The Full Potential of the Europe Agreements - Trade and Competition Issues : The Case of Poland

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I. INTRODUCTION

There is now an extensive literature on the dichotomies between trade and competition laws, where the treatment imposed on foreign commerce through trade measures is opposed to the treatment imposed on domestic products and producers by domestic competition laws. These discussions usually focus on the anticompetitive enforcement of most trade measures—such as antidumping—and their alleged contradiction with free-trade principles. The directly related issue—what are (or should be) the purpose and the effects of antidumping measures—leads to a fundamental question: to what extent can competition laws replace antidumping laws? Arguably, antidumping laws have evolved into strategic tools to counteract the extraterritorial impact of differences in domestic policies, laws and business practices and to protect national identity and even "statehood". However, within regional trade arrangements, these strategies and the trade/competition dichotomies lose their political rationale. Assuming that, in forming a regional arrangement, the authentic intention of regional States is to integrate production and distribution of goods and services (in favouring the most efficient firm within the region) and assuming that, in most cases, regional agreements are concluded between countries which already traded extensively and used antidumping measures against each other, the phasing-out of antidumping measures within the regional arrangement (internal antidumping measures) becomes a catalyst to the integration process and a prior condition to harmonization of any regulation on free movement of goods.[1]

At the same time, when firms lose access to antidumping tools, they need other instruments to complain about their competitors' restrictive business practices taking place in the territory of other regional States. The capacity of firms and governments to

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[1] The phasing-out of national trade frontiers maintained by antidumping measures will only accelerate integration of commercial functions within the region, increase the level of internal trade and arguably world trade. For a recent discussion of the welfare economics of trading blocs, see the comments by J. de Melo and A. Panagariya in *New Dimensions in Regional Integration*, Cambridge Press, Cambridge, England, 1993.

reach directly restrictive business practices wherever they take place within the regional area is a pre-condition, *sine qua non*, before antidumping measures can be effectively phased out. In this sense, the evolution of the relation between internal antidumping actions and the enforcement of competition provisions within the regional agreement is a key element in the integration process.

This article addresses the issue of the interaction between competition and antidumping provisions within the Europe Agreement between the EC and Poland and suggests actions to be taken during a pre-membership period. The bilateral free-trade agreement between the EC and Poland is interesting because it contains a series of Joint Declarations, in one of which Poland is said to envisage that "certain competition rules may be directly applicable at a later stage". Arguably, when the Europe Agreement was signed, the Polish authorities had understood the linkage between the direct effect of its competition provisions and the possibility of phasing out internal antidumping measures, even before Poland's full membership in the European Union. More importantly, the European Court of Justice (ECJ) has ruled that certain provisions of the EC's Association Agreements—and decisions taken under these Agreements—may have a direct effect. It is argued here that the competition provisions of the EC–Poland Agreement, together with those of its related Implementation Agreement, could be considered to have direct effect , or made to have direct effect. Importing and exporting firms could therefore complain about the restrictive business practices of firms located anywhere within the Association. This re-enforcement of competition provisions should stimulate the integration of the relevant economies. The EC Community Interest clause, and an eventual similar provision in the Polish legislation, should also be expanded to introduce criteria for the balancing of trade and competition elements.

After presenting, in Section II, a review of the GATT/WTO law on regional arrangements Section III analyses the legal means used in other regional arrangements to phase out antidumping measures. In Section IV, this study focuses on mechanics contained in the EC-Poland Agreement to address antidumping and competition issues; then Section V presents a set of general and specific suggestions towards furthering the integration process between the EC and Poland. Section VI sets out the conclusions. Sections of the Implementation Agreement are annexed to this article.

II. GATT/WTO Law on Free-Trade Areas and Regional Arrangements and the Issue of Internal Antidumping Measures in the Integration Process

The fundamental right of States to develop privileged political or economic relations is older than the GATT itself and has not since been abolished. Before the GATT, the autonomous concept of "free-trade area" did not exist, and a "free-trade area" was traditionally defined as an imperfect customs union. Generally, a customs union is defined as an arrangement of States where trade measures between Member States are

eliminated, Members adopt a common external commercial policy and customs revenue is apportioned. Internally, a free-trade area is like a customs union, but, externally, States maintain their respective tariffs and trade policies with non-Members.

At the first preparatory meeting for an international trade charter (lately called the Havana Charter), the French suggested that imperfect and unfinished customs unions be incorporated as another acceptable exception to most-favoured-nation (MFN) treatment.[2] The U.S. delegate agreed with this principle:

> "There were two or three comments to the effect that it takes time to complete a customs union and that some period of grace ought to be allowed for working it out. I think that it is a reasonable position. It obviously is a complicated matter, and as long as the definite decision has not been made to have the customs union, as long as the working out of the details is actually in process, it seems to me that there should be no rigid application of the most-favoured-nation clause in that case."[3]

Therefore a free-trade agreement would conceptually be an agreement less integrated than a customs union or common market. It could also be argued that free-trade areas are only temporary levels of integration that will either fade away or strengthen towards customs unions, as enterprises facing further internal competition will soon push for harmonization of their external tariffs and other trade policies in order to compete "fairly" with one another within the regional area. Active free-trade areas would therefore tend to lean towards customs unions and common markets. What the GATT did, therefore, was to provide criteria to ensure an authentic regional integration process. In one of these criteria, GATT Article XXIV(8)(b) requires that duties and other restrictive regulations of commerce be eliminated on substantially all the trade within a free-trade area.[4] Although most of the discussions centre on the interpretation of "substantially all",[5] the expression, "duties and other regulations restrictive of commerce" is also crucial. Can antidumping duties be considered as "duties restrictive of commerce"? Generally economists would tend to agree that most, if not all, antidumping measures restrict trade;[6] however, this does not answer the legal question as to whether antidumping measures can be considered restrictive regulations to trade. Does the GATT/WTO authorize antidumping measures only as measures to counteract restrictive regulation to trade?

It could be argued that only antidumping laws which respect the GATT cannot be considered restrictive of commerce. If one applies the reasoning developed in the GATT

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[2] F. A. Haight, *Customs Unions and Free-Trade Areas under GATT: A Reappraisal*, 6 J.W.T.L. 4, July–August 1972, 391 at p. 396. For a detailed study of the various positions taken during the negotiations, see R. Imhoof, *Le GATT et les zones de libre-échange*, 1979, pp. 183–201.

[3] GATT E/PC/T/C.11/PV 7, I.H.E.I., Geneva, p. 25.

[4] GATT XXIV(8)(b): "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

[5] Note the 4th premabular paragraph of the new Understanding on Article XXIV of the WTO Agreement, which recognizes that the contribution to the expansion of world trade is "diminished if any major sector of trade is excluded".

[6] To this effect very relevant work and studies have been completed by the DAFFE division of the OECD, namely the restricted papers by Patrick Messerlin and Jacques Bourgeois.

Panel Report on Section 337 of the U.S. Tariff Act of 1930, which concluded that procedural aspects of border laws were covered by the obligation on national treatment (GATT Article III), it can be argued that most existing antidumping laws do not respect the national treatment obligation of the GATT. Indeed, the choice of courts, the time-limits, the possibilities of defence and counterclaims, the rights of appeal, the remedy and the enforcement procedures of antidumping are all discriminatory against foreign producers faced with antidumping investigations as compared with domestic producers faced with competition complaints before their national courts involving similar issues.[7]

Furthermore, if one follows Jackson's distinction that both the MFN (Article I) and the tariff concessions (Article II) are found in Part I of the GATT, which refers to international obligations, and that the dispositions of Part II form a "code of conduct"[8] designed to protect the value of multilateral tariffs concessions, one may wonder why the "disciplines" of antidumping duties are necessary when the tariffs that they are supposed to protect have disappeared.[9] John Temple Lang, then involved in the transition process within the EC, writes the same thing:

> "Apparently it was assumed that dumping could occur and might be harmful, while tariffs were still applicable to intra-community trade in some products, and that after the end of the transitional period antidumping measures would not be appropriate."[10]

Moreover, there are exceptions to this obligation to eliminate duties and regulations restricting trade which are explicitly mentioned in Article XXIV(8)(b): "...(except, where necessary, those imposed under Articles XI, XII, XIII, XIV and XX)..." [11] It would have been easy to include Article VI in the list, since antidumping laws existed when this Article was drafted.[12] Of course the counter-argument is that, as such, Article VI measures were not considered as restricting trade. It can also be argued that the list of exceptions in paragraph 8(b) is not limitative and that safeguards measures, for instance, are an implicit exception not mentioned. Another argument in favour of interpreting Article XXIV (8)(b) as indicating the phasing-out of internal antidumping duties, is the fact that, in many free-trade agreements,[13] regional States have expressly retained jurisdiction to impose antidumping duties. If it were clear that antidumping

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[7] See G. Marceau, *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas*, OUP, Oxford, 1994, pp. 107–117.

[8] J.H. Jackson, *Equality and Discrimination in International Economic Law*, in *Yearbook of World Affairs*, Sweet & Maxwell, London, 1983, p. 228.

[9] The answer may be that tariffs are not the only barrier to entry and therefore, until other barriers are put down, antidumping regulations may be kept to "countervail" the effects of non-tariff barriers. However, in order to further integration and establish a "trade-creating" free-trade area, the ultimate and best solution would be to put down these other barriers along the recommendation of the GATT for the phasing-out of regulations restricting trade.

[10] J. Temple Lang, *Reconciling European Community Antitrust and Antidumping*, in B. Hawks (ed.), *1988 Annual Proceedings Fordham Corporate Law Institute*, New York, 1989, Chapter 7, p. 17.

[11] See *supra*, footnote 4.

[12] J.H. Jackson, *World Trade and the Law of GATT*, Bobbs Merrill, Indianapolis, 1969, p. 610.

[13] See the Israel-United States FTA, the old Australia-New Zealand CER, the Canada-United States FTA, the EEC-EFTA FTAs, the Europe Agreements.

duties were outside of the scope of regulations restricting trade, Member States would not have needed to retain such a right to use antidumping measures.[14]

If internal antidumping measures are phased out, internal competition would expand. With all enterprises within a free-trade area subject to the same internal competition, it is plausible that they would lobby for some harmonization of their external tariffs. The phasing-out of internal antidumping duties, this crucial legal step, which in turn relies on the alternative expanded (or extraterritorial) use of competition laws, will push free-trade areas closer to customs unions. This would explain why free-trade areas, imperfect customs unions, were accepted: they can lead to further integration towards customs union.

III. Experiences of Regional Arrangements in Phasing-Out Antidumping Measures

A review of the main regional agreements where antidumping measures have been phased out in favour of the application of laws on restrictive business practices (or competition) leads to the conclusion that States have used three main patterns to regulate competition and antidumping measures within regional economic arrangements.

A. The Australia—New Zealand Closer Economic Relations Agreement

The first model is the Australia–New Zealand Closer Economic Relations (CER) agreement, which established a free-trade area where antidumping measures were phased out gradually in institutionalizing the extraterritorial application of domestic competition laws.[15] Jurisdiction over the market source of the business practice was extended to cover any market in Australia, New Zealand or Australasia. But there is no

[14] In any case, phasing out antidumping duties would reduce administrative costs. On the administrative costs of antidumping measures, see J. Quinn, *Towards a New Legal Framework for Canada–United States Relations*, in M. Irish and E. Carasco (eds.), *Legal Framework for Canada–United States Trade*, Carswell, Toronto, 1988, p. 203; see also various articles to this effect by A. Deardoff, M. Hart and R. Herzstein in J.H. Jackson and E. Vermulst (eds.), *Antidumping Law and Practice: A Comparative Study*, The University of Michigan Press, Ann Arbor, 1991. Also the report of the Canada–United States Chamber of Commerce published in the Canada–USA L.J. Vol. 17, 1991, p. 71.

[15] It should be noted that Article 21 states: "The Member States recognize that the objectives of this agreement may be promoted by harmonization of customs policies and procedures in particular cases. Accordingly the Member States shall consult at the written request of either to determine any harmonization which may be appropriate." This would seem to indicate an intention towards a customs union.

common court, no common definition or standards, no directly applicable supra-national legislation.[16]

The turning point was to pass from a strictly international system to a system where firms had direct rights to ensure the respect of competitive behaviour. This was done by extending the prohibitions on anticompetitive use of market power, contained in Section 36 of the New Zealand Commerce Act and Section 46 of the Australian Trade Practices Act, to cover the use of market power throughout the combined Trans-Tasman[17] market. It introduced this new offence in amending domestic legislation rather than using a supra-national legislation or a treaty applicable to the whole free-trade territory, as was done in the European Free Trade Association (EFTA), the EEC–EFTA Free Trade Agreements (FTAs) and the EEC. The new Section 36A of the New Zealand Commerce Act prohibits any person with a dominant position in a market in Australia, in New Zealand or in New Zealand–Australia (Australasia) territory from using that position to restrict entry into, deter competition in, or eliminate a person from, a market in New Zealand. Section 46A of the Australian Trade Practice Act does the same, and prohibits firms with a substantial degree of market power in a Trans-Tasman market, or part of it, to seek to eliminate or substantially damage a competitor, prevent the entry of a person, or deter competition, in a market in Australia. Both the Australian and New Zealand amendments have addressed the "origin" of the market power. Now a dominant position in any Trans-Tasman market may be subject to the New Zealand legislation if such a practice affects a market in New Zealand. The same is true of the Australian legislation.[18]

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[16] Article 22 of the Australia–New Zealand CER stated that Member States should meet annually and that a general review of the operation of the agreement shall be undertaken in 1988. The review of 1988 resulted in three Protocols and seven Understandings aimed at accelerating the movement towards a single market. In the Protocol on the Acceleration of Free Trade in Goods, Member States agreed to eliminate remaining tariffs, quantitative import restrictions and tariff quotas by 1 July 1990. Article 4 of that Protocol provided that from that date neither country will take antidumping actions against goods from the other Member States. Anticompetitive conducts were to become subject to both countries' competition laws. A Memorandum of Understanding on Harmonization of Business Law was signed which committed both governments to further harmonize all relevant legislation with a view to fully realize the objectives of the CER: "to eliminate barriers to trade between Australia and New Zealand" (Article 1(c)); "to develop trade between New Zealand and Australia under conditions of fair trade" (Article 1(d)).

[17] Referring to the Tasman Sea, the body of water situated between Australia and New Zealand; expression used by the authors of the *CER and Business Competition* (K. Vautier, J. Farmer and R. Baxt (eds.), CCH, 1990).

[18] National Courts have been given additional jurisdiction to deal with offences perpetrated in the territory of the other Member State. National Courts can now move to the district of the seller who is alleged to be infringing one of the two legislations. Other legislative provisions had to be amended. The relevant courts of both countries had to have their jurisdiction extended to abuses taking place in the other's territory. Courts of both countries were made able to sit in the other country or take evidence and submissions by means of video-link or telephone. Both the Australian Trade Practice Commission and the New Zealand Commerce Commission were given new investigatory powers to obtain evidence in the other country and to collaborate. Lawyers of both jurisdictions have been given the right to plead in front of both courts. Enforcement agencies have agreed to collaborate for collection of evidence, information, subpoenas. Judgments are enforceable equally all over the Australasia territory. In the Joint Statement that they issued, they envisage the possibility that they will undertake preliminary investigations of facts on behalf of the other and that joint investigations will be carried out. Finally, judgments and orders, including injunctions, made by each Court in proceedings for anticompetitive behaviour in the Trans-Tasman market, became enforceable by registration in the corresponding court in the other country. See Report: *Courts to treat New Zealand as a Seventh State*, 29 Australian, 29 June 1988, p. 3.

B. THE EUROPEAN ECONOMIC AREA

The second model is the European Economic Area (EEA). In this model, antidumping measures within the EEA were abolished with the entry into force of the Agreement, without any transitional period.[19] The abolition of antidumping actions was made possible with the obligation of EFTA States to adopt the EC rules on free movement of goods (Part II of the EEA) together with the adoption of Articles 53 and 54 of the EEA, which are perfect duplications of Articles 85 and 86 of the EEC Treaty, and with the introduction of the direct effect in favour of private litigants with the *acquis communautaire* (i.e. all the EC legislation and case-law since the inception of the EEA).

The enforcement of these competition provisions is shared between the EC Commission and the EFTA Surveillance Authority. Article 55.2, paragraph 2, adds that each Authority may authorize its Members States to take action and may request the other Authority to authorize States within its jurisdiction to take such measures.[20] An EFTA Surveillance Authority and an EFTA Court perform functions similar to those of the EC Commission and the EC Court, over the EFTA territory, when they have jurisdiction under Article 56. Article 56 provides for the allocation of jurisdiction between the two authorities: jurisdiction is assessed according to the law of the territory where the horizontal agreement or the abuse of a dominant position[21] takes place. In case of potentially concurrent jurisdiction, the EC Commission will often have exclusive jurisdiction over cases involving one or more EFTA countries. Although the population of EFTA is approximately 10 percent of that of the EC, 33 percent of the turnover of enterprises under investigation must take place on the territory of EFTA in order to give jurisdiction to the EFTA Authority.[22] In case of a conflict as to which Authority has jurisdiction, the Joint Committee would decide.[23] If no consensus is reached in this Joint Committee,[24] the matter could be sent to the EC Court, which has declared, in its two Opinions on the EEA Agreement, the supremacy of the EC law over any other treaty.[25]

The EEA zone was more integrated than most free-trade areas, although two jurisdictions were maintained. Member States from both groups had fairly similar market conditions before undertaking such a process of integration. The very strong balance in favour of the EC's jurisdiction makes sense when the EEA is perceived as a stepping stone to full membership in the EC. The necessity to reach similar market

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[19] Article 26 of the EEA Agreement and Protocol 13.

[20] This can be seen as some sort of positive comity directed towards the Member States of each competent authority.

[21] Article 56.2: "...cases falling under Article 54 shall be decided upon by the surveillance authority *in the territory of which a dominant position is found to exist*. The rules set out in paragraph 1(b) and (c) apply only if dominance exists within the territories of both surveillance authorities." (emphasis added).

[22] See Article 56 of the EEA Agreement.

[23] Ibid., Article 111.

[24] Ibid., Article 93, stating that the EEC States and the EFTA States have one voice each. This is called the "two-pillar" principle of the EEA.

[25] The first opinion of the ECJ which invalidated the EEA is Opinion 1/91, 14 December 1991, (1991) ECR 1-6079; the second opinion is 1/92, 10 April 1992, (1992) ECR 1-282.

conditions, and the need to have similar free movement of goods rules before internal antidumping measures can be phased out amongst regional states, is relevant in the context of the Europe Agreement.

C. THE EUROPEAN COMMUNITIES

The third model, which is not a free-trade area, is what is now the European Communities. In the EC a single new supra-national competition law introduced European-wide competition standards and replaced national antidumping laws amongst trading partners.[26] This involved a single supra-national authority to ensure some homogeneity in the application of the competition rules throughout the territory covered by the supra-national legislation. In addition, national courts were asked to enforce provisions of new competition rules. A central Commission and a central Court are the major forces providing guidelines to national authorities. With the referral system to the EC Court, national tribunals get instructions on the questions of law which national courts implement into the set of facts before them. In addition, because competition provisions of the EC Treaty were held to be of direct effect, individuals can enforce them in domestic courts. This system of parallel legal orders carries, however, practical problems of homogeneity and co-ordination.

In the EC Treaty, as was the case for EFTA and the EEC-EFTA FTAs, rules on internal dumping are considered along with other rules on behaviour of firms. In fact, in the EC Treaty, Chapter I, entitled "Rules on Competition" (the second title of Part Three of the Treaty), is divided into three sections: Section 1, entitled "Rules applying to undertakings", goes from Articles 85 to 90; Section 2, entitled "Dumping" and dealing with intra-Community dumping, corresponds to Article 91; and Section 3, entitled "Aids granted by States", covers Articles 92 to 94. Dumping is treated in parallel with Articles 85 and 86, all under the title of "Competition: Private and governmental restrictive business practices affecting prices."[27] This clearly reveals the symmetry between the two sets of rules.

Internal antidumping measures were phased out during the transitional period during which the original Member States set up their customs union. For the founding Members, Article 91 stated:

> "1. If, during the transitional period, the Commission, on application by a Member State or by any other interested party, finds that dumping is being practised within the common market, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them. Should the practices continue, the Commission shall authorize the injured Member State to take protective measures, the conditions and details of which the Commission shall determine."

[26] Parallel national competition laws are still applicable to national transactions when they do not affect trade between Member States.

[27] Intellectual property (IP) laws also have a direct impact on prices and can also be viewed as part of the competition system of a country. Indeed it can be argued that antidumping measures act, notably, as a buffer between domestic legislations, including IP laws which should be harmonized before antidumping measures are phased out.

A similar process was envisaged during the three-year transitional period for the accession of new Member States (respectively, Denmark, Ireland and the United Kingdom;[28] Greece;[29] and Portugal and Spain.[30]) The Antidumping Regulation was amended in 1973 to authorize the Commission to amend or revoke, with or without retroactive effects, antidumping measures imposed during the transitional provision of any Act of Accession.[31]

John Temple Lang writes that the Community Institutions have never had any reason to give any official explanation of why this was done.[32]

The process was more elaborate for the accession of Spain and Portugal. When they joined the EC, Article 380 of the Act of Accession envisaged that, during the transitory period, antidumping actions should be phased out between the new EEC Members and the Communities as well as between Spain and Portugal. A regulation was adopted pursuant to Article 380, which provided the Commission with the authority, after consultations with Member States,[33] to communicate with the dumper and make recommendations that dumping be terminated. If the dumper did not comply, the Commission could authorize Member States to impose duties for a certain period of time and under specific conditions. Antidumping duties had to be phased out within a maximum of five years after the date on which they took effect, were confirmed or reviewed, and, in all cases, before the expiration of the transitional period.

The second paragraph of Article 91 of the EC Treaty contained the so-called "Boomerang clause", the main purpose of which is to counteract and arbitrage the effects of internal dumping in order to discourage the dumper:

> "As soon as this Treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, on reimportation, be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect. The Commission shall lay down appropriate rules for the application of this paragraph."

It is clear that the ultimate goal of the two sub-paragraphs of Article 91 was to supplement antidumping actions by more competitive rules regulating the behaviour of firms throughout the territory of the common market; when tariffs disappear, antidumping measures become useless and arguably detrimental to the integration process. This has to be understood, in the wider context of the completion of the common market, as a means to promote a harmonious development of economic activities, an accelerated raising of standards of living and closer relations between States belonging to the common market (Article 2 of the EC Treaty). Antidumping actions amongst Member States were considered as important limitations to the realization of these goals.

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[28] Treaty of Accession, 1972, O.J. L 73.
[29] Treaty of Accession, 1979, O.J. L 291/9.
[30] 1 January 1986, 1985, O.J. L 302/9.
[31] Council Regulation No. 1411/77, O.J. L 160, 4, Article 1.
[32] Temple Lang, *supra*, footnote 10.
[33] There was no consultation procedure for dumping from non-EEC Members.

IV. The Europe Agreement

Initially the so-called Europe Agreements referred to the free-trade agreements between the European Communities, on the one hand, and Poland, Hungary and the Czech and Slovak Republics, on the other.[34] The initial interim agreements were signed on 1 March 1992. The comprehensive Agreements entered into force on 1 February 1994. The bulk of these Europe Agreements is identical, but the bilateral Agreement with Poland contains a few more ambitious provisions concerning the direct effect of its competition provisions.

A. The competition provisions contained in the EC-Poland Association Agreement

The Agreement is divided into nine Titles. Title V, Payments, Capital, Competition and other Economic Provisions, Approximation of Law, contains a Chapter II on "Competition and Other Economic Provisions", with Articles 63 to 67. Article 63 of this Europe Agreement adopts the criteria of Articles 85 and 86 (and 92) of the EEC Treaty, is so far as trade between the EEC and Poland is affected.

Articles 63.1 and 63.2 read as follows:

> "63.1: The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Poland:
> (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
> (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Poland as a whole or in a substantial part thereof;
> (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or of the production of certain goods. [There is also express reference to the law under Articles 85, 86 and 92 of the EEC Treaty[35] and to the obligation of Poland to approximate its legislation with the EEC's, in parallel to the absorption of the *acquis communautaire* into the EEA Agreement.[36]]
> 63.2: Any practice contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community."

[34] These Agreements are "Association" Agreements concluded under Article 238 of the EEC Treaty and which provide for a transitional period of ten years. Now the EC has Association Agreements with the Baltic States, Bulgaria and Slovenia, as well.

[35] Article 63.2 of the Europe Agreement: "Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Economic Community."

[36] Moreover Article 11.1 of the Joint Declarations adds that existing Agreements should be dealt with in a manner similar to what is provided for in Article 7 of Regulation 17: "The Association Council shall establish appropriate measures to ensure that all agreements covered by Article 63.1 (i) of the Agreement and affecting trade between the Contracting Parties and which were concluded before the entry into force of the Agreement will be dealt with in a manner similar to what is provided in Article 7 of the Council Regulation, (EEC) No. 17/62."

Hoekman and Mavroidis[37] write that there are two main differences between the language on competition of the Europe Agreement and that of the EC Treaty: The Europe Agreement does not reproduce Article 85.3 (exemption of certain agreements between competitors if they "contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit...", what Hoekman and Mavroidis qualify as being in the "public interest" but which could also be considered as parameters for an interpretation along the "rule of reason"), and there is no explicit provision relating to concentrations.[38]

In response to this point, it could be argued that if agreements were assessed under Article 85.1 of the EC Treaty on the basis of a "rule of reason", there would not be any strict need for a provision similar to Article 85.3 or any specific set of rules on mergers and joint-ventures. In fact, situations envisaged by Article 85.3 and usually considered to be exceptions to Article 85.1 would arguably not be disciplined by Article 85.1 if they were not constituting agreements "which have as their object or effect the prevention, restriction or distortion of competition within the common market..." In other words, transnational agreements between the EC and Polish firms which would "contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit..." and which would not impose indispensable restrictions or eliminate competition in respect of a substantial part of the products (to use the language of Article 85.3) could be argued not to "have as their object or effect the prevention, restriction or distortion of competition" and not to "affect trade between the Community and Poland", therefore, not captured by the language of Article 63.1 of the Europe Agreement, with no further need for a specific language similar to that of Article 85.3 of the EC Treaty or any other process of exemption. This interpretation—that conceptually there is no real need for an explicit exemption process such as the one envisaged under Article 85.3—could also be supported by the fact that the Commission almost never grants any individual exemptions when requested, but rather uses block exemption or issues so-called "comfort letters", which, most of the time, state that the agreement for which exemption is requested under Article 85.3 is considered not to infringe the provisions of Article 85.1.[39] Indirectly, these comfort letters have introduced some form of "rule of reason" into the EC system in assessing whether an agreement is detrimental to EC competition, and have *de facto* limited the need for a formal exemption under Article 85.3. It can therefore be concluded that Article 63.1 of the Europe Agreement

[37] *Linking Competition and Trade Policies in Central and East European Countries*, Centre for Economic Policy Research (CEPR) paper 1009, September 1994, published in Allan Winters (ed.), *Foundation of an Open Economy, Trade Laws for Eastern Europe*, CEPR, London, 1995, p. 9.

[38] It should be noted that it has been argued that the absence of an Article similar to Article 85(3) would forbid the agreement from having direct effect; see *Bosch*, (1962) ECR 49.

[39] Legal issues remain as to the legal value of these comfort letters *vis-à-vis* third parties: if a firm has received a comfort letter for a distribution agreement and, for instance, wants to enforce its distribution agreement before a national tribunal, could this firm oppose this letter to a defendant who would argue that the distribution agreement infringes Article 85.3 of the EC Treaty?

is wide enough to encompass situations which would be covered by exemptions under Article 85.3 or by comfort letters.

As for the lack of provisions dealing with mergers and joint-ventures in the Europe Agreement, it was argued that, even within the EC, Articles 85 and 86 were sufficiently elastic to discipline joint-ventures and mergers,[40] but this position was rejected,[41] and in 1989[42] a first Merger Regulation was adopted. Indeed, without a specific regulation on mergers, the EC Commission would not have had the power to require prior notification of mergers and joint-ventures under Articles 85 and 86 of the EC Treaty. Additional provisions, to determine a threshold for intervention and to clarify the allocation of jurisdiction between the EC and Poland on these issues, would clarify the situation.[43]

These differences are therefore not so important, but there are also three other differences which Hoekman and Mavroidis do not discuss and which are relevant to the present consideration of the direct effect:

— Articles 85 and 86 of the EC Treaty list practices which are declared to be "prohibited", while Article 63 of the Europe Agreement states that certain business practices are "incompatible";

— Article 85(2) of the EC Treaty declares that any agreement prohibited under Article 85(1) shall be automatically void, where no such strong language exists in the Europe Agreement.

— Article 85(1) of the EC Treaty lists examples of prohibited practices, but this is not done in Article 63.

Importantly, Article 63.2 explicitly refers to the law developed under Articles 85, 86 and 90 of the EC Treaty. This will become crucial when arguing the direct effect of Article 63 of the Europe Agreement in Section V:A of this study, since Article 63 integrates into the Europe Agreement, exempting it from the need for detailed implementation regulation before its provisions can have direct effect.

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[40] This issue was addressed in the 1966 Memorandum on the Concentration of Enterprises in the Common Market (EEC Competition Series Study No. 3, Brussels, 1966). The Memorandum concluded that only cartels could be controlled under Article 85 of the EC Treaty and that concentrations could possibly be disciplined only by Article 86. Many authors, however, have contested that Article 85 can deal adequately with all mergers and joint-ventures, notably because of the time limitation under Article 85(3), the absence of pre-notification obligations, prevention rights, the absence of appropriate remedies, and so on. Mergers could also be disciplined by Article 86. The ECJ held in case 6/72, *Europemballage Corporation v. Commission*, [1973] ECR 215, hereinafter, *Continental Can*, that Article 86 could be applied to prevent mergers which "would result in the strengthening of a dominant position". However, the Commission believed that it did not have the authority to control anticompetitive mergers which resulted from the acquisition of a dominant position or the take-over of a dominant firm by a non-dominant firm. Because of the European conception of "dominance", where the EC law prevents the abuse of that position, the Commission doubted whether it could forbid the growing of a merger and took the position that it could only intervene if one of the firms was already in a dominant position.

[41] C.D. Ehlermann, *Deux ans d'application du contrôle des concentrations*, Revue du Marché Commun et de l'Union Européenne, No. 366, March 1993.

[42] Regulation 4064/89, 1989, O.J. L 395/1, entered into force on 21 September 1990.

[43] Unfortunately, the issue of transnational mergers and joint-ventures was not addressed in the Europe Agreement and not directly in the Implementation Agreement adopted pursuant to the Europe Agreement. On mergers, Article 7 of the Implementation Agreement did not add much; it provides the Polish Authority with a right to "express its view" on the enforcement of the EC Merger Regulation. See Article 7, Merger Control, in the Annex to this article.

Along the lines of existing free-trade areas in Europe, the Europe Agreement provides for an Association Council[44] similar to the EFTA Council and the EC-EFTA Joint Committee. This Association Council, consisting of members of the Council of the European Communities and the EC Commission, on the one hand, and of members of the Government of Poland, on the other, is able to take binding decisions. Interestingly, the Association Council is also the forum where antitrust and antidumping actions would be discussed, as were the EFTA Council and the EEC-EFTA Joint Committee.

Article 63.3 of the Europe Agreement states that the Association Council shall, within three years of the entry into force of the Agreement, adopt rules implementing Articles 63.1 and 63.2. Rules for the implementation of competition regulation were adopted on 25 March 1995 and envisage obligations of notification between Poland and the EC Commission when the action or absence of action would have effects on the other State territory, together with an obligation of "positive comity":

> "2.2 Consultation and Comity: Whenever the EC Commission or the AMO [Polish Antimonopoly Office] consider that anticompetitive activities carried out on the territory of the other authority are substantially affecting important interests of the respective party, it may request consultation with the other authority, *or it may request that the other party's competition authority initiate any appropriate procedures with a view to taking remedial action under its legislation on anticompetitive activities*. This is without prejudice to any action under the requesting party's competition law and does not hamper the full freedom of ultimate decision of the authority so addressed." (emphasis added).[45]

One can recognize the European positive comity initiative launched in 1991 by Sir Leon Brittan in the Agreement on competition matters between the United States and the EC. Under the Agreement a country can request another country to take positive action (and not only to restrain its measures if they affect another country, which would constitute negative comity) to address a specific problem identified by another country. The Implementation Agreement also contains provisions on confidentiality and collaboration in the exchange of relevant information. In the Implementation Agreement, the Association Council is again the forum where consultations will take place in the event of a disagreement on the effects and consequences of such EC block exemptions on the territory of Poland, but there is no allocation of jurisdiction as such. Articles 9 and 10 of the Implementation Agreement confirm the *carrefour* role of the Association Council when parties do not find a mutually acceptable solution or if both consider that neither of them have jurisdiction on the issue. Articles 9 and 10 reiterate the fundamental limitation of this Chapter on competition: the right for a party, which is of the opinion that Articles 63.1(i) or 63.1(ii)

[44] Articles 101 to 103 of the Europe Agreements.
[45] Implementation Agreement, not yet published, sections annexed to this article.

have been infringed, to take appropriate measures after a minimum of thirty days of consultation within the Association Council.[46]

The procedure for the enforcement of competition provisions follows that of the EEC–EFTA FTAs: an exchange of views shall take place in the Association Council at the request of one party within three months following the request. These exchanges of views would seem to be less important and less stringent than the "obligation to justify" contained in Article VII of the first United States–EC competition Agreement, which, it is proposed below, constitutes the most pragmatic possibility of increasing transparency and building up a body of practices and case-law in international competition (antitrust) conflicts. "Exchange of views" would be of the nature of consultations prior to a formal dispute before a GATT/WTO panel. Following this exchange of views, or after the expiration of the thirty-day delay stated above, the Association Council may make appropriate recommendations for the settlement of these cases, without prejudice to Article 63, paragraph 6, of the Europe Agreement:[47]

> "63.6: If the Community or Poland considers that a particular practice is incompatible with the terms of the first paragraph of this Article, and:
> — *is not adequately dealt with* under the implementing rules referred to in paragraph 3, or
> — *in the absence of such rules*, and if such practice causes or threatens *to cause serious prejudice to the interest of the other party or material injury to its domestic industry*, including its services industry, it may take appropriate measures after consultation within the Association Council or after thirty working days following referral for such consultation." (emphasis added).

There is, however, no criteria for defining "adequately dealt with" and, interestingly, the second paragraph of Article 63.1 refers to "injury caused to a party or to its domestic industry". "Injury to a party" could be interpreted as injury to the country as a whole, i.e. injury to downstream producers and consumers as assessed in competition cases, but the alternative injury "to its domestic industry" remains as an independent standard. The unilateral application of antidumping measures would, therefore, constitute an appropriate measure, under Article 63.6. Consequently, rules on competition are considered as secondary and trade measures remain the favoured tool to discipline transborder restrictive business practices.

B. ANTIDUMPING PROVISIONS IN THE EUROPE AGREEMENT

An important characteristic of the Europe Agreement is the obligation for either party, before imposing antidumping measures, to inform the other party. Since December 1994 at the Essen (Germany) Council of Ministers meeting, the EC Commission has undertaken to notify Members of the Europe Agreement as soon as a

[46] This was the language used in th EEC-EFTA FTAs. In fact Rosenthal and Nicolaides write that twice in 1994 the EC changed its decision to impose duties following consultations within the Association Council under the EC–Austria Agreement. D. Rosenthal and P. Nicolaides, *Harmonizing Antitrust: The Less Effective Way to Promote International Competition* in *Global Competition Policy*, not yet published, p. 47.

[47] It is also stated that these procedures in the Association Council are without prejudice to any action under the respective competition laws in force in the territory of the parties.

European industry requests that an antidumping investigation be undertaken. The party also has to "supply the Association Council with all relevant information with a view to seeking a solution acceptable to both parties", as expressed in Articles 30, 34.2 and 34.3 of the Europe Agreement:[48]

Article 30 reads as follows:

> "If one of the parties finds that dumping is taking place in trade with the other party...it may take appropriate measures...[in application of GATT, Article VI]...with the conditions and procedures laid down in Article 34."

Article 34.2 states:

> "In the cases specified in Article *30*, 31 and 32, *before taking the measures provided* for therein or, in cases to which paragraph 3(d) applies, as soon as possible, the Community or Poland... *shall supply the Association Council with all relevant information* with a view to seeking a solution acceptable to the two parties..." (emphasis added).

This prior information and referral process follows the framework contained in EFTA and in the EEC–EFTA FTAs. Article 30 of the Europe Agreement is similar to Article 17 of EFTA and to paragraph 1 of Article 25 of the EEC–EFTA FTAs, which also maintained the rights of Member States to impose antidumping measures, and where Members had to consult, within the Association Council, on measures against restrictive business practices and dumping.[49] In practice, for bureaucratic and diplomatic reasons, the EC has always ignored this procedure.[50] In the Europe Agreement, a compulsory period of thirty days of consultation before the imposition of antidumping duties is very valuable, if indeed respected, but there are risks that the Association Council ends up being a rubber stamp for EEC actions, as was the Joint Committee of the EEC–EFTA FTAs.

More extensive obligations of consultation and co-operation were respected between Member States in the Trans-Tasman CER before the imposition of antidumping measures; and, in some circumstances, the CER agreement provided for inter-industry consultations. If requested to initiate an antidumping investigation by a domestic industry, the requested State had to give prompt written notice to the other Member State, and an opportunity for consultation. Upon request, the State proposing to adopt a trade measure had to provide the other State with the following:

— the tariff classification and description of the relevant goods;
— a list of all known exporters thereof and an indication of the element of dumping occurring with respect to each exporter;

[48] Article 34.3(d) envisages exceptional circumstances where prior notification and consultation do not have to take place before the imposition of trade measures.

[49] Article 27 reads as follows: "(2) In the cases specified in Article 22 to 26 [which include 23 competition offenses and 25 dumping], before taking the measures provided for therein or, in cases to which paragraph 3(d) applies [exceptional circumstances], as soon as possible, the Contracting Party in question shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Contracting Parties..."

[50] The EEC used to inform the EFTA country concerned by the dumping investigation, but no consultation as such took place; discussions with Mr Jacques Bourgeois, 27 May 1993, on the functioning of the EEC–EFTA FTAs while he was responsible for trade actions between the EEC and EFTA.

— access to all non-confidential evidence relating to those goods;
— the volume, degree and effect of dumping; and
— the nature and degree of injury and the causal link between the dumped goods and the injury.[51]

The CER agreement did not provide for any supra-national executive or judicial authority. Consultation was the only procedure for the settlement of disputes, but tighter time-limits and procedures were adopted to ensure rapid solutions to antidumping conflicts.

This Trans-Tasman process of consultation has similarities with the "exchanges of views" which could take place inside the Council of EFTA, the Joint Committee of the EEC–EFTA FTAs and the Association Council of the Europe Agreement. An important difference is that, in the Trans-Tasman CER, firms concerned with allegations of dumping were directly involved, whereas in the Europe Agreement (and EFTA and the EEC–EFTA FTA), the process of consultation is strictly international, i.e. accessible to States only. This limitation, however, may be overcome with the direct effect of the competition provisions of the Europe Agreement and its Implementation Agreement with Poland.

V. PROPOSALS

Based on the experiences of other regional arrangements, the transition from situations where internal antidumping measures are used *de facto* to counteract all sorts of social and economic differences reflected in prices, to a situation where the commercial relations are governed by domestic competition rules, depends on the evolution of the level of integration between States. This integration will be accelerated if markets are harmonized through stronger competition enforcement and the parallel phasing-out of antidumping measures. It is the evolution of this interactive trade-competition which somehow must be accelerated. This is nothing new. In the EC–Poland context, Polish membership in the EC seems a certain but, as yet, undated event. Selecting from the three models (analysed in Section III) to phase out antidumping measures, and in order to rebalance trade and competition considerations between regional commercial partners, the process used amongst the founding Members of the EC is probably the only reasonable solution to be adopted between Poland and the EC for two reasons:

— the different economic power of the Members to the free-trade area (here Poland and the EC), and the absence of reciprocal economic dependence, makes it unreasonable to expect that the EC would treat Poland as an equal partner, as did Australia and New Zealand;

[51] Articles 15 and 17 of the Trans-Tasman CER. As for safeguard measures under Article 17(3) of the CER, a prior consultation of ninety days had to take place before safeguard measures could be applied for the minimum level possible and for a determined period of time during the transitional period only. If a prompt solution could not be reached, "the Member State into whose territory the goods are being imported *shall refer the matter to an industry advisory body for investigation, report and recommendation for appropriate action*..." (emphasis added).

— because of the important economic disequilibrium between the EC and Poland, and because the European integration process is complex and involves more than antidumping issues (and, contrary to what was done in the EEA, but rather in line with the transition pattern used in the Trans-Tasman CER and within the EC), the phasing-out of internal antidumping actions will require a period of adaptation where a central authority would be given some temporary leeway to try to get economic actors and factors more balanced.

Close surveillance of such evolution seems to be the only realistic way to ensure an evolutive balance between the tightening (and eventual disappearance) of antidumping rules, together with the differences in national economic policies that they are said to buffer. Considering the important differences between the EC and Poland, a "pre-transition" or "pre-membership" period should be put in place where, in the area of antidumping:

1. Competition authorities would be requested to assess how the pricing situation addressed in the dumping investigation would be treated by existing competition law standards.
2. A mediator (committee) would then, along the pattern used within the Trans-Tasman CER and the EC, assess the level of antidumping duties along the lesser-duty principle and where export prices are never constructed;
3. The mediator should report to the Joint Council, which should decide expeditiously on alternative remedies and lower duties.
4. Each antidumping determination should be automatically reviewed following a determination of an infringement of competition laws by the same parties; this would also help in the assessment of the evolution of relations from trade (in the international sphere) to competition patterns (with private firms directly involved).
5. Firms should participate in this process so that they get used to their direct involvement as required by competition laws.
6. An additional obligation should be imposed on national administrations to justify their enforcement or non-enforcement of competition laws relevant to antidumping investigations. Their decisions relating to the competitive situation of the firms involved in an antidumping complaint would increase transparency and force trading partners to develop a more consistent body of practice or guidelines. This "obligation to justify" is included in the Agreement on Antitrust/Competition Co-operation between the United States and the Commission.[52] Article VII-2 of that Agreement envisages that:

> "Each party shall take into account the principles of co-operation set forth in this Agreement and shall be prepared to explain to the other party the specific results of its application of those principles to the issue that is subject to consultation."

[52] The initial Agreement was declared null and void by the ECJ on 9 August 1994 and reconfirmed by the Council of the EC on 21 April 1995.

This provision was reinforced by the stipulation that it is in the common interest of the parties to share information which will "promote better understanding...of economic conditions and theories relevant to their competition authorities' enforcement activities and intervention" (Article III:1(b)). This obligation to justify its actions or absence of intervention concerning the competition (or antitrust) elements involved in a dumping procedure would help to build up a body of practices,[53] and would favour transparency in favour of all those concerned by the antidumping process.

7. Extensive obligations of pre-notification of antidumping measures are also necessary, similar to those used between New Zealand and Australia (before the transition for phasing out antidumping measures was initiated).
8. In addition, from now on, antidumping measures should have a very short "sunshine clause" of one year, to force actors to reassess the evolution of the relations between Poland and the EC from a sphere of purely international trade relations to a sphere where private firms are commercially involved.

A list of sectors should be agreed upon where imports and exports are to be increased within a *fourchette* of levels. Parties could be expected to consider the patterns which were used with the non-market economies' accession to the GATT. Poland, for instance, had to increase the total value of its imports from contracting parties by no less than 7 percent per annum. Such a scheme with mutual commitments should be used.

During this pre-membership period, the direct effect of the competition provisions of the Europe Agreement and of its Implementation Agreement with Poland would harmonize the major differences of the economies and reduce the need to buffer these differences with antidumping measures. In addition, the tension between antidumping measures and the desire to further integrate national markets should be monitored by courts through the Public Interest clause. Note that these two proposals could be implemented even if the pre-membership period was not put into place. In the next Section, the direct effect argument will be addressed first, and then criteria will be proposed for the balancing of trade and competition elements in the enforcement of the antidumping process.

A. DIRECT EFFECT OF COMPETITION PROVISIONS OF THE EUROPE AGREEMENT AND PRIVATE POSITIVE COMITY

Within a regional arrangement, the direct effect[54] of the competition provisions of the regional agreement, or of the domestic law of the other regional States in favour of the regional firms, would seem to be the turning point and a prerequisite for internal

[53] One could also argue that some principle of "international estoppel", recognized as a general principle of international customary law, would develop and maintain some consistent practices. This would at least facilitate the identification of differences.

[54] Also introduced into the process of integration of the EEA.

antidumping measures to be phased out.[55] Indeed, antidumping measures can be phased out between two countries only if and when:

— standards for transnational restrictive business practices (RBPs) exist;
— private firms have legal standing before the courts of the territory where the RBP takes place to enforce these standards; and/or
— when this issue is dealt with before domestic courts (other than that of the territory where the RBP takes place), the market of reference is transnational and the domestic courts are entitled to address transnational issues.

Ways to ensure that the above conditions are respected include providing the domestic legislation with an extraterritorial effect, providing firms of one country with a direct access to the other country's competition institutions (as it was done in the Trans-Tasman CER), or providing firms with a direct access to the competition provisions of an international treaty applicable on the territory of the other country.

It could be argued that the recent case-law of the EC would authorize the direct effect of the competition provisions of the Implementation Agreement together with those of Article 63 of the Europe Agreement.

The ECJ recognized for the first time the direct effect of a provision of an association agreement in *Bresciani*:[56] the obligation therein to abolish charges under the Lomé Convention was considered to be specific and not subject to any further action from the Community; the nature of that Association Agreement was noted; and since the provision of that Agreement performed the same function as Article 95 of the EC, itself of direct effect, Article 53 of the Association Agreement was concluded to have direct effect.

In *Kupferberg*[57] it was decided that Article 21 of the EEC-EFTA FTA, prohibiting fiscal discrimination, also had direct effect. The ECJ rejected the argument that different national courts within such a free-trade area may reach different conclusions, or that parties had established a special institutional framework for consultations and negotiations, or that the existence of safeguards clauses which enable parties to derogate from certain provisions "may prevent a trader from relying on the provisions of the said Agreement before a court in the Community".[58] The Court reiterated that in deciding whether an unconditional and sufficiently precise stipulation had direct effect the "object and purpose of the Agreement and its context" were to be considered. Since the purpose of the EEC–Portugal FTA was to create a system where rules restricting commerce were eliminated in respect of virtually all trade, the ECJ concluded that the first paragraph of Article 21 was "directly applicable and capable of conferring upon individual traders rights which courts must protect" (para. 27). However, since the EEC

[55] Moreover, as put by Llavero, "the only way in which it [the FTA] can be given legal teeth is by enabling private parties to bring legal proceedings on the direct basis of its provision"; M.V. Llavero, *The Possible Direct Effect of the Provisions on Competition in the EEC-EFTA*, Legal Issues of European Integration 2, 1983, p. 83.

[56] Case 87/75, *Bresciani v. Italian Finance Department*, (1976) ECR 129. One could also argue that the issue of the direct effect of an international agreement into the EC was first addressed in *International Fruit Co.*, (1972) ECR 1219, when the ECJ refused to give to GATT provisions any direct effect into the Community law.

[57] (1982) ECR 3659.

[58] (1982) ECR 3665.

Treaty and that Association Agreement did pursue different objectives, the interpretation given to Article 95 of the EEC Treaty could not be applied by way of simple analogy to the EFTA.

This reasoning was expanded with *Demirel*,[59] *Sevince*,[60] *Restamark*[61] and recently in *Regina*.[62] In *Demirel* the principles of *Kupferberg* were confirmed:

> "A provision in an agreement concluded by the Community with non-Member countries must be regarded as being directly applicable when, *regard being had to its wording and the purpose and nature of the agreement itself*, the provision contains a *clear and precise obligation which is not subject, in its implementation and effects, to the adoption of any subsequent measure*." (emphasis added).[63]

The ECJ maintained the same three safeguards, namely: the "purpose and nature of the agreement", whether the obligation is "clear and precise" and whether it is "not subject, in its implementation and effects, to the adoption of any subsequent measure".

The *Sevince* case dealt specifically with secondary legislation under an association agreement. The ECJ stated that the same criteria established in *Demirel* "apply in determining whether the provisions of a *decision* of the Council of Association can have direct effect". (emphasis added).[64] The *Restamark* case dealt with a provision of the EEA Agreement on State monopoly. The ECJ declared that since one of the purposes of the Agreement was the free movement of goods, and because Article 16 of the Agreement was similar to Article 37(1) of the EC Treaty, which had been considered directly applicable since the end of the EC transition, Article 16 had to be interpreted as fulfilling the criteria of being unconditional and sufficiently precise, therefore directly applicable. More recently in *Regina*,[65] the ECJ dealt with the Association Agreement between the EC and Cyprus, and the provisions of its 1977 Protocol dealing with the origin of products. The Court took the view "that provisions concerning movement certificates appearing in a trade agreement concluded by the Community with non-Member countries, similar to the provision at issue in the main proceedings, may be applied by national courts."[66]

Can we conclude that Article 63.1 of the Europe Agreement and its Implementation Agreement with Poland are directly applicable? Following the reasoning developed in *Demirel*, *Sevince*, *Restamark*, and *Regina*, it can be argued that, based on the nature and the purpose of the Europe Agreement with Poland, which is to accelerate its integration towards full membership in the EC, its competition provisions should be given direct effect. This is to say that the provisions of the

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[59] *Meryem Demirel v. Stadt Schwabish Gmund*, (1987) ECR 3719.

[60] *Sevince and Staatssecretaris van Justicie*, (1990) ECR 3497.

[61] See *Ravintoloitsijain Liiton Kustannus Oy Restamark v. Helsingin Piiritullikamari*, C.M.L.R. Vol. 72, 1995, p. 161.

[62] *Regina v. Anastasiou, Minister of Agriculture, Fisheries and Food*, 1 C.M.L.R., 1995, 569.

[63] *Supra*, footnote 58, paragraph 14 of the Judgment, p. 3752.

[64] *Supra*, footnote 60, p. 3502; also, p. 3501: "The Court also held that, since they are directly connected with the Agreement to which they give effect, the decisions of the Council of Association, in the same way as the Agreement itself, form integral part, as from their entry into force of the Community legal system."

[65] *Supra*, footnote 62;. see paragraphs 23 to 27 of the Judgment.

[66] *Demirel*, *supra*, footnote 59.

Implementation Agreement, reinforcing Article 63 of the Europe Agreement, may have direct effect "regard being had to its wording and the purpose and nature of the Agreement itself".[67] Considering the "European integration mind" of the ECJ, it is not unreasonable to expect that the ECJ would conclude that the purpose of the Agreement with Poland is full membership in the EC; therefore private traders may invoke provisions of the Europe Agreement and of the Implementation Agreement before their national courts. However, since parties have explicitly envisaged the possibility that provisions may, in the future, have direct effect, they never intended that competition provisions have immediate direct effect.[68] On the other hand, the intention of parties cannot alter clear provisions of a treaty: if the ECJ or a Polish tribunal conclude that the provisions of the Europe Agreement as drafted have direct effect, the intentions of the parties—if such a common intention could be identified—would not change anything much. Arguments can also be raised on the different language between Articles 85 and 86 of the EC Treaty and Article 63.1 of the Europe Agreement. As noted in Section IV:A above, the language of Article 63 contains distinctions with that of Articles 85 and 86, e.g. agreements infringing Article 85 are said to be prohibited (where Article 63.1 speaks of agreements *incompatible*) and declared automatically void (nothing similar exists in Article 63.1). Is an incompatibility more acceptable than a prohibition? This seems doubtful. Pursuant to Article 85.2 of the EC Treaty, prohibited agreements being automatically void would confirm their absolute nullity, where the language of Article 63.1 would indicate the relative nullity of such incompatible agreements. Was the term "incompatibility" used in order to avoid the direct effect of such provisions?[69]

Arguably, obligations mentioned in Article 63.1 are sufficiently clear and precise, since Article 63.2 refers to the criteria developed under Articles 85,[70] 86 and 90. However, the competition provisions of Article 63 of the Europe Agreement were explicitly subject to the adoption of an implementation programme referred to in paragraph 3. An Implementation Agreement having been negotiated with Poland on 25 March 1995, makes the Europe Agreement clear, unambiguous and unconditional. Article 63 of the EC–Poland Agreement, which is nearly identical to Articles 85 and 86 of the EC Treaty—and which refers explicitly to the law developed under Articles 85, 86 and 90 of the EC Treaty—can be argued to have direct effect, since it is admitted that Articles 85 and 86 are directly effective.

It could, therefore, be concluded that Article 2.2 of the Implementation

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[67] See *supra*, footnote 63.

[68] In this context, a very interesting provision of the Agreement with Poland is Article 11.3 of the Joint Declarations concerning Article 63, which adds the possibility of a further step of "direct application" of competition rules: "Parties may request the Association Council at a later stage, and after the adoption of the implementing rules referred to in Article 63(3), to examine to what extent and under which conditions certain competition rules may be directly applicable, taking into account the progress made in the integration process between the Community and Poland."

[69] See also the discussion on this language in the context of the EEC-EFTA FTAs in N. Hunnings, *Enforceability of the EEC–EFTA FTAs*, E.L.R. 2, 1977, p. 163; M. Waelbroeks, *Enforceability of the EEC–EFTA FTAs: A Reply*, E.L.R.3, 1978, p. 27, and Llavero, *supra*, footnote 55; where the first and the last authors argue against the direct effect of the provision on competition of the EEC–EFTA FTAs.

[70] See *supra*, footnote 38.

Agreement, referring to the obligation of positive comity, also has direct effect, and could be enforced by private firms, transforming this obligation into some form of "private positive comity".[71] In other words, private firms affected by abuses of a dominant position within the Association territory could, arguably, request from the other State the application of positive comity. A private firm could not "sue" the other State for its inaction but this first request would at least force the other party to determine its position on the competition elements of the dispute, and therefore on the possible defence that firms may want to raise to a competition ligitation such as foreign sovereign compulsion or foreign sovereign immunity. In addition, and this is more audacious because it implies the "horizontal" direct effect of Article 63.1 of the Europe Agreement, a firm could initiate proceedings against other firms in the Association territory, furthering even more the integration and harmonizing process within the territory.

Following the reasoning in the *AKZO*[72] case, let us imagine the following scenario, with a European firm and a Polish firm and two markets: Market A is located in the EU and Market B in Poland. The European firm has a dominant position in the EU in Market A, an important market for the European firm, and also sells in Market B in Poland; the Polish firm, which is already selling in Poland in Market B, decides to begin selling in Market A in the EU. The European firm decides to practice price reductions in Market B (located in Poland), not for the purpose of strengthening its position in Market B but for the purpose of maintaining its position in Market A (in the EU) by preventing the Polish firm from extending its activities in that Market. This type of situation would not be captured by a dumping provision, since the national markets concern different goods. Following *AKZO*, the ECJ would condemn sales below average total costs in Market B, even though the European firm was not in a dominant position in Market B, since the behaviour in the two markets was interrelated. Such practices by the European firm would be covered by the provisions of Article 63.1 of the Europe Agreement and Articles 2, 3 *et seq.* of the Implementation Agreement.[73]

The EC and Poland could, of course, decide to provide the competition provisions of the Association Agreement and of its Implementation Agreement with direct effect in order to activate harmonization of domestic markets, therefore reducing the need for antidumping measures.

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[71] Something similar was done in NAFTA where a party to the Agreement can be forced by a private firm to trigger a dispute process: "Article 1904.5: An involved party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing party, commence domestic procedures for judicial review of that final determination."

[72] (1991) ECR, p. 3439.

[73] Assuming the direct effect of these provisions, a private firm could therefore force its national competition authority to intervene and, in the absence of any action, initiate a private action in its own domestic court. It could also be argued that under EC law a European firm could take action, under Articles 173–175 of the EC Treaty, against the Commission for a negative decision or failure to act. This is, however, highly contestable.

B. The Public or Community Interest Clause and the Lesser-Duty Principle

This study will now discuss the administration of the Community Interest clause contained in the EC antidumping legislation. The harmonization of national economies would greatly benefit from a more systematic and authentic balancing between trade and competition elements in the antidumping process. Even before a pre-membership period, a stronger enforcement of Public Interest clauses would discipline the application of antidumping measures and reduce their level.

The purpose of most antidumping laws is straightforward: the protection of domestic production from dumped imports. The primary purpose of the provisions of the GATT on dumping is quite different. GATT antidumping law attempts to limit antidumping actions by exhorting Member States to use minimal duties whenever possible and by reiterating that antidumping actions are not mandatory. In fact, Article VI of the GATT was adopted in 1948 in order to restrain national antidumping actions, even if it also legitimized antidumping laws by allowing Member States to impose antidumping duties in certain circumstances. In 1980, two provisions of the Tokyo Antidumping Code further favoured the reduction of antidumping duties: the "lesser-duty" principle in Article 8, and the reference to restrictive business practices, in footnote 5 to Article 3.4, in the application of an injury finding.[74] The lesser-duty principle encourages States to provide their antidumping authorities with the discretion to impose duties less than the margin of dumping already determined, if such lesser duty would be sufficient to remove the injury suffered. The reference in footnote 5 of Article 3.4[75] to RBPs as variables, which may be assessed when determining the injury, could aim at addressing anticompetitive agreements between exporters, between domestic producers or between the two groups.

1. *The Community Interest Clauses before the WTO Antidumping Agreement*

In 1979,[76] the EC introduced a new legal technique through enacting a Community Interest clause in the Antidumping Regulation. This concept can be viewed as a way to ensure that interests, other than those of producers, are considered in an antidumping inquiry.

Article 10, paragraph 1, of the General Antidumping Regulation reads as follows:

> "Where the facts as finally established show that dumping or subsidization during the period under investigation *and* injury caused thereby, *and the interest of the Community call for*

[74] These provisions were already in the stillborn 1967 Antidumping Code. Unfortunately, none of the national antidumping legislation refers to RBPs.

[75] Article 3.4: "It must be demonstrated that the dumped imports are, through the effects[4] of dumping, causing injury within the meaning of this Code. There may be other factors[5] which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports." Footnote 5: "Such factors include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the pattern of consumption, *trade restrictive practices of and competition between the foreign and domestic producers*, developments in technology and export performance and productivity of the domestic industry." (emphasis added).

[76] Antidumping Regulation 3017/79, 1979, O.J. L 339/1.

> *intervention*, a definitive antidumping or countervailing duty shall be imposed by the Council..." (emphasis added).[77]

Duties may therefore be imposed after it has been determined that dumping, injury caused thereby, and the Community interest have been proved to exist. It is important to note that the provision for Community interest is not contained in the section on injury. In other words Community interest could be alleged as a reason to refuse to initiate an investigation. In fact, van Bael argues[78] that the Community interest can only be assessed when considering whether or not it is necessary to intervene. There are still debates on the scope and purposes of the Community Interest clause. In the Guide to the European Communities' Antidumping and Countervailing Legislation, the Commission defined the concept as follows:

> "Article 12: Community Interest:
>
> Community interest may cover a wide range of factors but the most important are the interests of consumers and processors of the imported product and the need to have regard to the competitive situation within the Community market."[79]

The head of the Directorate in charge of antidumping measures in the EEC once said to the European Parliament:

> "...the public-interest element in dumping is a tacit acknowledgement of the overlap of political and legal considerations."[80]

In *Allied*,[81] Advocate-General Veroren van Themaat suggested that:

> "...the requirements of the Community Interest laid down in Article 12 must be interpreted as meaning that when definitive antidumping duties are fixed, reasons must also be given for the rate of the levies imposed. It should be stated in particular that lower levies would not be sufficient to remove the injury. So, besides the dumping margin, the 'injury margin' also constitutes a limit which may not be exceeded."

In other words, for the Advocate-General, the principle of lesser duty referred to in Article 8 of the Antidumping Code was made mandatory in the EC Antidumping Regulation through the requirements of the Community interest. Although the Court concluded that the Antidumping Regulation had to ascertain whether the amount of duties was necessary in order to remove the injury, no link was made with the Community Interest clause.

In the EC, the Community interest has been argued to cover various interest

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[77] Article 11 on provisional measures is similar but can be interpreted as limiting the consideration of the Community interest to the assessment of injury caused during the proceedings: "Where preliminary examination shows that dumping or subsidy exist *and* that there is sufficient evidence of injury caused thereby *and* the interest of the Community calls for intervention to prevent injury being caused during the proceeding...the Commission shall impose a provisional duty..."

[78] I. van Bael and J.-F. Bellis, *Antidumping and Trade Protection Laws in the EEC*, CCH, Oxford, 1990, p. 152.

[79] Ibid., Annex 8.

[80] EEC Parliament, 1981, point G-19, reported in K. Stegemann, *International Trade and the Consumer*, OECD, Paris, 1984, p. 250. This is why most authors in Europe doubt that the ECJ would quash a decision where Community interests are mentioned.

[81] Opinion of the Advocate-General on 21 November 1984, case 53/83 reported in *Allied*, (1985) ECR, 1621.

groups: consumers, commercial users, unions and municipal authorities.[82] The Commission and the doctrine have argued that Community interest may include considerations of industrial policies[83] and foreign relations.[84] With exceptions, the interests of the Community have been equated with those of directly competing producers. When convenient, the Commission has referred to Community interest, at all levels of the antidumping process, to refuse initiating an antidumping investigation,[85] to reduce the level of duty under the margin of dumping,[86] to terminate an investigation,[87] to refuse imposing antidumping duties,[88] to assess the best form of remedy,[89] to protect employment,[90] and when taking into consideration the competition within the EC.[91]

The best use of a Public or Community Interest clause would be to introduce into trade measures domestic competition considerations and to force a formal and systematic balance of these variables.

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[82] See van Bael and Bellis, *supra*, footnote 78, p. 146.

[83] Community interest "may also involve industrial policy considerations, such as the need to maintain a viable industry in the Community": J. Bourgeois, *Anti-Trust and Trade Policy: A Peaceful Co-existence?*, Int'l. Bus. Lawyer, February 1989, p. 59; J. Besseler and A. Williams (in *Antidumping and Antisubsidy Law*, Sweet & Maxwell, London, 1985, p. 171) write that Community interest covers the strategic importance of an industry or the need to maintain a viable industry within the Community. Temple Lang writes that the Community interest should be used for regional discrimination, for implementing industrial policies, and for market integration; he cites *Photocopiers* as an example of an important range of office equipment, important for the EEC office industry as a whole, which justified strong protection: *supra*, footnote 10, chapter 7, pp. 7-33–35 and 7-73. The EEC industrial policy guidelines refer to community interest defined in terms of competitive industry: "Only a competitive industry will allow the Community to maintain its position in the world economy, which constitutes the essence of the Community"; *Industrial policy in an open and competitive environment—Guidelines for a Community approach*, Besseler and Williams, ibid., Annex 8. There are stories of profound disagreements between pro-industrial and competition considerations amongst EEC Commissioners, as, for example, what was heard through the grapevine in the *De Haviland* case.

[84] In *Typewriters* (Japan), 1985, O.J. L 163/9, the Court rejected the argument that *it is not* in the Community interest to protect inefficient producers'. In *Hydraulic exactors*, 1985, O.J. L 176/64, the Council decided that "in the light of the present trade relations with Japan" it was not in the Community interest to accept undertakings. See also *Glycine from Japan*, 1985, O.J. L 176/4. In *Kraftliner* (United States), 1984, O.J. L 64/25, p. 27, it was said that the fear of relying on non-EEC-producers also led to the imposition of antidumping against the Japanese exporter; from C. Stanbrook, *The Impact of Community Interest and Injury Determination on Antidumping Measures in the EEC*, in B. Hawks (ed.), *1985 Annual Proceedings Fordham Corporate Law Institute*, New York, 1986, p. 623. It was also decided that it is not in the interest of EEC consumers to become dependent on a single non-EEC source of supply, a principle repeated in *Aspartame*, EEC 1391/91, 1991, O.J. L 134/1; the Community is said to take into account the way in which its major trading partners implement their respective domestic antidumping rules. Stanbrook reports the following cases: *Japanese hydraulic excavators* case, Council Regulation No. 1877/85, 1985, O.J. L 176/1, the *Pentaerythriol* case, 1983, O.J. L 13/1, and *Acrylonitrile* case, 1983, O.J. L 101/29, in *EEC Interest and Injury Determination*, ibid., pp. 628–30.

[85] *Codeine from Eastern Europe*, 1983, O.J. L 16/30: it was decided that protective measures would not be of any benefit to the injured industry. See also *Furfural from China, the Dominican Republic and Spain*, 1981, O.J. L 189/57.

[86] *Glycine from Japan*, *supra*, footnote 84.

[87] *Non-alloyed unwrought* (Norway, Surinam, U.S.S.R., Yugoslavia), 1984, O.J. L 57/19.

[88] *Furfural from China, the Dominican Republic and Spain*, 1982, O.J. L 371/25, and *Aluminium from Norway and others* 1984, O.J. L 57/19.

[89] *Glycine from Japan*, *supra*, footnote 84.

[90] *Dot-matrix printers* (Japan), 1988, O.J. L 130/32, and *Photocopiers* (Japan), 1987, O.J. L 54/12, where the argument of employment was alleged by downstream users but refused by the Commission.

[91] The form of the relief in *Glycine from Japan*, *supra*, footnote 84, where the Commission rejected price undertakings, was influenced by antitrust consideration: "It is not to be in the Community's interest to accept the undertakings offered because of the effect these price undertakings could have in this case on the competitive situation and structure of the glycine market."

(a) *The reference to competition within the EC and the balancing of trade and competition interest within the enforcement of the Community Interest clause*

Right from the beginning, the Community interest was unsuccessfully argued in opposing antidumping actions initiated by a firm in a dominant position or practising restrictive agreements within the EEC.[92] The ECJ considered antitrust elements in antidumping procedures in *Mercury* (USSR):[93]

> "...if an infringement of Articles 85 and 86 is discovered and a proceeding is initiated under Council Regulation No. 1, the Commission may review the present proceeding in accordance with Article 14(1) of Regulation (EEC) No. 2176/84."[94]

In *Synthetic fibres of polyester*,[95] the absence of competition among domestic producers was one of the elements leading to a termination of the investigation. In the *Japanese sensitised paper*[96] case, however, the competitive conditions of the market of industrial users justified a very low level of duty compared to the margin of dumping. In *Glycine* (Japan)[97] the dominant position of the EEC producer justified a duty "that would not fully eliminate the injury".[98] The state of competition inside the Community was argued many times with a few successes: in *Typewriters* (Japan),[99] *Photocopiers* (Japan)[100] and *Ferro-silico-calcium* (Brazil),[101] it was argued that a full duty would reduce competition or create a dominant position. These arguments were rejected and Community interest was equated with the needs of the domestic competing industry.

(b) *How to balance competition and trade variables in the Community Interest clause*

Vermulst writes about Community interest:

> "This is a positive development as political considerations should be confined to where they belong, i.e. the weighing of the Community interests, and should not enter other aspects of the antidumping investigation."[102]

Bourgeois is of the opinion that the Community Interest clause "remains a tool *to*

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[92] In *Bisphemol*, 1983, O.J. L 199/4, in *Barium Chloride*, 1983, O.J. L 110/11, and in *Propyl Alcohol*, 1984, O.J. L 106/55, the argument that the risk of creating a dominant position if antidumping measures were allowed was rejected. Temple Lang wrote that the initiation of an antidumping investigation by a firm in a dominant position may constitute an abuse under Article 86: *supra*, footnote 10, p. 48.

[93] 1987, O.J. L 346/27.

[94] A similar language can be found in *Calcium silicide* (Brazil), 1987, O.J. L 129/5.

[95] 1987, O.J. L 103/38.

[96] 1984, O.J. L 124/45.

[97] 1985, O.J. L 218/1.

[98] For detailed comments on the EC case-law where competition variables were addressed in antidumping cases, see P. Vandoren, *The Interface between Anti-dumping and Competition Law and Policy in the European Community*, 2 Legal Issues of European Integration 2, 1986, 1; and P. Vandoren, *Recent Developments in the Area of the Interface between Anti-dumping and Competition in the EC*, Legal Issues of European Integration 2, 1994, 21.

[99] 1984, O.J. L 335/43; also, *Bisphonol*, 1983, O.J. L 110/11 and L 110/13, and *Barium Chloride*, 1983, O.J. L 199/4.

[100] 1987, O.J. L 54/29.

[101] 1987, O.J. L 129/7.

[102] E. Vermulst, *Antidumping Law and Practice in the United States and the European Communities*, North-Holland, Amsterdam, 1987, p. 330.

weigh conflicting interests in each case where they are claimed, within the framework of the overall investigation." (emphasis added). [103] The Commission has not yet issued any criteria of how to co-ordinate the conflicting interests of commercial users and consumers against those of producers within the EC. Balancing the interest of domestic producers and those of commercial users involves the balancing of different policies of the EC. Undistorted competition (EEC Treaty, Article 3(f)) and the establishment of a commercial policy towards third countries, which includes antidumping actions (EEC Treaty, Article 3 (b)), are two of the goals of the EC which often follow opposite routes. There is no indication on how to reconcile particular trade considerations with domestic competition. In the above cases, the argument of Community interest was introduced by downstream producers, and their consideration would have tended to encourage more competitive antidumping measures.

The duty on the Commission to balance conflicting policies was addressed in *Continental Can*,[104] in *Nölle*, [105] and in *Extramet*.[106]

Although *Continental Can* did not involve issues of trade and competition law, the efforts to reconcile conflicting policies are relevant:

> "But if Article 3(f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires *a fortiori* that competition must not be eliminated... *Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty, are limited by the requirements of Articles 2 and 3.* Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the Common Market." (emphasis added).[107]

In *Nölle*, Advocate-General van Gerven stated:

> "The balancing of these opposing interests is a matter for the Commission and the Council which, in assessing whether the imposition of an antidumping duty is in the Community interest, must rely on a two-fold guideline: on the one hand, the object of antidumping proceedings cannot be to enforce or encourage practices contrary to the rules on competition; and, on the other hand, antidumping measures and proceedings must be prevented, as far as possible, from having such an effect. In the first place they [the Commission and the Council] had to strike a balance between the Community producers' interests in the adoption of measures against imports at dumping prices and the consumers' interest in having access to cheap paint brushes."[108]

In *Extramet* (1992), Advocate-General Francis Jacobs insisted on the special status of competition policy under the EC Treaty:

> "The special status of competition policy under the EEC Treaty is reflected in Article 3(f)... The fundamental importance of the objective was emphasized by the Court in *Continental Can*. It is true that, by virtue of Article 3(b), the activities of the Community also include

[103] J. Bourgeois, *EC Antidumping Enforcement—Selected Second Generation Issues*, in *1985 Annual Proceedings Fordham Corporate Business Institute*, New York, 1986, p. 590.

[104] See *supra*, footnote 40.

[105] *Nölle v. Hauptzollamt Bremen-Freihafen* case C-16/90, (1991) ECR, p. 5163.

[106] *Extramet Industries SA v. Council*, case C-358/89, A.-G. Jacobs, opinion, not yet reported (delivered 8 April 1992); judgment delivered on 11 June 1992.

[107] See *supra*, footnote 40, at 244.

[108] *Supra*, footnote 105, at p. 5177, para. 11.

> 'the establishment of a common customs tariff and a common commercial policy towards third countries' and that it is in the framework of that policy that action against dumping is taken: see Article 113 of the Treaty. None the less, while *the Treaty recognizes the need for protection against dumping as a necessary evil, that need must not be met without taking account of the objective set out in Article 3(f).*" (emphasis added).[109]

Advocate-General Jacobs would have required the Commission to assess market power and balance more systematically interests other than those of the complainant, forcing a balancing of trade and competition policies:

> "...a concentration which creates a dominant position as a result of which effective competition is significantly impeded is to be considered incompatible with the common market...there is no evidence that the institutions made any serious attempt to perform the balancing exercise required of them...
>
> 50. I also consider that the Council failed to give proper consideration to the question of *whether the imposition of a duty was consistent with the need to avoid distortion of competition in the common market.*" (emphasis added).[110]

Extramet had four arguments. One of them was that the Commission had to consider the restrictive business practices of the parties; it was abusive for the complainant, in a dominant position, to initiate an antidumping investigation. Extramet also argued that the complainant was responsible for its own injury since it had refused to supply Extramet. Extramet did not have any other choice than to import.[111] The Court quashed the regulation imposing antidumping duties on the ground that the Commission had not considered whether the plaintiff's injury was self-inflicted.[112] The ECJ agreed that the Commission had to consider the impact of the alleged abuse of dominant position but avoided the more fundamental discussion on the co-ordination of antidumping and competition rules.[113]

The main problem of the Community Interest clause is that there are no agreed or established criteria for the courts to balance trade and competition variables. A balancing operation takes place under Article 85.3 of the EC Treaty, and a body of case-law has been developed to help the Commission and the ECJ to assess whether an agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit..."; the experience therein developed could be used for a balancing test by the antidumping authorities, as further discussed in Section 3, below.

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[109] A.-G. Jacobs, opinion, *Extramet* case, *supra*, footnote 106, paras. 32 and 45.

[110] Id., paras. 44, 48, and 50.

[111] Extramet was suing the complainant for abuse of dominant position in French national courts.

[112] In *Ferro-silico-calcium from Brazil*, *supra*, footnote 101, the argument was put to the Commission that the EEC industry could not have suffered injury since it refused unilaterally to supply to a specific group of customers. The Commission concluded that there was no evidence of that refusal.

[113] Temple Lang has argued that the EEC "may have a duty not to take antidumping measures which would have the effect of creating a dominant position...or strengthening such a position...": *supra*, footnote 10, p. 30.

2. *The New Provisions of the WTO Antidumping Legislation*

Before the WTO, in March 1994, the EC Antidumping Regulation was amended to refer explicitly to consumers after the *BEUC v. Commission* case,[114] where a consumer group was refused the right to consult non-confidential information of an antidumping action. Hoekman and Mavroidis reported, in September 1994, that this legislative change had an impact on the EC case-law. For them, in the *China gum rosin* case:

> "...the negative effects of antidumping measures on the users of gum rosin would be overwhelmingly disproportionate to the benefits arising from antidumping measures in favour of the Community industry. These new developments reveal a tendency to seek to balance the interests of beneficiaries and injured parties as a result of an eventual introduction of antidumping duties."[115]

With respect, this statement is too generous concerning the intention of the Commission. Since the Commission is in charge of the enforcement of both antitrust and antidumping policies, it is difficult for Directorate IV to intervene aggressively in antidumping assessments.[116] Indeed, in the six antidumping investigations initiated by the EC against Polish exports since 1 January 1992, none of the Community-interest analysis refers to the situation of commercial users or consumers in Europe. Nor is there any discussion of the special situation of Eastern countries or of the fact that Poland and the EC share (or should share) common objectives of integration.[117]

GATT antidumping law provided rights to consumers and other commercial producers when it referred to restrictive business practices in the exporting and importing country.[118] Most national antidumping laws have not extended these rights to their nationals, and unfortunately the Community Interest clause has not been used as much as it should be. In the WTO Antidumping Agreement, the lesser-duty principle

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[114] Case C-170/89, judgment of 28 November 1991.

[115] B. Hoekman and P. Mavroidis *Antitrust-Based Remedies and Dumping in International Trade*, Working Paper 1347, The World Bank, Washington, D.C., p. 24.

[116] Antidumping investigations cannot be used to form cartels or oligopolies, or for restricting competition. The "sham litigation" doctrine of the Noeer-Pennington prohibits the misuse of trade laws. See H. Applebaum, *Antitrust Aspects of Trade Law Cases*, Antitrust L.J., Vol. 50, p. 759; S. Waller, *Abusing the Trade Laws: An Antitrust Perspective*, L. & Policy Int'l. and Bus., Vol. 17, 1985, p. 515. Undertakings to raise prices in order to avoid antidumping duties can be concluded only under the umbrella of the Antidumping Regulation with the participation of the authorities of the importing country. Otherwise they constitute an illegal cartel infringing competition rules. Informal settlements, such as a withdrawal of a petition in exchange for commitments by foreign exporters or foreign governments, raise antitrust problems: M. Koulen, *Potential Anti-Trust Liability of Exporters Participating in Various Forms of Export Restraint Arrangements*, in E.-U. Petersmann and M. Hilf (eds.), *The New GATT Round of Multilateral Negotiations*, Kluwer, Deventer, 1991, p. 437. Staiger and Wolak have suggested that U.S. antidumping actions can be used by domestic firms to promote collusion between domestic firms and foreign firms to their mutual advantage. Referred to by R. Baldwin and J. Steagall in *An Analysis of Factors Influencing ITC Decisions in Antidumping, Countervailing Duty and Safeguard Measures*, paper presented at Carleton University for the Conference on Trade Policy, Ottawa, 16 May 1991. In Europe, Professor Messerlin has also demonstrated that EEC firms have been able to capture EEC antidumping procedure: firms colluding have paid the fines for cartelization imposed by the Competition Directorate, DG IV, but thereafter have been able to limit the penetration of imports by initiating antidumping investigation; P. Messerlin, *Antidumping or Pro-Cartel Law*, World Economy, Vol. 13, 1990, p. 465.

[117] 3 July 1992, O.J. L 183; 18 December 1992, O.J. L 369; 14 November 1992, O.J. L 328; 15 May 1993, O.J. L 120.

[118] Article 3.4 of the Antidumping Agreement.

was repeated in the last sentence of Article 9.1,[119] and the content of footnote 5 was introduced in the substantive part of Article 3.4; but, most importantly, the WTO Antidumping Agreement has introduced a right for industrial users and consumers organizations to provide relevant information:

> "6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality."[120]

In the EC this right of consumers and commercial users existed before the WTO was reinforced, in the section dealing with public interest:

> "Article 21: Community interest
>
> 1. Pursuant to this Regulation, a determination as to whether the Community interest calls for intervention shall be based on an appreciation *of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers, and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2.* In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures..." (emphasis added).[121]

It should be noted, however, that consumers and commercial users have not been given any legal standing in the antidumping process, but simply the right to provide information, and in the EC the Commission now has the obligation to consider this information; an obligation of consideration has not had much influence in the past. Another realistic limitation is that in the EC, competition enforcement is mainly done by the Commission, and the ECJ has stated that the information received in antidumping procedures may only be used "for the purpose for which it was requested,"[122] which excludes antitrust measures.[123] Advocate-General Francis Jacobs

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[119] Article 9(1) of the WTO Antidumping Agreement: "The decision *whether or not to impose* antidumping duty in cases where "all requirements for the imposition have been fulfilled and the decision *whether or not the amount* of the antidumping duty to be imposed shall be the full margin *or less*, are decisions to be taken by the authorities of the importing country or customs territory. It is *desirable* that the imposition be permissive in all countries or customs territories parties to this Agreement, and *that the duty be less than the margin*, if such lesser duty would be adequate to remove the injury to the domestic industry." (emphasis added).

[120] Article 6.12 of the WTO Antidumping Agreement.

[121] Article 21 of the EEC Antidumping Regulation, Council Regulation (EC) No. 3283/94, 22 December 1994, O.J. L 349/1.

[122] Article 8(1) of the EEC Antidumping Regulation.

[123] Anthony R. Byrne, J., *Safeguarding Confidential Information in ITC Injury Proceedings*, L. & Policy Int'l. Bus., Vol. 17, 1985, p. 1; and P. Ehrenhaft, *A Practitioner's Response to the Anthony Byrne Report*, id., p. 71. In the United States, lawyers and persons involved in the administration of an antidumping file must be under "protective order"; in Europe, the same principles of confidentiality apply, but lawyers do not have access to confidential information; C. Kell, *Antidumping-Redefinition of Confidentiality and Right of Judicial Review*, Ga. J. Int'l. & Comp. L.,Vol. 16, p. 179; E. Vermulst and J. Taylor, *Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings under the United States Law: A Framework for the European Communities*, Int'l. Lawyer, Vol. 21, 1987, p. 43; H. Lasa, *Confidential Information in Antidumping Proceedings before the United States Courts and the European Courts*, E.L. Rev., Vol. 11, 1986, p. 331. Also, discussion with Jacques Bourgeois, 4 June 1992.

and the ECJ, in the *Spanish Bank* case,[124] concluded in favour of a restrictive use of the information received during competition investigations. It was decided that information received by the Commission under Articles 2, 4, 5 and 11 of Regulation 17 cannot be used by national authorities for the enforcement of national or EC competition law.

The difficulties in balancing trade and competition variables, however, remain.

3. *Proposed Criteria for a More Systematic Enforcement of the Community (Public) Interest Clause*

Balancing conflicting interests is a difficult operation, which can be assessed only on a case-by-case basis. Criteria and guidelines may, however, indicate to the administrations concerned when and how to weigh opposing and/or competing interests.

It is suggested that the period for contestation should be increased to allow more interest groups to make representations concerning public interest. The law should require direct notification of the antidumping investigation to antitrust and competition authorities, as well as a public notification in a distributed daily newspaper, not just the Official Gazette. The time delay to respond should be more than thirty days, and notification of an opposing interest group should result in the interruption of the time-limit (with possibilities for submitting written detailed notes within ninety days). Such notification to the competition authority would allow it to enquire about the structural and potential effects of such a measure on the importing market.

As suggested by Hoekman and Mavroidis: "Public Interest clauses should come into play at the same time that injury to producers and the causal link between dumping and such injury is established."[125]

In using recent EC case-law, one can suggest that, in balancing the interests of commercial users against those of domestic producers in a more systematic manner, the following substantive criteria may be used:

1. The competition authority should systematically answer the notification of an antidumping investigation if the plaintiffs:
   — are in a dominant position in the sense of the Merger Regulation; or,
   — would be considered in a dominant position according to the case-law; or
   — are parties to competition proceedings on related matters, or have been so in the year prior to the preliminary determination of the antidumping measure.
2. Duties should always be proportional to the injury suffered and as minimal as possible (the lesser-duty principle).
3. Competition within the domestic market should never be eliminated.

[124] *Direccion General de Defensa de la Competencia et Association Española de Banca Privada et autres*, case C-67/91, not yet reported.

[125] *Antitrust-based Remedies and Dumping in International Trade*, PRWP 1347, The World Bank, Washington, D.C., August 1994.

Therefore, in the situation of there being only one domestic producer, a comparison with prices of similar goods abroad should be mandatory. Differences are possible and acceptable, but these differences should be addressed.

4. Competition should be restricted only to the extent necessary to protect domestic producers. This criterion is parallel to the first criterion, above, but with an emphasis on the possibility of using a remedy other than duties if the tribunal sees that said remedy would fit better.
5. In case of intervention by the competition authority concerned the need to ensure the respect of competition laws and to deter their infractions should be weighed against the need to impose antidumping measures. Foreign competition may sometimes be the only discipline against domestic cartels or monopoly. In that context the process envisaged by Article 31 of the Canadian Competition Act, which authorizes the Council of Ministers to reduce trade measures if the Canadian market is not competitive, is useful.
6. Antidumping measures should automatically be revised following a determination of an infringement by the same actors to competition laws.
7. In all revision of antidumping measures, the competition situation of the relevant actors should be assessed.

VI. Conclusion

The Europe Agreement with Poland seems to contain all the necessary provisions to accelerate the country's integration into the EU. The modest proposals discussed above would activate the parallel enforcement of both competition and antidumping laws in furthering integration and eventual EC membership. The direct application of the competition provisions of the Europe Agreement, and of the positive comity obligation of the Implementation Agreement in favour of firms,[126] would certainly further integration and could become elements of a "pre-membership" or "pre-transition" period, together with an extended obligation on antidumping authorities to justify their consideration of the competition elements involved in an antidumping assessment, in parallel with the phasing-out of antidumping measures, and through a more systematic enforcement of the Community Interest clause, where trade and

[126] In the United States, private actions by consumer groups are possible in domestic courts for antitrust violations. In *Kissinger* (506 F.2d 136), a consumer union filed suit concerning a voluntary export restraint on steel from Japan to the United States. The standing of the consumer group to challenge the trade agreement was not contested. On 18 February 1981 the U.S. Attorney General wrote about antitrust liability of import restraints: "The antitrust risks that would be raised by concerted, voluntary, private behaviour by foreign producers have led us to conclude that in any negotiations between our government and a foreign government in which our government seeks a reduction in imports from that country, U.S. negotiators should emphasize the need for the foreign government to provide protection to its companies from actions under U.S. antitrust laws, by ordering, directing, or compelling any agreement restraining exports to the United States in terms as specific as possible...where such negotiations are implemented through voluntary private behaviour, serious antitrust risks arise." Copy of the letter reproduced in R. Grey, *United States Policy Legislation: A Canadian View*, Institute for Research in Public Policy, Montreal, 1982, p. 30. It is also now the case in the EC since *BEUC v. Commission*, 18 May 1994, case T-37/92.

competition interests are more rigorously balanced. Difficulties in administering confidential information and in balancing conflicting regulatory interests will not be eased so simply. Transferring these difficulties to the appreciation of a tribunal should not relieve the governments from their responsibility to address the issues up front; however, it would free the same governmental authorities from the continuous lobbying pressure of various interest groups. The recommendations and criteria discussed here would help judicial and quasi-judicial authorities, requested to balance the needs and pressures of various interest groups in the integration process, in an effort to smooth the related transitory economic adaptation among all social participants.

Annex

Relevant Sections of the Implementation Agreement between the EC and Poland

Article 1: General Agreement

Cases relating to agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition, as well as to abuses of dominant position in the territories of the Community or of Poland as a whole or in a substantial part thereof, which may affect trade between the EC and Poland, shall be settled according to the principles contained in Article 63 (paras. 1 and 2) of the Europe Agreement.

For this purpose, these cases are dealt with by the EC Commission (DG IV) on the EC side and the Polish Antimonopoly Office (AMO) on the Polish side.

The competence of the EC Commission and the AMO to deal with these cases shall follow from the existing rules of the respective legislations of the EC and Poland, including where these rules are applied to undertakings located outside the respective territory.

Both authorities shall settle the cases in accordance with their own substantive rules, and having regard to the provisions set out below. The relevant substantive rules of the authorities are the competition rules of the Treaty establishing the European Community as well as the ECSC [European Coal and Steel Community] Treaty including the competition-related secondary legislation, for the EC Commission, and the Polish Antimonopoly Law for the AMO.

Article 2: Competence of Both Competition Authorities

Cases under Article 6.3 of the Europe Agreement which may affect both the EC and the Polish market and which may fall under the competence of both competition authorities shall be dealt with by the EC Commission and the AMO, according to the rules under this Article.

2.1 *Notification*

2.1.1 The competition authorities shall notify to each other those cases they are dealing with, which, according to the general principle laid out in Article 1, appear to fall as well under the competence of the other authority.

2.1.2 This situation may arise in particular in cases concerning activities that:
— involve anticompetitive activities carried out in the other authority's territory;
— are relevant to enforcement activities of the other competition authority;
— involve remedies that would require or prohibit conduct in other authority's territory.

2.1.3 Notification under this Article shall include sufficient information to permit an initial evaluation by the recipient party of any effects on its interests. Copies of the notifications shall be submitted on a regular basis to the Association Council.

2.1.4 Notification shall be made in advance, as soon as possible and, at the latest, at the stage of an

investigation still far enough in advance of the adoption of a settlement or decision so as to facilitate comments or consultations, and to enable the proceeding authority to take into accont the other authority's views, as well as to take such remedial action it may find feasible under its own laws, in order to deal with the case in question.

2.3 *Finding of an Understanding*

The competition authority so addressed shall give full and sympathetic consideration to such views and factual materials as may be provided by the requesting authority and, in particular, to the nature of the anticompetitive activities in question, the enterprises involved and the alleged harmful effects on the important interests of the requesting party. Without prejudice to any of their rights or obligations, the competition authorities involved in consultations under this Article shall endeavour to find a mutually acceptable solution in the light of the respective important interests involved.

Article 3: Competence of One Competition Authority Only

3.1 Cases falling under the exclusive competence of one competition authority, in accordance with the principle laid down in Article 1, and which may affect important interests of the other party, shall be handled having regard to the provisions set out in Article 2, and taking account of the principles set out below.

3.2 In particular, whenever one of the competition authorities undertakes an investigation or proceeding in a case which reveals to affect important interests of the other party, the proceeding authority shall notify this case to the other authority, without formal request by the latter.

Article 4: Request for Information

Whenever the competition authority of a party becomes aware of the fact that a case, falling as well or only under the competence of the other authority, appears to affect important interests of the first party, it may request information about this case from the proceeding authority.

The proceeding authority shall give sufficient information to the extent possible and at a stage of its proceedings far enough in advance of the adoption of a decision or settlement to enable the requesting authority's views to be taken into account.

Article 5: Secrecy and Confidentiality of Information

5.1 Having regard to Article 63 (para. 7) of the Europe Agreement, neither competition authority is required to provide information to the other authority if disclosure of that information to the requesting authority is prohibited by the law of the authority possessing the information, or would be incompatible with important interests of the party whose authority is in possession of the information.

5.2 Each authority agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other authority.

Article 6: Block Exemptions

In the application of Article 63 of the Europe Agreement as provided for in Articles 2 and 3 above, the competition authorities shall ensure that the principles contained in the Block Exemption Regulations in force in the EC shall be applied integrally. The AMO shall be informed of any procedure related to the adoption, abolition or modification of Block Exemptions by the EC.

Where such Block Exemption Regulations encounter serious objections on the Polish side, and having regard to the approximation of legislation as foreseen in the Europe Agreement, consultations shall take place in the Association Council, in accordance with the provisions contained in Article 9.

The same principles shall apply regarding other significant changes in the EC or Polish competition policies.

Article 7: Merger Control

With regard to mergers which fall within Council Regulation (EEC) No. 40664/89 and have significant impact on the Polish economy, the AMO shall be entitled to express its view in the course of the procedure, taking into account the time-limits as provided for in the aforementioned Regulation. The EC Commission shall give due consideration to that view.

Article 8: Activities of Minor Importance

8.1 Anticompetitive activities whose effects on trade between the parties or on competition are negligible, do not fall under Article 63 (para. 1) of the Europe Agreement, and therefore, are not to be treated under Articles 2 to 6 of the present implementing rules.

8.2 Negligible effects in the sense of Article 8.1 are generally presumed to exist when:

— the aggregate annual turnover of the participating undertakings does not exceed ECU 200 millions; and

— the goods or services which are the subject of the agreement together with the participating undertakings' other goods or services which are considered by users ot be equivalent in view of their characteristics, price and intended use, do not represent more than 5 percent of the total market for such goods or services in the area of the common market affected by the agreement and the Polish market affected by the agreement.

Article 9: Association Council

9.1 Whenever the procedures provided for in Articles 2 and 3 above do not lead to a mutually acceptable solution, as well as in the other cases explicitly mentioned in the present implementing rules, an *exchange of views* shall take place in the Association Council at the request of one party within three months following the request.

9.2 Following this *exchange of views*, or after expiration of the delay stated above, the Association Council may make appropriate recommendations for the settlement of these cases, *without prejudice to Article 63 (para. 6) of the Europe Agreement*. In these recommendations, the Association Council may take into account eventual failure of the requested authority to give its point of view to the requesting authority within the delay provided for in Article 9.1.

9.3 These procedures in the Association Council are without prejudice to any action under the respective competition laws in force in the territory of the parties.

Article 10: Negative Conflict of Competence

When both the EC Commission and the AMO consider that neither of them is competent to handle a case on the basis of their respective legislation, an *exchange of views* shall take place on request in the Association Council. The EC and Poland shall endeavour to find a mutually acceptable solution in the light of the respective important interests involved, with the support of the Association Council, which may make appropriate recommendations, *without prejudice to Article 63 (para. 6) of the Europe Agreement, and the rights of individual EU Member States on the basis of their competition rules.*

Article 11: Treaty Establishing the European Coal and Steel Community (ECSC)

The provisions contained in Articles 1 to 10 above shall also apply with respect to the coal and steel sector as referred to in Protocol 2 to the Europe Agreement.

Article 12: Administrative Assistance (Languages)

The EC Commission and the AMO will provide for practical arrangements for mutual assistance or any other appropriate solution concerning in particular the question of translations.