and their application. This thesis hopes to contribute to their understanding the EC anti-dumping regulations to allow them to avoid being involved in anti-dumping cases or at least be able to react positively if they are investigated.

¹ Statistics on anti-dumping case with Vietnam involvement up to May 2008

1.2 Purpose

The main aim of my thesis is to find ways for Vietnamese enterprise to avoid being involved in anti-dumping cases or to react in the positive way if their goods are considered as having been dumped. In order to achieve this, I will examine the EC anti-dumping regulations and their application in Vietnam cases.

So these questions need to be answered:

- What are the EC anti-dumping regulations?
- How are the EC anti-dumping regulations applied against Vietnam?
- What lessons can be drawn by Vietnamese enterprises?

1.3 Method

The method will be used in the thesis are the traditional methods used in law researching such as analysis, synthesis and comparison.

1.4 Material

All the legal texts and documents studied can be found on three main websites:

- The website of Vietnam Chamber of commerce and industry: http://chongbanphagia.vn.

The thesis will also use books, articles and cases which relate to the implementing of the EC anti-dumping regulations and the ten Vietnamese cases will also be studied.

1.5 Delimitations

The thesis will only cover 9 of the anti-dumping cases where the EC initiated proceedings against Vietnam (shoes/slippers will not be covered). However at one point, the focus will be on one typical example only.
2. Dumping, anti-dumping and an overview of the EC anti-dumping investigations of Vietnamese enterprises.

2.1 Dumping and anti-dumping

2.1.1 What is “dumping”? 

Dumping can be simply defined as selling a product below its normal value. It is defined in GATT (General Agreement on Tariff and Trade) Article VI as:

1) selling at an export price which is below the home market price
2) selling at an export price which is below the export price to a third country, or
sells at an export price which is below the cost of production plus profit and selling cost.

2.1.2 History of dumping and the current situation

After World War II, a new surge of dumping occurred, gathering strength in the late 1970s. The phenomenon seems to have increased because of the GATT, advances in technology and the emergence of newly industrialised countries. Since the 18th century, whenever production capacity increases rapidly and the desire for market expansion grows, dumping becomes a big issue.2

Antidumping laws were first passed in the early 20th century in Canada. The law gave the government the right to levy a special duty on goods. After that, similar laws were passed in South Africa, Australia, Great Britain, New Zealand and the United State.

Article VI of the GATT 1994 is now the basis for establishing an international anti-dumping law. The purpose of the Article is however not to control the practice of dumping, but to regulate the administration of antidumping measures.

Antidumping measures imposed by a member of the World Trade Organization are authorized under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement). “Antidumping measures are unilateral remedies which may be applied by a Member after an investigation and determination by that Member, in accordance with the provisions of the AD Agreement, that an imported product is “dumped” and that the dumped

imports are causing material injury to a domestic industry producing the like product”.

2.1.3 Anti-dumping in international law

Within the international arena, anti-dumping law must be based on treaties: It is contained now in one agreement (the AD agreement).

In general, the GATT anti-dumping law in both Article VI and the subsequent Codes contains two prerequisite conditions and procedural rules for an anti-dumping action. Article VI does not prohibit dumping, nor do any of the three Codes, Article VI condemns dumping only if there exists dumping which causes or threatens material injury to an established domestic industry or materially retards the establishment of a domestic industry. The two conditions for an anti-dumping action are therefore:

(i) existence of dumping, and

(ii) material injury or threat of material injury to a domestic industry, or material retardation to establish a domestic industry.

In nature, the GATT rules for determination of both dumping and injury are rather technical. These rules provide various and sometimes, alternative or surrogate, approaches for determining whether dumping has occurred as well as whether a domestic industry has been injured. The procedural rules are mainly developed by and contained in the three successive GATT Anti-dumping Codes.

2.1.4 The relation between EC law and WTO law

The relationship between EC and WTO anti-dumping law can be considered under two aspects:

The first relates to the applicability of WTO law in the Community.

The ECJ has held in several cases that GATT and WTO law do not have direct effect in the EC legal system but must operate through the EC legal instruments.

Secondly, even if WTO anti-dumping law is not directly applicable in the EU it still has an effect on this region by indirect means. In other words, the WTO anti-dumping law is implemented in the EC by way of Regulations which are directly applicable in all Member States.

3 Elenor Lissel, A field study of an EU anti-dumping proceeding – The case of Vietnamese footwear, p.13.


5 See case C-149/96 Portugal v. Council, ECR I-8395, para. 47
2.1.5  The evolution of Anti-dumping law in the EC

Member States within the EU have agreed on a common commercial policy in trade with non Member States. Articles 131- 134 Treaty Establishing the European Community (EC Treaty) provide the legal basis for this policy. According to articles 131-134 EC Treaty, Member States enter agreements with other states based on uniform principles and likewise adopt common regulations on imports to and exports from the EU. When establishing trade with other countries, dumping may occur and that is the reason for the appearance of anti-dumping law in the EC.

The legal basis for antidumping in primary EC law is Article 133 (1) of the EC Treaty which provides that:

The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalism, export policy and measures to protect trade such as those to be taken in event of dumping or subsidies.

Under Article 133 EC Treaty, the Council of European Communities adopted the first EC antidumping legislation on 5 April 1968. It is Regulation 459/68 on protection against dumping or the granting of bounties or subsidies by the countries which are not members of the EEC.

Regulation No 459/68 was amended in 1973 and 1979. In the 1973 amendment, only a procedural point was changed. But the 1979 amendment is very significant with many changes to the computation of the normal value of imports from non-market economy countries, the constructed export price and sales made at a loss etc.

At the end of 1979, Regulation 459/68 was replaced by Regulation 3017/79. This regulation introduced new rules for determination of injury and some procedural amendments.

In July, 1984, Regulation 3017/79 was replaced by Regulation 2176/84. This Regulation has new provisions and a “sunset clause”. It was amended in 1987.

In July 1988, the 2423/88 Regulation replaced the Regulation 2176/84. Some changes were made and a new rule on anti-absorption duty was established.

Regulation 2176/84 was replaced by the Regulation 3283/94 and amended in 2005 by Regulation 1251/95.

---


7 Article 133 (4) of the Treaty Establishing the European Community.
The current EC antidumping legislation in force is the 1995 Basic regulation; Regulation No 384/96 of 22 December 1995.\(^8\) The Regulation applies to imports from all countries that are not members of the European Community but the Community may adopt precise provisions in relation to countries without a market economy or whose economy is in transition.\(^9\)

According to Article 1 (1) Regulation No 384/96 antidumping duties can be applied to any product whose release for free circulation within the Community causes injury. Article 3 defines determination of injury as material injury to Community industry or the threat of the same. The examination of the impact of dumped imports shall include “all relevant economic factors and indices having a bearing on the state of the industry”.\(^10\)

The determination of dumping is made in accordance with Article 2 where in (1) a normal value and (2) an export price shall be applied to the price. A fair comparison shall be made based on these prices. The determination of injury and the definition of Community Industry are defined in Article 3 and 4. According to Article 12, if the measure has led to no movement, the investigation can be reopened.\(^11\)

**2.2 Overview of EC anti-dumping investigations against Vietnam**

In the year of 1998, the EC initiated an anti-dumping proceeding concerning imports of monosodium glutamate originating in Vietnam, the definitive anti-dumping duty being 16.8%.

In the same year, the EC initiated an anti-dumping proceeding concerning the imports of shoes and slippers originating from Vietnam, China, Indonesia, Thailand. However, because of its small market share, the EC did not levy anti-dumping measures on Vietnam.

In 2002, the EC initiated an anti-dumping proceeding concerning imports of disposable gas-fuelled pocket lighters originating in the China, Indonesia, Malaysia

---


\(^9\) ibid Article 2(7).

\(^10\) ibid Article 3.

\(^11\) ibid Article 12.
and Vietnam. The result is terminating the proceeding because of the withdrawal of Community industry.

In 2003, the EC initiated an anti-dumping proceeding concerning imports of certain zinc oxides consigned from Vietnam. The definitive anti-dumping duty is 93%, a very high level so as to prevent dumped imports from China.

On 28 April, 2004, the EC proved that ring binder mechanisms originating in China, were consigned to Vietnam in order to be exported into the EC. It initiated anti-dumping proceedings.

On 29 April 2004, the EC initiated an anti-dumping proceeding concerning imports of bicycles originating in Vietnam. On 4 July 2005, it announced the levy of a definitive anti-dumping duty level of 15.8% - 34.5%.

On 28 April, 2004, the EC proved that ring binder mechanisms originating in China, were consigned to Vietnam in order to be exported into the EC. It initiated anti-dumping proceedings.

On 29 April 2004, the EC initiated an anti-dumping proceeding concerning imports of bicycles originating in Vietnam. On 4 July 2005, it announced the levy of a definitive anti-dumping duty level of 15.8% - 34.5%.

On 11 August 2004, the EC officially initiated an anti-dumping proceeding concerning imports of certain tube or pipe fittings originating in Taiwan and Vietnam. On 8 July 2005, there was an announcement that the proceeding was terminated because of the withdrawal of the complaint.

On 24 August 2004, the EC announced the initiation of an anti-dumping proceeding concerning imports of stainless steel fasteners and parts thereof originating in China, Indonesia, Malaysia, the Philippines, Taiwan, Thailand and Vietnam. The duty level was levied is 7.7%.

On 10 September 2004, the EC initiated an anti-dumping proceeding concerning integrated electronic compact fluorescent lamps (CFL-i) originating in China but consigned from Vietnam. The definitive anti-dumping duty was 66.1%.

On 7 July, 2005, the EC officially initiated an anti-dumping proceeding concerning certain footwear with uppers of leather originating in China and Vietnam. The definitive anti-dumping duty was 10%.

**Conclusion:** There have been over 20 anti-dumping cases against Vietnam goods brought by various countries in the world. Among them are 10 cases from the EC, thus nearly half of them. It means that the EC is the market where Vietnamese goods may be considered as being dumped most often.

We can summary the above 10 cases in the below table:

<table>
<thead>
<tr>
<th></th>
<th>1998</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monosodium Glutamate</td>
<td>x</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shoes/ slippers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
</tr>
<tr>
<td>Gas-fuelled pocket lighter</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>x</td>
</tr>
</tbody>
</table>
In the year 2004, 5 anti-dumping proceedings were initiated against Vietnam goods in the EC market. The types of goods involved are metals, electronic products and mechanical products. These are disadvantageous for Vietnam because they are the major products exported from Vietnam to foreign countries and most of them need considerable raw material and/or workforce. If they are regarded as having been dumped, the damage may well be larger.

A disadvantage for Vietnam is our country’s location. We are in a region which has attracted many anti-dumping proceedings. So Vietnamese goods are often suspected of being dumped as are the goods of other Asian countries.

### 3. Determination of dumping

The main task of an anti-dumping proceeding is to determine whether the export price is lower than the normal value or not. To do this, we have to determine the export price and the normal value and compare them. If the export price is higher than the normal value, no dumping. But if it is less than the normal value, dumping can be considered to have occurred.
For example: if a Vietnamese export company sold a bicycle in the EU market for 10€ but it sold the same thing in Vietnam for 12€, this would mean the company is dumping in the EU market. If the price in Vietnam for the same bicycle was 9€, there would be no trace of dumping there.

### 3.1 In market economy countries

#### 3.1.1 Normal value.

Although this differs slightly from the GATT provisions, in the EC, the general rule applied for calculating the normal value is “based on the prices paid or payable, in the ordinary course of trade, by the independent customer in the exporting country”\(^{12}\). This means that the primary rule for determining normal value is the domestic price paid or payable for the like product in the exporting country.

There are two other ways to calculate the normal price in case this domestic price cannot be determined\(^{13}\):

a. The “constructed value” or

b. The export price, in the ordinary course of trade, to an appropriate third country, provided that these prices are representative.

#### 3.1.1.1 Normal price as the domestic price

The domestic price will be established as the normal value if it meets the following conditions:

- Domestic sales must exist;
- These domestic sales must be representative;
- These sales must have been made in the ordinary course of trade;
- These sales must permit a proper comparison.\(^{14}\)

In the Basic Regulation meaning of “exist” and the meaning of “representative” are not defined, but it does stipulate cases in which the domestic price in the exporting country is to be disregarded. They are:

Firstly, in case of no sales or insufficient sales.

By no sales, it is understood that the products exported to the Community are not sold in the exporting country (i.e. the products are only made for export) or the

---

\(^{12}\) Council Regulation 384/96, Article 2(1)

\(^{13}\) Council Regulation 384/96, Article 2(3)

model sold on the domestic market is different from the model sold in the Community. In this case, the normal value will be calculated on the basis of other exporter’s sales.

Insufficient sales (or the 5% rule) are defined by way of this rule:

“Sales of the like product intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5% or more of the sales volume of the product under consideration to the Community…”

This can be clarified by a very simple example: If exporter A produces 55 products with 50 for export to the Community and 5 for sale in the domestic country, the domestic sale volume equal to 10% (5/50x100%) > 5%. In this case the domestic price may be used to determine the normal value.

In Bicycles, only one company “Always” received the market economy treatment under the EC regulations. When determining the normal value, the 5% rule was used, and the Commission stated that:

In accordance with the Article 2(2) of the basic Regulation, the Commission first examined whether the domestic sales of the like product to independent customers by Always were representative, i.e. whether the total volume of such sales was equal to or greater than 5% of the total volume of the corresponding export sales to the Community.

The 5% rule has been applied in the EC since the early 1980s. In the application process, some aspects should be noted:

- If the exporter sells different models for export and domestically, the Commission will first apply the 5% rule to the whole and subsequently apply this rule on a model-by-model basis (e.g. in the Recordable compact disc case or polyethylene terephthalate case).
- In some cases, where the domestic sales volume is less than five percent of the sale to the Community, it can still be considered representative and used to determine the normal value pursuant to Article 2(2) but this happens quite rarely.

16 Article 2(2) of Basic Regulation
18 Council Regulation (EC) No 1095/2005, recital 75
- Domestic sales which were subsequently cancelled or transferred outside the investigation period have in the past been taken into consideration for the purposes of applying the 5% rule.

Secondly, in the case of no sales in the ordinary course of trade.

In the Basic Regulation, there are three circumstances if sales under that, sales can be considered as not in the ordinary course of trade:

(1) Sale below cost of production

Sale of product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining normal value, only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.\(^{20}\)

So, sales at a price below unit production costs plus selling, general and administrative costs (SGA) are always considered sales not in the ordinary course of trade if “they are made within an extended period of time in substantial quantities or are at the prices which do not provide for the recovery of all costs within a reasonable period of time”.

In Article 2(4), “the recovery of all costs within a reasonable period of time” may be considered to occur if the prices below costs at the time of sale are above weighted average costs for the period of investigation. And the “extended period of time” should normally be one year but shall in no case be less than six months.

In the practice of the Commission, there is a “80/10 rule” to determine the normal value in cases of sales below cost:

If sales equal to or above the cost of production represent more than 80% of total sales volume, the normal value will be based on the weighted average price of all domestic sales during the investigation period, including sales below costs;

If sales equal to or above cost of production represent less than 80% but more than 10% of the total sales volume, the normal value will be based on a weighted average of profitable domestic sales only;

If sales equal to or above cost of production represent less than 10% of the total sales volume, the Commission will consider that there are no domestic sales in the ordinary course of trade and will construct the normal value.\(^{21}\)

\(^{20}\) Council Regulation 384/96, Article 2(4)

The 80/10 rule was applied to determine the normal value in Bicycles, Stainless Steel Fasteners and Footwear with Upper of Leather. In Bicycles, the Commission stated that:

In the case where the volume of profitable sales of a product type represented 80% or less but at least 10% of the total sales volume of that type, or where the weighted average price of such sales was below the unit cost, normal value was based on the actual domestic price, calculated as a weighted average of profitable sales of those types only.

For those product types, where the volume of profitable sales represented less than 10% of the total sales volume of that type on the domestic market, it was considered that the product type concerned was not sold in the ordinary course of trade and therefore, normal value could not be based on domestic prices in Mexico\(^22\).

(2) Sales between associated parties.

Under Article 2(1) sales between associated parties shall be considered as not being sales in the course of ordinary trade. “Associated” in this case can be understood as being where parties form a “single economic unit” or one party hold a majority of the shares in the other company.

(3) Compensatory arrangements

Article 2(1) of the Council Regulation 384/96 stipulates that:

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

If parties have a compensatory arrangement, sales between them can not be considered as sales in the ordinary course of trade unless it is determined that those prices are unaffected by the relationship. This ideas proceeds from the finding of the ECJ in the case Petrotub SA and Republica SA v. Council, (2003). We cannot find the exact definition of “compensatory arrangement” in the Regulation but in the EC proceedings, the Commission sometimes classes the relationship between the sellers and the buyers as such.

Thirdly, sales not permitting a proper comparison.

This is one of the cases where sales are disregarded when calculating the normal value based on the exporter’s domestic prices. To determine what the term “permitting a proper comparison” means is quite complicated. In some cases, it is linked to the sales channel but in others, it refers to the sales to original equipment manufacturers (OEM). It will be analyzed in the ……

\(^{22}\) Council Regulation (EC) No 1095/2005, recital 71, 72
In the Basic Regulation, Article 2(1) states that:

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

This means that if the exporter’s domestic prices are not sufficient to establish the normal value, the domestic prices of other producers or sellers will be used.

In *monosodium glutamate*, Thailand was chosen as an analogue country, and:

Normal value was therefore established on the basis of the prices paid or payable, by independent customers in Thailand for sales of the like product which were found to have been made in the ordinary course of trade and in sufficient quantities to permit a proper comparison\(^{23}\).

### 3.1.1.2 Constructed normal value

Under the Article 2(3), if the normal value cannot be determined from the domestic prices of exporters or others, the constructed normal value will be used instead:

“… the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits…”

The constructed normal value is covered in both the Basic Regulation and Article 2.2.1 of the AD Agreement. The constructed normal value is the cost of production plus a reasonable amount for selling, general and administrative costs plus profit.

First, on the cost of production, Article 2(5) of the Basic Regulation provides that:

Cost shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.

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

Where the costs for part of the period for cost recovery are affected by the use of new production facilities requiring substantial additional investment and by low capacity utilization rates, which are the result of start-up operations which take

\(^{23}\) Council Regulation (EC) No 2051/98, recital 34
place within or during part of the investigation period, the average costs for the start-up phase shall be those applicable, under the abovementioned allocation rules, at the end of such a phase, and shall be included at that level, for the period concerned, in the weighted average costs referred to in the second sub-paragraph of paragraph 4. The length of a start-up phase shall be determined in relation to the circumstances of the producer or exporter concerned, but shall not exceed an appropriate initial portion of the period for cost recovery. For this adjustment to costs applicable during the investigation period, information relating to a start-up phase which extends beyond that period shall be taken into account where it is submitted prior to verification visits and within three months of the initiation of the investigation.

From the above regulation, we realize that there are three major rules concerning the determination of costs. They are:

- The costs shall be based on the records kept by the party under investigation.
- Cost allocation methods may be used.
- Costs for any start-up phase shall be applicable.

These may well be the rules but we cannot base necessarily use them to calculate the cost of production. The EC authorities have not stated exactly what items constitute costs of production but according to the questionnaire used by the Commission, they comprise:

- Cost of materials;
- Direct labour cost;
- Manufacturing overhead.

The cost of materials includes all expenses including inward transport, duties and other costs incurred in obtaining raw materials.

The direct labour cost consists of:

- Pay, overtime pay, incentive pay, bonuses and shift differentials;
- Employee benefits: housing, holiday pay, retirement, social security programmes;
- Other employee-related expenses.  

The manufacturing overheads cover all expenses incident to and necessary for production of a product, including the items of:

- Indirect labour;
- Supervision;

- Depreciation;
- Rent;
- Power;
- Maintenance and repair and;
- Any other relevant costs\(^\text{25}\)

Secondly, selling, general and administrative costs (SGA)

SGA are not described under any regulation of the Commission but from the questionnaire used by it, SGA costs embrace all other costs incurred in connection with domestic sales not covered by the costs of production.

SGA shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation\(^\text{26}\). In case SGA can not be determined on the basis set out above, it can be calculated by:

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

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

- any other reasonable method\(^\text{27}\).

Thirdly, reasonable profits

Reasonable profits can be added to determine the constructed value. As provided for in Article 2(6)(c), reasonable profits “shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin”.

In *Bicycles*, Mexico was chosen as the analogue country, and the constructed normal value in the Mexico market was applied to Vietnam:

For exported product types, without corresponding types sold in the ordinary course of trade on the domestic market of Mexico, normal value was constructed, pursuant to Article 2(3) of the basic Regulation, on the basis of the weighted average of each


\(^{26}\) Council Regulation 384/96, Article 2(6)

producer's own manufacturing costs plus a reasonable amount for selling, general and administrative (SG&A) costs and for profit. The SG&A costs and profit were determined on the basis of the weighted average of SG&A costs incurred and of profit realised by each of the cooperating Mexican producers on their domestic sales of the like product, in the ordinary course of trade. For exported product types, without sales on the domestic market of Mexico, the manufacturing costs of similar product types were used in the construction of normal values, appropriately adjusted in order to take into account the differences in physical characteristics with the exported types.28

3.1.1.3 Export price to a third country

The second alternative method for determining the normal value is “the export prices, in the ordinary course of trade, to an appropriate third country”29. There are two conditions:

- The third country should be “appropriate”;
- The export prices should be “representative”.

However, in practice, the Community authorities have rarely relied on export prices to a third country to determine normal value as they fear that sales to a third country might also be made at dumped prices.

3.1.2 Export price

In order to find whether dumping occurred or not, the export price must be determined and compared with the normal value.

Under Council Regulation 384/96, there are two ways to determine the export price, they are:

- The actual export price;
- The constructed export price.

3.1.2.1 The actual export price.

Article 2(8) states that:

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

This determination is quite simple if the product was imported directly from the producing country. However, in international trade, products usually go from the

28 Council Regulation (EC) No 1095/2005 recital 74

29 Ibid, Article 2(3)
producing country to an intermediate company and only after that are they imported into the Community. In this case, the export price can be determined as follows:

1) If the intermediate company is independent from the producer, provided that the producers knows that the final destination of goods is the EU, the export price is the price charged by the foreign producer to the intermediate company.

2) If the intermediate company is not independent (related) of the producer, the export price will be determined on the basis of the price charged by the related company to the first independent customer in the Community.

3.1.2.2 The constructed export price

Article 2(9) Regulation 384/96 provides that:

In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed…

This means that, the constructed export price may be used in two cases:
- Where there is no export price;
- Where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party.

No export price means that there are no sales between the exporter and the importing country so no actual export price can be found. In this case a constructed export price will be used.

How to calculate the constructed export price

According to Article 2(9) Regulation 384/96:

the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

So there are two methods to determine the constructed export price:

The basic method is the price at which the imported products are first resold to an independent buyer;

If above method is not satisfied, the alternative method of “any reasonable basis” will be used.

This Article also stated that:

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

The factors to be adjusted for included:
- usual transport, insurance, handling, loading and ancillary costs;
- customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods; and
- a reasonable margin for selling, general and administrative costs and profit.

In addition, some other expenses can be deducted when determining the constructed export price, e.g. commissions and transfers between related companies or any advertising and promotion expenses for which the related importer was reimbursed by the exporter.

“a reasonable margin of profit” deducted from the construction of the export price is calculated very differently from case by case. In fact, it fluctuates between 2.8% and 12%. However, in most cases, a reasonable margin of profit is 5%. The Commission tries to use 5% for all cases.\(^{30}\)

In practice, the reasonable margin of profit is calculated much more often than the actual margin of profit. This leads to the situation where the export price constructed with a reasonable margin of profit is much lower than the actual export price. The dumping margin in such a case will be increased.

In most of the ten Vietnamese cases, the export price was constructed and based on the facts available. This is the main reason that the dumping margin for Vietnamese product is so high.

In \textit{monosodium glutamate}:

As far as Vietnam is concerned, it was found that the export volume of the cooperating Vietnamese exporting producer was immaterial and hence not an appropriate basis for the determination of the weighted average export price. Therefore, also for Vietnam the export price had to be established on the facts available according to Article 18 of the Basic Regulation. Eurostat data, which were found to be in line with the export price alleged in the complaint and with the prices of import transactions verified at the premises of one cooperating unrelated importer were considered an appropriate basis to establish the export price\(^{31}\).

It leads to the fact that, the dumping margin in this case is quite high and the anti-dumping duty for Vietnamese monosodium glutamate is quite high.

In \textit{Stainless steel fasteners}:

As was explained under the analysis of IT above, only one company cooperated in Vietnam, but it was not granted IT. Furthermore, this company was operating as a subcontractor of a Taiwanese related company, which cooperated with the investigation. The Taiwanese company was the owner of the raw materials and it was performing all functions related to export sales. However, it was not able to demonstrate through its accounts that the export prices to independent customers, as


\(^{31}\) Council Regulation (EC)2051/98 recital 40
reported in the reply to the questionnaire of the Vietnamese subcontractor, concerned products manufactured in Vietnam and exported to the Community. Therefore, such prices cannot be used as export prices from Vietnam to the Community. The company was informed accordingly. Since no other source was available, export prices were provisionally based on Eurostat import statistics for all exporting producers.\footnote{Council Regulation (EC) 771/2005 Recital 91}

3.1.3 Comparison

A comparison is the necessary step in the determination of dumping\footnote{Li, Wenxi, *Anti-dumping Law of the WTO/GATT and the EC: Gradual Evolution of Anti-dumping Law in Global Economic Integration*, juristförlaget i Lund, 2003}. Article 2 (10) of Regulation 384/96 gives the principles concerning the comparison between normal value and export price.

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

With this provision, the comparison must be:

- At the same level of trade;
- As nearly as possible at the same time;
- No duplication;
- A reasonable adjustment.

Article 2(10) covers not only the general rules for comparison but also the specific rules for adjustments.

According to that Article, the factors to be adjusted comprise:

(1) Physical characteristics:

The normal value and the export price of the like products will be compared. However, like products are not only identical ones but also products with closely similar characteristics. With an identical product, it is not necessary to adjust the physical characteristics of the product. But in the similar products, adjusting the physical characteristics will make the comparison fairer. In this case:
The amount of the adjustment shall correspond to a reasonable estimate of the market value of the difference\textsuperscript{34}.

(2) Import charges and indirect tax

Article 2(10)(b) stipulated that:

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

e.g. Consider where the normal value of product A is 150USD, but this value includes 10 USD, the indirect tax when importing raw material to produce A. In this case the normal value used will be 140 USD (150 – 10).

(3) Discounts, rebates and quantities.

An adjustment shall be made for differences in discounts and rebates, including those given for differences in quantities, if these are properly quantified and are directly linked to the sales under consideration. An adjustment may also be made for deferred discounts and rebates if the claim is based on consistent practice in prior periods, including compliance with the conditions required to qualify for the discount or rebates\textsuperscript{35}.

(4) Level of trade

As general principles, the comparison between normal value and export price must be established at the same level of trade. However, because of the complicated situations arising in international trade, the normal value and export price may not be calculated at the same level of trade. Under the Article 2(10)(d):.

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

(5) Transport, insurance, handling, loading, ancillary costs

Article 2 (10) (e) regulated that:

An adjustment shall be made for differences in the directly related costs incurred for conveying the product concerned from the premises of the exporter to an

\textsuperscript{34} Council Regulation 384/96, Article 2(10)(a)

\textsuperscript{35} Council Regulation 384/96, Article 2(10)(c)
independent buyer, where such costs are included in the prices charged. Those costs shall include transport, insurance, handling, loading and ancillary costs.

In *monosodium glutamate*,

The weighted average normal value thus established was compared to the weighted average export price, in accordance with Article 2(11) of the Basic Regulation. etc with regard to Vietnam, the comparison was made on a fob exporting country basis. In all cases, the comparison was made at the same level of trade. For the purpose of ensuring a fair comparison, account was taken, in accordance with Article 2(10) of the Basic Regulation, of differences in factors which were claimed and demonstrated to affect prices and price comparability. In this respect, adjustments were made for transport, insurance, handling, loading and ancillary costs and credit costs\(^36\).

It is to be noted that, in practice, the Commission usually rejects adjustments for pre-sale warehousing and transportation costs incurred within the exporter’s organization.

(6) Packing

An adjustment shall be made for differences in the directly related packing costs for the product concerned.\(^37\)

(7) Credit

An adjustment shall be made for differences in the cost of any credit granted for the sales under consideration, provided that it is a factor taken into account in the determination of the prices charged.\(^38\)

(8) After-sales costs

An adjustment shall be made for differences in the direct costs of providing warranties, guarantees, technical assistance and services, as provided for by law and/or in the sales contract\(^39\).

(9) Commissions

An adjustment shall be made for differences in commissions paid in respect of the sales under consideration\(^40\).

(10) Currency conversions

\(^36\) Council Regulation (EC) No 2051/98 Recital 41
\(^37\) Council Regulation 384/96, Article 2(10)(f)
\(^38\) Ibid, Article 2(10)(g)
\(^39\) Ibid, Article 2(10)(h)
\(^40\) Ibid, Article 2(10)(i)
When the price comparison requires a conversion of currencies, such conversion shall be made using the rate of exchange on the date of sale, except that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Normally, the date of sale shall be the date of invoice but the date of contract, purchase order or order confirmation may be used if these more appropriately establish the material terms of sale. Fluctuations in exchange rates shall be ignored and exporters shall be granted 60 days to reflect a sustained movement in exchange rates during the investigation period.41

Adjustments are made in most anti-dumping cases. In each case, it depends on the situation which factors are adjusted to make the comparison fairer.

For example: In Bicycles many factors were adjusted such as: indirect tax, discounts, level of trade, transport (including handling costs) ocean freight, insurance costs, packing and credit costs:

For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting price comparability in accordance with Article 2(10) of the basic Regulation. On this basis, adjustments were made where appropriate with regard to indirect taxes, discounts, level of trade, transport (including handling costs), ocean freight and insurance costs, packing and credit costs. The adjustments in the export price in respect of inland freight in the exporting country and credit costs were made based on the costs established in the analogue country with regard to companies to which MET was not granted. Adjustments were also made where the export sales were made via a related company located in a country other than the country concerned or the Community, pursuant to Article 2(10)(i) of the basic Regulation.42

3.1.4 Dumping margin

The dumping margin is defined in Article 2 (12) of Regulation 384/96:

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

As a rule, the Commission frequently uses the formula:

\[
\text{Dumping margin (\%)} = \frac{\text{Normal value less export price}}{\text{CIF export price (duty unpaid) at EC frontier}} \times 100
\]

41 Ibid, Article 2(10)(j)

42 Council Regulation (EC) No 1095/2005 Recital 87
According to Regulation 384/96, there are three ways to determine the dumping margin. They are

Method 1: Normal value and export price in above formula are weighted average normal value and weighted average export price.

Method 2: Normal value is individual normal value and export price is the individual export price, too.

Method 3: Normal value is weighted average normal value while export price is individual export price.

Note: Method 3 is only used if:
- there is a pattern of export prices which differs significantly among different purchasers, regions or time periods, and
- methods 1 and 2 would not reflect the full degree of dumping being practiced.

3.1.5 Zeroing

In order to calculate the dumping margin for each exporter in the case of comparison between the weighted average normal value and the weighted average export price, the Commission uses a methodology called “zeroing”.

It can be described as follows:

First, they calculate a weighted average export price and normal value for each type of product concerned (PCN);

Second, they compare the export price and normal value on a PCN by PCN basis in order to determine the dumping amount for each PCN;

Lastly, the Institution calculate a weighted average margin of dumping by summing up the dumping amounts of each PCN. However, each time the export price is higher then the normal value thereby yielding a “negative” dumping amount, the “negative” dumping amount for the PCN concerned is put at zero in the final calculation, rather than at the lower, negative value.

If the zeroing method is used, the dumping margin will be much higher than the dumping margin calculated by the normal methods. This method was criticised in the anti-dumping cases where it was used and there are many arguments against it.

3.2 **For the non-market economy country.**

Regulation No 384/96 provides that the non-market economy treatment will be applied for goods imported from the non-market economy countries (listed in Regulation No 519/94: Albania, Armenia, Azerbaijan, Belarus, China, Georgia, Kazakhstan, North Korea, Kyrgyz republic, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam). This provision was amended by Council Regulation No 2238/2000 of 9 October, 2000. It permitted China, Ukraine, Kazakhstan and Vietnam to have the right to request market economy treatment on the first date of becoming a WTO member.

There is an important provision in the EC anti-dumping law. If a country is considered as a non-market economy country, a company still has the right to claim the treatment of a producer in the “special market economy regime” as laid down in Article 2(7)(c). The company claiming can get the treatment if it satisfies five criteria as follows:

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

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

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

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

5. exchange rate conversions are carried out at the market rate44.”

(called MET)

As Vietnam is regarded as a non-market economy, the normal value of products from Vietnam is determined by the price in analogous country.

In some cases, the Vietnamese companies concerned claimed the above treatment but most such claims were rejected.

---

44 Council Regulation 384/96, Article 2(7)(c)
In *Bicycles*, only one company (Always) fulfilled the five Criteria. Four companies were refused MET because:

Regarding companies situated in an IZ, it was established that the Government Decree 24/2000NDCP of 31 July 2000 implementing the Law on Foreign Investment of Vietnam, provided for a general obligation for companies subject to this law to export at least 80% of their production (export obligation) in order to obtain an investment licence. It was also found that the export obligation was included in the investment licences of all five companies situated in an IZ.

Furthermore, it has to be mentioned that in the case of four companies of the five companies referred to in recital 34 above subject to the export obligation, it could not be concluded that they had one clear set of accounting records independently audited in line with international accounting standards and applied for all purposes. It was found that a non-transparent invoicing arrangement was in place with regard to the invoicing of the product concerned to the Community. This arrangement involved intermediary companies in tax havens and other locations outside Vietnam and it did not allow an audit trail to be followed. As a result, the accounting records of the companies in Vietnam did not represent faithfully the underlying export sales transactions.

Consequently, after consulting the Advisory Committee, it was decided to grant MET to Always on the basis that the company met all the criteria set in Article 2(7)(c) of the basic Regulation and to reject the claims of Asama, Dragon, High Ride, Liyang and Sheng Fa since these companies did not meet all the above-mentioned criteria.45

In *Stainless steel fasteners*, only one Vietnamese company claimed MET but:

As far as criterion 1 is concerned, it was concluded that this was not met. In particular, it was established that there was a certain quantity restriction on export and domestic sales. This restriction existed in the business investment licence, the application for the issuance of the licence as well as in the company’s charter. Finally, all decisions on matters involving the lease of land policy are explicitly determined by the State in the company’s business investment licence. The company also enjoys a waiver on the payment of land lease until its basic construction plans will be completed, as well as an additional waiver from the payment of the land lease for a number of years. Under these circumstances, it was found that the company had not demonstrated that its business decisions and costs were made in response to market conditions, and without significant state interference.

(40) As far as criterion 2 is concerned, it was concluded that it was not met because contrary to IAS 1 the financial statements of 2002 were not published in good time

and they were not properly audited. As regards the lease of land, the company argued that the land lease procedure followed in Vietnam was not contrary to the market economy principles and that all special provisions in relation to the land lease policy were merely incentives used by the Vietnamese Government to attract foreign investments. The exporting producer alleged that the lease amount itself was a kind of 'tax' and that it had bought the land from another company which was the 'original landlord'.

(51) It is noted that there is no free market of land in Vietnam. According to a government circular submitted by the company, the price of land is set by the State. As regards the argument concerning the purchase of land from the 'original landlord', this term is rather misleading since there is no private ownership of land in Vietnam. In fact, the company referred to compensation for the right to use the land paid to the previous tenant, which was determined unilaterally by the State. Moreover, no evidence was submitted which could support the allegation that the land lease is a kind of 'tax'. In any event, as set out in recital 39, the company has not been paying any land lease for a number of years.

(52) As regards criterion 2, the company argued that the auditors had spotted that it had published its Financial Statements for 2002 later than the IAS prescribed, but it received an approval from the Ministry of Finance to ignore this discrepancy.

(53) It is noted that this allegation was not confirmed by the auditor's report. On the contrary, the auditors stated that the audit was concluded in accordance with the IAS and no reservation on the accounts or explanation in a form of a note were included on why the company deviated from a clearly defined IAS practice. Moreover, the fact that a letter issued by the Ministry of Finance can allegedly change or relax a clearly stipulated law policy proves that the IAS were not applied properly in practice.

(54) Consequently, it was concluded that criteria 1 and 2 were not met and, therefore, MET should not be granted.46

From the above example, we can see that the Vietnamese companies find it difficult to get MET because of:

- The export obligation in the investment license.
- The accounting records in the company did not meet international standards.
- The nature of the lease of land.

These factors (investment license and land lease) were affected by the transition of the economy during this period as was the accounting method of the company. Both companies and government must change their approach.

---

4. Determination of injury

To determine injury is very important in an anti-dumping investigation because it will determine whether anti-dumping measures can be imposed or not.

There are four steps in determining injury:\n\begin{enumerate} \item Determine the scope of like product. \item Which producers of the like product constitute a “Community industry”. \item About the injury. \item Whether there is a causal link between dumped imports and injury. \end{enumerate}

4.1 Like product

The like product is defined in the Article 1(4) of the EC No. 384/96 as:

…to mean a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration.

In order to determine the like product, the notion of “product concerned” will be used.

4.1.1 Product concerned

The scope of product concerned will have a significant impact on the outcome of the case. On the one hand, if the product range is broad, this will have the effect of diluting the relative impact of dumped imports, thus making it easier to reach a no-injury conclusion. The other alternative is the controversial one.

There is no provision in the Basic Regulation stipulating what factors may be used to determine the product concerned but in practice, some factors are normally used, such as:

- Essential physical, technical, and chemical characteristics;
- Main uses and applications;
- Degree of interchangeability;
- Consumer perception and channels of sale;

---


\cite{Ibid}Ibid, p158
- And other factors: Production process, raw material involved, differences in production costs and prices, CN codes, quality, absence of EC production and some special cases.

In the ten EC anti-dumping cases against Vietnam, these factors can be used to determine the product concerned.

For example, in *Stainless steel fasteners* the product concerned is defined as:

It was found that all types, other than nuts, fall under the broad definition of fasteners and have the same basic physical and technical characteristics, the same basic uses and the same distribution channels.

In *bicycles*, the product concerned was divided into four categories (all-terrain bicycles including mountain bicycles 24” or 26”; trekking/city/hybrid/VTC/touring bicycles 26” or 28”; junior action (BXM) and children bicycles 16” or 20” and other bicycles/cycles:

The investigations confirmed that all types of bicycles as defined above have the same basic physical and technical characteristics. Furthermore, they are sold through similar distribution channels such as specialised retailers, sport chains and mass merchandisers on the Community market. The basic application and use of bicycles being identical, they are largely interchangeable and models from different categories therefore compete with each other. On this basis, it was concluded that all the categories form one single product.

In *Certain tube or pipe fittings*:

The product concerned is, as define in the original Regulation, certain ring-binder mechanisms (RBMs) currently classificable within CN code ex 83051000. These RBMs consists of two rectangular steel sheets or wires with at least four half-rings made of steel wire fixed on it and which are kept together by a steel cover. They can be opened either by pulling the half rings or by using a small steel-made trigger mechanism fixed to the product concerned. Generally, RBMs are composed of such as ring, blade, cover, eyelet and, where applicable, trigger.

If the authorities find that there are some differences in the factors, the product will be excluded from the definition of product concerned:

In *bicycles*, the unicycle was exempted from the scope of product concerned because the Commission:

---


…found that basic physical and technical differences clearly exist. Unlike bicycles, unicycles have no second wheel, no handlebar for steering and no breaking system. In addition, there is a clear dividing line between the uses of unicycles and other cycles. Unicycles are normally not used for transportation or sport, they are normally considered and used for acrobatic purposes. It was therefore concluded that the claim was duly justified and that the definition of the product concerned should be adjusted accordingly.

4.1.2 Like product

The determination of like product becomes easier after the scope of the product concerned is limited. In most cases, once the product concerned is defined, it is almost invariably found that it is a like product to the product produced by the Community industry.

In certain ring-binder mechanisms, it is said that:

The investigation showed that the RBMs exported to the Community from the People's Republic of China and those consigned from Vietnam to the Community have the same basic physical characteristics and have the same uses. They are therefore to be considered as like products within the meaning of Article 1(4) of the basic Regulation.

4.2 Community industry

4.2.1 Notion of Community industry

The notion of Community industry is in Article 4 of the Basic Regulation:

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

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

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


product in question in that market; and (ii) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community. In such circumstances, injury may be found to exist even where a major portion of the total Community industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such a market.

From the above regulation, we find that there is a rule to determine the community industry, it is:

The Community industry will comprise Community producers accounting for at least “a major proportion” of the total Community production of the like product.

To determine the Community industry, firstly we must calculate the Community production. Secondly, the producers holding the major proportion of like product should be determined.

The Community production will be calculated under the rules:

- products manufactured in the Community will automatically fall within the definition of Community production.

- All producers located in the Community will have their products counted for Community production, except:
  - Producers who are related to the exporters or importers of the allegedly dumped products;
  - Producers who are them selves importers of the allegedly dumped products;
  - Special circumstances for the producers in the certain re\textsuperscript{55}.

The meaning of the term “related to the exporters and importers” is specified in the Article 4(2) of the Basic Regulation.

4.2.2 Determination of Community industry

Under Article 4(1) of the Basic Regulation, producers will be considered as Community industry when considering whether to impose anti-dumping measures or not if:

- The producers must be the part of the Community industry, and
- The producers must hold the “major proportion” of the Community production.

The producers are also considered as the part of the Community industry if they support the complaint and cooperate in the investigation. The withdrawal of support for the complaint or non-cooperation in the investigation will exclude the producers from the Community industry definition.

In *Stainless Steel Fasteners*, the investigation established in the framework of the sampling exercise that the like product was manufactured by seven producers in the Community during the investigation period. However, two of them did not cooperate further with the investigation. So the five cooperating producers representing 54% of the total Community production of the like product will constitute the Community production within the meaning of Article 4(1) of the Basic Regulation.

About the “major proportion”, Article 5 (4) of Basic Regulation provided that:

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

In the footwear case, the definition of Community industry:

The complaint was lodged by and/or on behalf of Community producers representing a total of 814 companies. Those complainants were found to account for a major proportion of the total Community production of the product concerned, i.e. in this case around 42%.

For the purpose of the injury analysis, and in view of this significant number of complaining Community producers, the provisions of the Article 17 of the basic Regulation had to be applied. A sample of 10 producers was selected accordingly. These 10 companies, representing slightly more than 10% of the production of the complaining Community producers, fully cooperated in the investigation.

On the basis of the above, it is considered that the 814 complainant Community producers, i.e. those sampled and the other non-sampled Community producers, are deemed to constitute the Community industry within the meaning of Article 4(1) and Article 5(4) of the basic Regulation. They will hereinafter be referred to as the ‘Community industry’\(^{56}\).

\(^{56}\) Council Regulation (EC) No 553/2006, recital 150, 151, 152
4.3 Injury

4.3.1 Notion of “injury”

Article 3(1) stated that:

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

According to above Article, there are three ways to determine injury, they are:
- The material injury;
- The threat of material injury to the Community industry or
- The material retardation of the establishment of such an industry.

4.3.1.1 Material injury

There is no definition of material injury in the Basic Regulation but it lists some factors which are considered when determining material injury, and they are:
- the volume of the dumped imports;
- the effect of the dumped imports on prices in the Community market for like products; and
- the consequent impact of those imports on the Community industry\(^{57}\).

\(^{(1)}\) The volume of the dumped imports

Article 3(3) of Basic Regulation stipulated that:

With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community…

In practice, the Commission normally assesses the volume of the dumped import based on the increase in imports in terms of absolute volumes and market share. The data which is used to calculate that volume is the figures published by Eurostat.

In bicycles, the volume imported from Vietnam for the period between January 2000 and 31 March 2004 increased from 307 282 units to 1 577 737 units (413%). The Vietnamese share of the market increased from 1,77% to 8,7% in the IP.

In footwear, the volume imported from Vietnam for the period between 2001 and IP increased from 41 241 pairs to 81 477 pairs (equal 98%). The Vietnamese share of the market increased from 7,00% to 13,8% in the IP.

When determining the share market increase, it should be noted that the de minimis rule must be considered.

\(^{57}\) Council Regulation (EC) No 384/96, Article 3(2)
Article 5(7) Basic Regulation states that:

…Proceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Community consumption.

This means that if the market share held by imports is lower than 1%, the anti-dumping proceeding shall be terminated unless such countries collectively account for 3% or more.

Although de minimis rule is contained in the WTO anti-dumping agreement, it is still a major issue in most anti-dumping cases. Recent surveys reveal that de minimis rule is favorable to a decision which states that injury for the Community industry exists…. For the EC anti-dumping investigation, if the de minimis rule is applied, the number of cases where injury for Community industry is found to exist increases 42%58.

In recent times, some types of Vietnamese goods are imported have a market share lower than 1% but they are still involved in anti-dumping investigation when linked to the larger market share of Chinese goods. Gas-fuelled pocket lighters is one example. EC would like to apply anti-dumping measures to prevent the flood of Chinese gas-fuelled pocket lighters and Vietnamese lighters was also involved.

This seems to be a problem for Vietnamese enterprises who import the like product with other producers in other countries. They must follow what is happening to get early signals of an anti-dumping investigation so that they can react in a positive way.

(2) the effect of the dumped imports on prices in the Community market for like products

The effect in this case must be understood as follows:

…With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree…59

Price undercutting is normally determined by the average sale prices of exporter in a specific country with the Community industry’s average selling prices in the Community. However, it may be calculated in other ways.

In Monosodium Glutamate:

58 Dinh Thi My Loan, 2006, Activeness to react in the anti-dumping investigations
Price undercutting was established on the basis of a comparison of the export price, conventional duty paid, with the ex-works prices charged by the Community industry at the same level of trade\textsuperscript{60}.

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

It is stated in Article 3(5) of Basic Regulation that:

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

In \textit{Bicycles}, to determine the impact of dumped bicycles on the Community industry, ten factors were in consideration. Finally, the Commission found that:

- Despite the overall decrease of Community production, the sampled producers have managed to maintain and even increase their production. The sampled producers have managed to some extent to benefit from the existence of the measures, but any possibilities for further growth has been undermined by the dumped imports.

- Sales prices have decreased and profit levels have remained at low levels despite the increase in sales.

- Stock levels have increased and employment has decreased.

- The total Community production had decreased by 20\%, overall sales have decreased by 21\% and the market share of the total Community industry has fallen by 16\%.

The above statistics led to the conclusion that the Community industry had suffered material injury within the meaning of Article 3 of the basic Regulation.\textsuperscript{61}

\textbf{4.3.1.2 The threat of material injury to the Community industry}

The threat of material injury to the Community industry is provided for in Article 3(9) as follows:

\begin{center}
A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which
\end{center}

\textsuperscript{60} Council Regulation (EC) No 2051/98, recital 52

\textsuperscript{61} Council Regulation (EC) No1095/2005 recital 150, 151, 152
would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

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

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

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

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

(d) inventories of the product being investigated.

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

This definition is quite detailed. There is no need to comment on it.

4.3.1.3 material retardation of the establishment of such an industry

There is no particular provision in the EC anti-dumping regulations referring to this issue. The Commission will consider this factor on a case by case basis.

4.4 The causal link between dumped import and injury.

In an anti-dumping investigation, the causal link between the dumped import and injury is normally tested to ensure that the Community industry was injured after dumping occurred and because of it.

To determine the causal link between dumped import and injury, the Commission regularly examines:

- The coincidence of deterioration of a Community industry with occurrence of dumped imports;
- Other factors which were at the same time injuring a Community industry; and
- Degree of the injury if a coincidence was established.

The term “coincidence” in this case is understood that two or more events occur or happen at the same time.

---

Other factors which were normally to be considered are:
(i) Import that were not sold at dumping prices;
(ii) Demand for or consumption of a product under investigation; and
(iii) Export of the Community industry.

In *Monosodium Glutamate*,

Cumulated imports from the countries concerned by the new investigation increased their total market share from 9% in 1994 to 36% in the investigation period, i.e. by 27 percentage points or 300%. In contrast, the Community industry increased its market share by 14% between 1994 and 1995, but overall had a decrease in market share of 3% between 1994 and the investigation period\(^{63}\).

Other factors like other imports, development of consumption, export activity were also examined in this case but the Commission concluded that:

Given the fact that MSG is a commodity-type product, offered in a transparent market through similar sales channels in the Community, it was considered that dumped imports of MSG originating in the three countries subject to the new investigation, taken in isolation, have caused material injury to the Community industry.

This conclusion has been confirmed by the analysis carried out in respect of any other possible factors causing injury, notably imports from the countries concerned by the review investigation, which decreased substantially up to the investigation period, and the switch of the production process carried out by the Community industry. None of these factors was such as to break the causal link between the material injury suffered by the Community industry and the dumped imports from the countries concerned by the new investigation.\(^{64}\)

### 4.5 Community interest

Anti-dumping measures will be applied on the basis of a dumping determination, injury determination and the Community interest factor.

As stated in Article 21 (1) of the Basic Regulation:

\[\ldots\text{based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers…}\]

Anti-dumping may not be taken if they should contravene the interest of the Community.

As analyzed above, in most cases, the Community industry suffers injury from the dumped import. This means that the Community industry will get help if the anti-dumping measures are imposed. This is the point of levying the anti-dumping measures.

\(^{63}\) Council Regulation No 2051/98, recital 62

\(^{64}\) Ibid, recital 70.
The interest of users and consumers are considered as factors in the community interest under the Basic Regulation. In practice, the Commission does not usually pay much attention to these factors on the basis that users or consumers tend not to care whether anti-dumping duties are imposed or not. Instead of that, the Commission takes other factors in consideration.

In *Stainless steel fasteners*: the interests of Community industry, the importer/distributors, upstream suppliers, users and consumers were all evaluated and the Commission finally concluded that:

> Having examined the various interests involved, it is provisionally concluded that, from an overall Community interest perspective, no interest outweighs the Community industry’s interest to provisionally impose measures with the aim to eliminate trade distorting effects resulting from dumped imports\(^{65}\).

So the important factor behind imposing anti-dumping measures is the Community interest.

In practice we can conclude that: some factors are missing when evaluating the Community interest such as: the value of the trade affected by measures, the importance of the Community industry and competition aspects. They suggest the Community interest could be better assessed if one also looks at: estimating static costs of anti-dumping duties, estimating the size and importance of the total Community Industry, assessing the risks associated with dumping, assessing the interest of concerned parties which did not contact the Commission and improving access to the Commission services for interested parties\(^{66}\).

### 5. Procedure

The procedure of an anti-dumping start with the lodging of complaints. Based on these, the Commission will decide whether to initiate an anti-dumping proceeding or not. After that, the investigations is carried out. In this period, some preliminary decisions may be made:

- a decision on applying a provisional anti-dumping duty and later the definitive anti-dumping duty;
- terminating the proceeding…

In this part, the author does not describe all of these regulations but only focuses on:

\(^{65}\) Commission Regulation (EC) No 771/2005, recital 175

\(^{66}\) National Board of Trade, 2005, Treatment of the “Community interest” in EU anti-dumping investigations.
5.1 The advantages of cooperation

According to the Basic Regulation:

- The Commission has used the highest dumping margin found with regard to an exporter who did not cooperate in the IP.
- A Community producer who refuses to cooperate will not be regarded as being part of the Community industry.
- If the analogue country refuses to cooperate, the Community has to select another analogue country.
- If a party has submitted false or misleading information, the Commission will rely on the facts available to calculate the dumping margin.
- If the exporter provided partial replies only to a request for information, the Commission can use the facts available to calculate dumping margin.

These regulations give the Commission the right to decide which method to apply when finding the true extent of dumping. If an exporter cooperates with the Commission and submits all information related to itself, this is an advantage in comparison with just using the facts available. If the Commission uses the facts available the dumping margin is, in most cases, much higher than normal.

5.2 Terminating the proceeding

Of the ten Vietnamese cases, there were two (gas-fuelled pocket lighters and certain tube or pipe fittings) which were terminated during the proceeding because of the withdrawal of the complaint. This was a good experience for the Vietnamese enterprises involved in the anti-dumping investigation. They need to cooperate with the investigations authorities to show that in some cases our market share is very small in comparison with the larger shares of other neighbouring countries and that applying the anti-dumping proceeding to our product is unfair.

5.3 Circumvention

Of the ten Vietnamese cases, three of them (certain zinc oxides, integrated electronic compact fluorescent lamps and ring binder mechanisms) refer to the situation where goods are made elsewhere, transferred to Vietnam and only after
that, exported to the Community. Under the Basic Regulation, those goods can still be subjected to an anti-dumping proceeding if the goods can be considered as being dumped.

In these cases, the dumping margins found by the Commission are very high. The level of definitive anti-dumping duty was correspondingly high and the companies suffered a great deal from the investigation. So Vietnamese enterprises need to be careful when importing goods from China and then exporting them to the EC.
6. **Conclusion:**

From the above statistics, we can conclude as follows:

On the one hand, undergoing an anti-dumping investigation is very dangerous for the Vietnamese economy and the Vietnamese people and their society. So the target for Vietnamese exporters should be to avoid being involved in such a situation. For this, enterprises should note:

- Recognising the early signs of an anti-dumping proceeding is very important because we can best prepare how to react to this. Thus, we should pay attention to our products which are exported to the EU. Furthermore, we must follow what happens to like products from other countries in the region which are also imported there, especially if they are first shipped to Vietnam. We can see that in the ten above cases, 9 of them involved other countries such as: the Peoples Republic of China, Thailand and Taiwan...

The enterprises alone cannot do this. There should be cooperation between the competent authorities and the enterprises as a whole especially those operating by way of a federation of enterprises. So the enterprises producing in a field need to establish a federation to get information and act on behalf of single enterprises if needed cases.

- When unfortunately involving in an anti-dumping cases, Vietnamese enterprises need to keep calm and cooperate with the Commission in a positive way in order to get the best results.
- Vietnamese enterprises should recorded figures pursuant to international standards so that they can use the data in other antidumping proceedings to help calculate the normal value which best reflects the actual operation of the enterprises.

On the other hand, reacting to an anti-dumping case is not the duty of the enterprises alone but is also the responsibility of the competent authorities.

- The authorities should help enterprises in understanding the EC regulations and their implementation.
- The authorities should help the enterprises subject to an investigation because this is a problem not only for the enterprises but also for the Government.
- Vietnam is a member of the WTO, so if there is a dispute under WTO anti-dumping law, the government of Vietnam can ask the WTO disputes settlement body to resolve it.

These are some of the ideas of the author which may assist both Vietnamese enterprises and the government.
Table of Statutes and other Legal Instruments

**International Treaties and Conventions**
The general agreement on trade and tariff
The anti-dumping agreement

**National Legislations**

*Vietnam*
Constitution (1992) of the Socialist Republic of Vietnam
Civil Code (No. 33/2005/QH11 of 14 June 2005)
Law on Investment
Table of Cases

EC Decision


Notice of initiation of an anti-dumping proceedings concerning imports of disposable gas-fuelled pocket lighters originating in People’s Republic of China, Indonesia, Malaysia and Vietnam and of the initiation of an interim review of the anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in the People’s Republic of China or consigned from or originating in taiwan and on imports of certain refillable pocket flint lighters originating in the People’s Republic of China or consigned from or originating in Taiwan, OJ C153 27.6.2002.

Commission Decision of 11 September 2003 terminating the anti-dumping proceedings concerning imports of disposable gas-fuelled pocket lighters originating in People’s Republic of China, Indonesia, Malaysia and Vietnam and terminating the interim review of the anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in the People’s Republic of China or consigned from or originating in taiwan and on imports of certain refillable pocket flint lighters originating in the People’s Republic of China or consigned from or originating in Taiwan, OJ L228 12.9.2003.


Commission regulation (EC) No 1582/2004 of 8 September 2004 initiating an antidumping investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation No 1470/2001 on import of integrated electronic compact fluorescent lamp originating in the People’s Republic of China by import of integrated electronic compact fluorescent lamp consigned from Vietnam, Pakistan or the Philippines, whether declared as originating in Vietnam, Pakistan or the Philippines or not, and making such imports subject to registration, OJ L 289 10.9.2004.


Bibliography

Unless otherwise stated, all Internet links shown in this bibliography have been assessed on 30 November 2008.

Official Reports and other Documents

Monographs


Articles in Journals, Anthologies etc.
Treat of the “Community interest” in Eu antidumping investigation – National Board of trade Kommerskollegium.
European Communities – Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil.

Injury Investigation in Antidumping and the Super-Additivity Effect: A theoretical Explanation..

European Communities – antidumping measures on farmed salmon from norway