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## ESSAY

# ANTI-DUMPING CIRCUMVENTION IN THE EU AND THE US: IS THERE A FUTURE FOR MULTILATERAL PROVISIONS UNDER THE WTO?

*By Lucia Ostoni\**

It is an experiment, as all life is an experiment. \*\*  
-Justice Oliver Wendell Holmes

### I. INTRODUCTION

Dumping is a commercial practice based on price discrimination.<sup>1</sup> It consists of selling goods in a foreign market often at a price lower than the cost of production, or, in any case, at a price lower than the price charged in the domestic market.<sup>2</sup> This practice is finalized by penetrating the targeted foreign market and, where possible, gaining a relevant position.<sup>3</sup> The General Agreement on Tariffs and Trade 1994 (“GATT 1994”) provides the general rules for determining when

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\*\* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

1. For the purpose of this essay, general reference is made to the classic treatise by JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (University Chicago Press, 1927) (1991). For a general discussion on anti-dumping policies and international trade, the following texts are referred: ANDREAS F. LOWENFELD, *INTERNATIONAL TRADE LAW* 242–293 (2002); DAVID PALMETER, *THE WTO AS A LEGAL SYSTEM, ESSAYS ON INTERNATIONAL TRADE LAW AND POLICY* 11–124 (2003).

2. See e.g., Konstantinos Adamantopoulos & Diego De Notaris, *The Future of the WTO & the Reform of the Anti-Dumping Agreement: A Legal Perspective*, 24 *FORDHAM INT’L L.J.* 30, 32 (2000).

3. See *id.* See also Jean-Marc Leclerc, *Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries*, 44 *MCGILL L.J.* 111, 115–116 (1999).

dumping occurs and what measures need to be taken on such occasions.<sup>4</sup> Article VI of GATT 1994 ("Article VI") condemns the practice of one country introducing products into the commerce of another at less than normal value.<sup>5</sup> Adopted on the assumption that artificial sales at lower prices may damage a domestic industry and distort the dynamics of fair competition and international free trade, this provision allows World Trade Organization ("WTO")<sup>6</sup> Members to impose certain measures in order to offset and/or prevent dumping practices causing or threatening material injury to a domestic industry.<sup>7</sup>

With Article VI as the point of departure, WTO Members concluded the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement" or "ADA").<sup>8</sup> While Article VI is general and provides the basic framework only, the ADA lays down the detailed rules relating to the determination of dumping practices and the implementation of protective measures by ADA Members.<sup>9</sup> For example, ADA Members are allowed to impose anti-dumping duties, even temporarily, in the case that the export price of a product is less than the comparable price for the like-product in the exporting country with regard to the ordinary course of trade.<sup>10</sup>

Though Article VI and the rules set under the ADA seek to arm

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4. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VI, 55 U.N.T.S. 194, as amended by the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations done at Marrakech, Apr. 14, 1994 [hereinafter GATT 1994]; see also Leclerc, *supra* note 3.

5. See GATT 1994 *supra* note 4, art. VI.

6. Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

7. See GATT 1994 *supra* note 4, art. VI (1) and (2); see also, Leclerc, *supra* note 3, at 113.

8. Agreement on the Implementation of Article VI of the General Agreement On Tariffs and Trade 1994 (Anti-dumping), Apr. 15, 1994, in WTO Agreement *supra* note 6, Annex 1A, at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm) [hereinafter ADA]. Under the ADA, dumping is not qualified as a negative practice. In fact, the purpose of the ADA is not to ban the dumping strategy, but to allow anti-dumping reactions by the WTO Members. See Adamantopoulos & De Notaris *supra* note 2, at 32–33 (pointing out that, unlike the ADA, both US and EU anti-dumping legislation in force before the finalization of GATT 1994 defined dumping as an unfair practice).

9. See e.g., ADA, *supra* note 8, including accompanying text.

10. See *id.* art. 1–5, 7, 9–11, 14, 17.

Members with the tools for confronting dumping practices, they are inadequate in the face of trade practices specifically aimed at defeating the very purpose for which they were promulgated.<sup>11</sup> In fact, the provisions do not contemplate strategies such as circumvention, a process in which other states disguise their dumping activities to defeat the reach of Article VI and the ADA.<sup>12</sup>

The circumvention of anti-dumping measures is a trade strategy for exporting complex manufactured products when an importing country applies (or is likely to apply), anti-dumping duties for the protection of a national industry that produces like-products.<sup>13</sup> Circumvention strategies are based on hiding the origin of the dumped product by confusing the customs authorities of the importing country, as well as the trade players and consumers.<sup>14</sup> These strategies consist in altering the product subject to anti-dumping measures or transferring wholly, or in part, the manufacture and/or the assembly of this product from the country of origin (to which the anti-dumping measure is addressed) to a different country.<sup>15</sup>

More specifically, there are four distinct types of anti-dumping circumvention strategies. First, circumvention may consist of exporting individual parts or components of a dumped product to an intermediate third country, and assembling them there.<sup>16</sup> Such a case is called third-country circumvention. For instance, assume that Country A (the importing country) is applying an anti-dumping duty order on color television receivers from Country B.<sup>17</sup> The producers of color television

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11. See e.g., Leclerc, *supra* note 3, at 139.

12. See, e.g., David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 20 (1995).

13. *Id.*; According to ADA *supra* note 8 art. 2.6 ("[T]he term 'like product' ('*produit similaire*') shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration[.]").

14. See Leebron *supra* note 12.

15. *Id.*

16. See, e.g., Gilbert B. Kaplan, *Anti-dumping, Countervailing duty, and National Security Provisions in the 1988 Trade Act*, 22 GEO. WASH. J. INT'L L. & ECON. 553 (1989). See also Adamantopoulos & De Notaris, *supra* note 2 at 56-58.

17. See, e.g., Color Television Receivers From Korea, 61 Fed. Reg. 1339 (Dep't Commerce Jan. 19, 1996) (initiation of anticircumvention inquiry on anti-dumping duty

receivers of Country B may export components to a third country, C, assemble the final product there, and export it from Country C to Country A.<sup>18</sup> In this case, no anti-dumping duty would be applied because formally Country C is the place where the dumped merchandise was manufactured, and the anti-dumping duty order was originally addressed by Country A to the products imported from Country B.<sup>19</sup>

The second type of anti-dumping circumvention, known as importing-country circumvention, consists of exporting individual parts or components of a dumped product to the country which is applying the anti-dumping measure and assembling them there. For instance, assume that Country A applies an anti-dumping duty order to typewriters from Country B, thus producers from Country B may decide to ship individual components of the typewriter to Country A, assemble the final product there, and then sell the merchandise.<sup>20</sup> In this case, no anti-dumping duty should be applied because the original anti-dumping duty order refers to like-products, while the imported merchandise is components, and components differ from like-products because they have their own separate specificity.<sup>21</sup>

The third type of anti-dumping circumvention is when a part or the entire production of the product subject to the anti-dumping duty order is transferred from the original country of manufacture to the importing country or to a third country.<sup>22</sup> In this case, the circumvention producer

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order). In this case, the importing country (A) was the US, the country (B) subject to the anti-dumping order was Korea, and the third countries (C) were Mexico and Thailand.

18. *Id.*

19. *Id.*

20. *See e.g.*, Brother Industries, Ltd. and Brother Industries (USA), Inc., 56 Fed. Reg. 14922-01 (Dep't Commerce Apr. 12, 1991) (initiation of anti-circumvention inquiry on anti-dumping duty order on portable electric typewriters). In this case, the importing country (A) was the US, and the country (B) to which the anti-dumping duty order was directed was Japan.

21. *Id.*

22. *See e.g.*, Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China, 59 Fed. Reg. 62-01 (Dep't Commerce Jan. 3, 1994) (affirmative preliminary determination). In this action, the US Department of Commerce (DOC) affirmed that the import into the US of pipe fittings that were finished in Thailand from unfinished pipe fittings produced in the People's Republic of China constituted circumvention of an anti-dumping duty order on certain carbon steel butt-weld pipe fittings from the People's Republic of China.

decides to move a manufacturing operation, which is more complex.<sup>23</sup> In the case of assembly analyzed in the previous paragraphs, the purpose of transferring the final part of the production is to change the place of manufacture of the product subject to the anti-dumping order, and prevent the application of the duty to import activity.

The fourth type of anti-dumping circumvention, known as minor alteration circumvention, consists of exporting products that are an alteration of the product subject to the anti-dumping order.<sup>24</sup> The alteration may concern different minor aspects of the product subject to the anti-dumping order such as the way the product is presented to consumers.<sup>25</sup> The circumvention practice is successful when the variation is sensitive enough to create a distinction between the original products without distracting consumers.

It can be easily argued that the tolerance of circumvention strategies would imply the nullification of anti-dumping measures. Therefore, it is logical to assume that countries which are victims of dumping are likely to apply anti-dumping duties, and to discourage anti-dumping circumvention by adopting proper legislation. Although the WTO Members contemplated and implemented anti-dumping rules, they did not expressly include common rules to prevent and suppress trade strategies like circumvention.<sup>26</sup> This essay will examine why major trading entities have failed to agree on the issue of circumvention and propose a strategy for WTO Members to develop further in ADA negotiations in their attempt to cure the practice of circumvention. Part II will describe the failure of past negotiation of multilateral anti-circumvention provisions at the Uruguay Round. Part III will analyze the European Union's ("EU") and United States' ("US") domestic anti-dumping legislation as it applies to the regulation of anti-circumvention. The purpose of this analysis is to verify whether the provisions adopted unilaterally by these two WTO Members are within the scope of the

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23. *Id.*

24. *See e.g.*, Certain Pasta From Italy, 63 Fed. Reg. 54672-01 (Dep't Commerce Oct. 13, 1998) (affirmative final determination). In this case, the US DOC found that importing from Italy a certain kind of pasta in packages greater than the packages usually used to import the same kind of pasta (subject to an outstanding anti-dumping duty order) was a circumvention operation.

25. *Id.*

26. *See* Adamantopoulos & De Notaris, *supra* note 2, at 56.

ADA. Finally, in the light of the unilateral anti-circumvention provisions domestically adopted by some of the WTO Members, namely the EU and the US, Part IV will focus on the criteria that a common anti-circumvention legislation, if any, should meet under the WTO rules.

## II. ANTI-CIRCUMVENTION UNDER GATT 1994: AN UNSUCCESSFUL ATTEMPT IN NEGOTIATING ANTI-CIRCUMVENTION REGULATIONS BETWEEN WTO MEMBERS

Anti-dumping circumvention provisions were supposed to be included in the final version of the ADA.<sup>27</sup> In fact, Article 12 of the Dunkel Draft (one of the last draft versions of GATT 1994),<sup>28</sup> provided that, under specific circumstances, anti-dumping duties could be extended in the case of circumvention operations consisting of assembling or completing a like-product in the importing country.<sup>29</sup> Indeed, under the Dunkel Draft, the regulation of anti-circumvention measures was quite limited.<sup>30</sup> In particular, no sanction was established in the case of the assembly or the completion of a product subject to

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27. *Id.*

28. GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA/F-21 (Dec. 20, 1991) [hereinafter Dunkel Draft].

29. *See id.* art. 12.1. These specific circumstances include cases in which it has been established that: 1. the product assembled/completed had to be a like-product with regard to a product which was subject to a definitive dumping measure; 2. the assembly/completion operation had to be carried out by an entity which was related to the original dumping exporter (*i.e.* under a contractual arrangement with the exporter); 3. the components used in the assembly/completion operation had to be, directly or indirectly, sourced by the dumping exporter; 4. the assembly/completion operation had to have started or expanded substantially after the initiation of the anti-dumping investigation; 5. the total cost of the components used in the assembly/completion operation had to be no less than the 70% of the total cost of all the parties used in the operation, with the exception that no anti-dumping measure should be extended if the value of the assembly/completion operation was greater than 25% of the ex-factory cost of the like-product; 6. there had to be evidence of dumping concerning the difference between the price of the product in the importing country and the normal value of the product when subject to the original definitive anti-dumping duty; and 7. there had to be evidence that the extension of the anti-dumping measures to the components was within the scope of the definitive anti-dumping duty in order to prevent the injury to a domestic industry with regard to the like-product.

30. *Id.*

anti-dumping orders that took place in third party countries.<sup>31</sup> Furthermore, the extension of the original anti-dumping order to the case of circumvention practice was possible only upon the application of definitive anti-dumping duty orders, with the express exclusion of extending the order for preventive purposes in the case of mere initiation of the anti-dumping investigation.<sup>32</sup> Finally, under the Dunkel Draft provisions, anti-circumvention measures were applicable only if it was possible to trace a relation between the alleged circumvention operation and the original anti-dumping order such as in the case of the existence of a commercial relation between the assembling operator and the dumping exporter.<sup>33</sup>

Article 12 of the Dunkel Draft aimed to synthesize the following two concurring and opposite needs: to limit the anti-dumping circumvention of importing countries (like the EU and the US), and to protect against the pervasive application of anti-dumping duties to exporting countries (like Japan).<sup>34</sup> The strongest criticism to Article 12 of the Dunkel Draft came from the US, which argued for the need of strict anti-circumvention rules, and filed a proposal to extend anti-dumping duty orders even in the case of third-country and minor alteration circumventions.<sup>35</sup> The majority of the WTO Members, nevertheless, rejected this proposal,<sup>36</sup> and, during the negotiations, the

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31. *See id.*

32. *See id.* art. 12.1(i).

33. *See id.* art. 12.1(ii).

34. For a general discussion on the negotiation of the Dunkel Draft, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, 1986-1994, at 252 (Terence P. Steward ed., 1999); Simon Holmes, *Anti-Circumvention Under the European Union's New Anti-Dumping Rules*, 29 (3) JOURNAL OF WORLD TRADE 161, 164-165 (1995); ANDREAS F. LOWENFELD, *supra* note 1, at 278-279; *see e.g.*, Leebron *supra* note 12.

35. *Communication from the United States, Proposal for Improvements to the Anti-Dumping Code*, MTN.GNG/NG8/W59 of December 20, 1989. *See* Norio Komuro, *U.S. Anti-Circumvention Measures and GATT Rules*, 68 (3) JOURNAL OF WORLD TRADE 5, 26-30 (1994) for comments on the position of the US during the Dunkel Draft negotiation.

36. *See* PIERRE DIDIER, WTO TRADE INSTRUMENTS IN THE EU LAW 158 (1999).

[C]riticisms were made that each of these [U.S.] proposals allowed the imposition of anti-dumping duties on parts and components or finished products without conclusion on dumping on these parts. . . . The USA, however, responded that their proposal was not contravening GATT Article VI because everything was dependent on determination of whether the parts or altered products are "like" the product originally



WTO Members prioritized other issues. As a result, since there was no strong political interest in the adoption of multilateral anti-circumvention provisions, no final agreement was reached, and Article 12 of the Dunkel Draft was deleted.<sup>37</sup>

Nevertheless, at the end of the Uruguay Round the WTO issued the following decision which stated

Noting that while the problem of circumvention of anti-dumping measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,

Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,

[The Ministers] [d]ecide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution.<sup>38</sup>

In April 1997 (three years after the finalization of GATT 1994), the WTO Committee on Anti-Dumping Practices established an Informal Group on Anti-Circumvention in order to promote the discussion and make recommendations concerning this issue. At first, the Informal Group on Anti-Circumvention focused on two issues: what constitutes circumvention according to domestic legislation, and what the WTO Members had done with respect to what domestically had been defined as circumvention.<sup>39</sup> At the October 2001 meeting, the discussion was opened to a third topic: how circumvention would be dealt with under the relevant WTO rules, and which options would be deemed necessary

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covered by the order.

37. See Adamantopoulos & De Notaris, *supra* note 2, at 56 (“[T]he relevant provisions on anti-circumvention and country hopping were deleted when it became apparent that a compromise could not be reached on the amendments proposed by the United States on the Dunkel text.”).

38. Decision on Anti-Circumvention Annexed to the Agreement Establishing the Multilateral Trade Organizations, enclosed with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh, Apr. 15, 1994, available at <http://www.wto.org> (last visited Mar. 9, 2005).

39. 2001 USTR Annual Report – World Trade Organization, at 43, available at <http://www.ustr.gov> (last visited Mar. 9, 2005).

in the event of multilateral regulation.<sup>40</sup>

WTO Members decided to address again the unresolved issue of anti-dumping circumvention at the Fourth WTO Ministerial Conference that took place in Doha, Qatar in November 2001.<sup>41</sup> At this Conference, Members agreed on a mandate for negotiation on specific subjects, which included the ADA.<sup>42</sup> Though the negotiations were set to be concluded by January 1, 2005, the pace has been ever so slow in part because of the non-cooperative atmosphere generated by the recent US anti-dumping policy.<sup>43</sup>

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40. *Id.* at 44.

41. The Ministerial Conference in Doha was surrounded by many factors, which had negative effects on the possibility that the WTO Members would find a common agenda (e.g., the geopolitical crisis following 9/11; the pressure due to the critical attitude of some leading opinion movements concerning international trade; the relevant position that developing countries claimed in the negotiating process). The Conference was affected by a general lack of spirit of cooperation and the individual WTO Members preferred to focus on specific instances inspired by individual needs. In particular, in view of its imminent enlargement, the EU insisted on the issues of agricultural subsidies, while the US affirmed the necessity to strengthen anti-dumping and anti-subsidies measures. As it has been summarized, "[t]he goal in Doha was quite limited: . . . simply to agree on what issues should be put on the agenda for negotiations." Richard W. Stevenson, *Measuring Success: At Least the Talks Didn't Collapse*, N.Y. TIMES, Nov. 15, 2001 at A12. For a general comment on the Conference, see William A. Lovett, *Reflections on The WTO Doha Ministerial: Bargaining Challenges And Conflicting Interests: Implementing The Doha Round*, 17 AM. U. INT'L L. REV. 951 (2002).

42. According to the Ministerial Declaration adopted on November 14, 2001, the negotiation process should consist of two steps: first clarifying the controversial issues of anti-dumping regulation, and, then, improving the principles of the resulting agreement. Daniel Pruzin, *WTO Members Reach Agreement on Framework, Chairman of Doha Round*, 19/6 BNA INTERNATIONAL TRADE REPORT 226 (2002). For a comment on the results of the Doha Round, see Petros C. Mavroidis, *The Meeting in Doha: keep on keeping on*, 36 (2) JOURNAL OF WORLD TRADE 167 (2002).

43. See Leclerc, *supra* note 3, at 139. One of the most controversial issues was the decision of the Bush administration in March 2002 to impose an average 30 percent tariff on selected foreign steel entering in the US. For a brief overview on the impact that this decision had in the developing of international trade negotiations see Kevin K. Ho, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Trade and Economic Affairs: Trading Rights and Wrongs: The 2002 Bush Steel Tariffs*, 21 BERKELEY J. INT'L L. 825. At the post-Doha negotiation table, in particular the US adopted a critical approach on anti-dumping and

During its 2002 annual meetings, the Informal Group on Anti-Circumvention continued to discuss the definition of circumvention and to analyze domestic rules and administration procedures for anti-circumvention practices.<sup>44</sup> The US was the country most concerned with “the need to strengthen rules to prevent circumvention of antidumping measures.”<sup>45</sup> In 2002, the US submitted to the Informal Group a document stating, “while there was as yet no consensus on what constitutes circumvention, Members would also benefit from general guidelines on what does not constitute circumvention.”<sup>46</sup> The activities of the Informal Group on Anti-Circumvention continued regularly during 2003, and the WTO Members continued to discuss the definition of circumvention, and analyze the domestic provisions related to the issue.<sup>47</sup>

The collapse of the Fifth WTO Ministerial Conference in Cancun in September 2003 further stalled the process of a successful negotiation of anti-dumping regulation. Presently it seems unlikely that the Informal Group on Anti-Circumvention will be able to propose and draft new multilateral anti-circumvention provisions in the near future.

### III. ANTI-DUMPING CIRCUMVENTION: UNILATERAL PROVISIONS IN THE EU AND IN THE US

Absent uniform international regulation, several WTO Members have domestically adopted anti-circumvention legislation.<sup>48</sup> Under GATT 1994, unilateral anti-circumvention regulation is legitimate and it

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countervailing reforms, insisting on the necessity to limit the negotiations to unfair trade practice and transparency rules. Daniel Pruzin, *EU Sketches View on WTO Reform of Anti-dumping Rules*; *U.S. Skeptical*, 19/28 BNA INTERNATIONAL TRADE REPORT 1198 (2002).

44. 2002 USTR Annual Report – World Trade Organization, available at <http://www.ustr.gov> (last visited Mar. 9, 2005).

45. Daniel Pruzin, *United States Pitches WTO Agreement Identifying Breaks With Anti-dumping Rules*, 19/17 BNA INTERNATIONAL TRADE REPORT 734 (2002).

46. See *supra* note 44, at 70.

47. 2003 USTR Annual Report – World Trade Organization, at 55, available at <http://www.ustr.gov> (last visited Mar. 9, 2005).

48. See generally ANTI-DUMPING UNDER THE WTO: A COMPARATIVE REVIEW (Keith Steel ed., 1996). Australia, Canada, Japan, Mexico, New Zealand, as well as the EU and US have adopted anti-circumvention measures.

is consistent with its provisions.<sup>49</sup> According to the methodology adopted by the Informal Group on Anti-Circumvention, the analysis of anti-circumvention domestic provisions may be a good starting point for the purpose of defining prospective multilateral regulation. The cases of the EU and the US may be particularly meaningful because, due to the relevance of those two WTO Members in the international trade context, it is likely that their unilateral legislation will influence the discussions within the Informal Group.

#### A. Anti-Dumping Circumvention in the EU

The EU's approach to the issue of anti-dumping circumvention is embodied in Article 13 of Regulation (EC) No 384/96 of December 22, 1995 (the "EU Anti-dumping Circumvention Regulation").<sup>50</sup> Since the ADA is binding on WTO Members,<sup>51</sup> the EU Anti-dumping Circumvention Regulation was adopted in order to comply with the anti-dumping provisions of GATT 1994, and to harmonize the Community's legislation with these principles and procedures.<sup>52</sup> Conscious of the absence of multilateral provisions under the WTO rules, the EU legislators have set up anti-circumvention provisions as an integral part of the EU Anti-dumping Circumvention Regulation.<sup>53</sup>

According to Article 13(1) of the EU Anti-dumping Circumvention Regulation, the general conditions for the application of anti-circumvention measures are:

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49. See GATT 1994 *supra* note 4, art. XX(d).

50. Council Regulation No. 384/96 of 22 December 1995 on Protection against Dumped Imports from Countries not Members of the European Community, 1996 O.J. L 56 6.3 [hereinafter EU Anti-dumping Circumvention Regulation]. For a general comment on the implementation of GATT 1994 in the European Community with respect to anti-dumping regulation, Peter L.H. Van den Bossche, *The European Community and the Uruguay Round Agreements*, in IMPLEMENTING THE URUGUAY ROUND 23 (Johan H. Jackson & Alan O. Sykes eds., 1997); SEBASTIAN FARR, EU ANTI-DUMPING LAW – PURSUING AND DEFENDING INVESTIGATIONS (1998).

51. See ADA, *supra* note 8.

52. EU Anti-dumping Circumvention Regulation *supra* note 50. See also EEC Regulations on Imports of Parts and Components adopted on May 16, 1990, GATT Document, L/6657, March 22, 1990.

53. EU Anti-dumping Circumvention Regulation *supra* note 50.

1. A change in the regular pattern of trade between the Union and third countries;
2. The impossibility to relate this change in the pattern of trade to a due cause or to an economic justification rather than the imposition of the anti-dumping duty;
3. Evidence that the remedial effects of the anti-dumping duties are undermined in terms of the price and/or the quantity of like products;
4. Evidence of dumping in relation to the normal values of the like or similar products.<sup>54</sup>

Due to the broad language of the EU Anti-dumping Circumvention Regulation, it is possible to detect circumvention in the case of operations of a different nature (such as minor variations of the dumped product, or when the dumped product is combined with other products).

Article 13(2) of the EU Anti-dumping Circumvention Regulation expressly deals with cases of circumvention with regard to assembly.<sup>55</sup> To detect assembly circumvention, two conditions must be met.<sup>56</sup> First, an assembly operation must take place in the EU or in a third country,<sup>57</sup> and there should be evidence that this operation started or increased after, or just prior to, the anti-dumping investigation.<sup>58</sup> Second, the parts or components used for the assembly should have been imported from the country subject to anti-dumping investigations or to the final order.<sup>59</sup>

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54. *Id.*

55. *Id.*

56. *Id.* art. 13(2).

57. See Council Regulation No. 2423/88, 1988 O.J. L 209 (noting that as of July 11, 1988 regulations against dumped or subsidized imports from countries that were not members of the European Economic Community did not provide anti-circumvention measures in the case of assembly operations in third countries, but that the extension was included in the present legislation in order to discourage the establishment of productive operations in countries that were not EU members); see also Holmes, *supra* note 34, at 166.

58. See EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(2)(b) (stating that circumvention may be detected even in the case of assembly operations started or increased before the investigation, meaning that broad discretion is given to the investigating authorities); see also Holmes, *supra* note 34, at 166.

59. See Commission Decision No. 2003/560/EC 2003 O.J.E.C. L 190/10, 1 (discussing Council Regulation No. 71/97 EEC, 1997 O.J. L 17, which extended the

To meet the second condition, the parts or components imported from the country subject to the anti-dumping measure and used in the assembly operation must be at least 60% of the total value of the parts used in the operation or 60% of the value of the final product.<sup>60</sup> This means that at least 60% of the value of the parts/components must consist of products originating in the dumping country, and the remaining parts/components (which would constitute 40% or less of the total value) would be from the EU or from third countries.<sup>61</sup> In any case, under the EU Anti-dumping Circumvention Regulation, circumvention is excluded if the value consequent to the assembly or completion operation is greater than 25% of the manufacturing cost.<sup>62</sup> This last condition is quite restrictive, since the test takes into account the value added during the assembly operation, but not the value of the parts/components used during the operation, even if these parts originated in the EU.<sup>63</sup>

Case law has held that paragraphs (1) and (2) of Article 13 of the EU Anti-dumping Circumvention Regulation are cumulative, which means that, in order to apply anti-circumvention sanctions in the case of assembly operation, the conditions listed in Article 13(1) must be met in

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definitive anti-dumping duty imposed by Council Regulation No. 247/93 on bicycles originating in the People's Republic of China to imports of certain bicycle parts from the People's Republic of China, and levying the extended duty on such imports registered under Council Regulation No. 703/96 EEC, 1997 O.J. L 016); *see also Bicycle Parts from China*, 1997 O.J.E.C. L 16 (noting that if in fact mere origin were required, anti-circumvention sanctions might be avoided by exporting the components from the dumping country to intermediate countries, and then to the assembly country); *see also* DIDIER, *supra* note 36, 167–168.

60. *See* EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(2)(b).

61. *See* Holmes, *supra* note 34, at 167 (discussing that prior EEC anti-circumvention legislation provided the extension of anti-dumping duties in the case of circumvention consisting of assembling in the European Community parts that originated in the dumped country if these parts represented at least 50% of the value of all parts); *see also* Council Regulation 2423/88, art. 13(10)(a), 1988 O.J. L 209.

62. *See* EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(2)(b).

63. *See* Holmes, *supra* note 34, at 169 (arguing “[T]his test differs in two respects to the ‘value-added’ test sometimes applied in determining the origin of the product. First, the origin tests generally take into accounts not only the value-added during the ‘assembly or completion operations,’ but also the value of locally sourced parts. Second, in origin cases, the value-added is compared, not with the ‘manufacturing cost’ but with the ex-works price of the finished products.”)

addition to the conditions required under Article 13(2).<sup>64</sup>

If circumvention is suspected, the Community industry may file written request to the EU Commission giving evidence of the circumventing practice.<sup>65</sup> The EU Commission may then initiate a proper investigation, and terminate the procedure within nine months from the filing of the request.<sup>66</sup> The main purpose of this investigation is to find the persistence of material injury to the interest of the Community upon which the anti-dumping measures were originally adopted.<sup>67</sup> In fact, if material injury persists despite the application of anti-dumping measures, circumvention would be deemed the most likely cause.<sup>68</sup>

In order to verify if the conditions under Article 13 of the EU Anti-dumping Circumvention Regulation are met, it is necessary to determine: 1) if the remedial effects of the anti-dumping measures have been undermined; and 2) if dumping persists with respect to the normal value of the like or similar product as was established in the investigation before the adoption of the anti-dumping measures.<sup>69</sup> First, the investigating authorities take the price of the dumped product (as it was calculated during the original anti-dumping investigation). Then, they add the anti-dumping duties (in order to obtain the un-dumped price). Finally, they compare the un-dumped price with the current

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64. See *Bicycle Parts from China*, *supra* note 59 (noting that despite this decision of the European Court of Justice, the cumulative interpretation of the two clauses is controversial, because in Commission Regulation No. 88/97, regarding the authorization of the exemption of imports of certain bicycle parts originating in the People's Republic of China from the extension by Council Regulation No. 71/97 of the anti-dumping duty imposed by Council Regulation 2474/93, the purpose of the Commission was limited to examining if the assembly operation is within the scope of EU Anti-dumping Circumvention Regulation, art. 13(2)); see also Commission Regulation No. 88/97, 1997 O.J. L 017; see also DIDIER, *supra* note 36, at 161.

65. See EU Anti-dumping Circumvention Regulation *supra* note 50, art. 5.

66. *Id.* art. 13(3).

67. See *id.* art. 3 (stating that injury is relevant for the purpose of the application of anti-dumping duties when it is "material" and "directed to the Community industry"); see also *id.* art. 3(1); see generally Marc Wellhausen, *The Community Interest Test in Anti-dumping Proceedings of the European Union*, 16 AM. U. INT'L L. REV. 1027 (2001) (commenting on the notion of "material injury to the interest of the Community").

68. See Leebron, *supra* note 12, at 20.

69. See EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(2)(c).

export price of the alleged circumventing product. If there is a difference, circumvention may be suspected.<sup>70</sup>

The second element, on which the Commission focuses to detect if there is present injury to the interest of the Community, is the difference between the alleged dumping price (calculated in relation to the like-product engaged in circumvention operation) and the normal value of the dumped product, as was calculated before the adoption of anti-dumping measures.<sup>71</sup> For this calculation, problems may arise in the case of products assembled in the Community: mere components are exported and, therefore, it is not possible to calculate the present export price of the dumped merchandise and to compare it with the "normal value of the product" as it was calculated in the original anti-dumping investigation.<sup>72</sup> Anti-circumvention measures will be applied if the price difference is consistent with the difference detected during the prior anti-dumping investigation.<sup>73</sup>

In the case of an affirmative investigation, the Council may decide to extend the existing anti-dumping measure upon proposal by the Commission.<sup>74</sup> Sanctions are applied retroactively from the date of the registration of the imports subject to the anti-dumping order.<sup>75</sup> Circumvention sanctions are not cumulative: in the case of importing-country circumvention by assembly, the anti-circumvention measure is applied to the imported components, based on the value of the components imported from the countries subject to the anti-dumping duty order.<sup>76</sup> In the case of third-country circumvention by assembly, the

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70. See e.g., Vermulst *infra* note 130.

71. See EU Anti-dumping Circumvention Regulation *supra* note 50, art. 2(1).

72. T.W. Huang, *The Gathering Storm of Anti-dumping Enforcement in China*, 36 (2) JOURNAL OF WORLD TRADE 255-283 (2002).

73. See EU Anti-circumvention Regulation *supra* note 50, art. 5.

74. *Id.* art. 13(3).

75. *Id.* (mentioning that under art. X(6) of GATT 1994, retroactivity is allowed within 90 days from the application of the anti-dumping sanctions. However, if the retroactivity effect of the anti-circumvention measures is longer than 90 days, doubts may arise concerning the compatibility of the Regulation with the GATT 1994); see DIDIER, *supra* note 36.

76. See e.g. Edwin Vermulst & Paul Waer, *Anti-Diversion Rules in Anti-Dumping Procedures: Interface or Short-Circuit for the Management of Interdependence*, 11 MICH. J. INT'L L. 1119 (1990).



sanction is applied to the final product based on its full value.<sup>77</sup>

B. Anti-dumping Circumvention in the US

Like in the EU, the adoption of ADA has induced the US legislators to provide a new set of rules on anti-dumping circumvention.<sup>78</sup> These new provisions were adopted to address specifically newly emerged circumvention practices to which the previous domestic legislation did not refer to appropriately.<sup>79</sup>

Under the present version of the Tariff Act § 781, 19 U.S.C. § 1677j, ("the "US Anti-dumping Circumvention Regulation") there are four different cases in which anti-circumvention measures may be adopted.<sup>80</sup> First, if merchandise of the same kind or class as the merchandise which is presently subject to anti-dumping or countervailing duties or anti-dumping findings, is completed or assembled in the US, and the components are from foreign countries to which the anti-dumping duties are applied.<sup>81</sup> In this case, the anti-circumvention measures are applied if the assembly operation performed

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77. *Id.*

78. The Uruguay Round Agreements Act (URAA) L. 103-465, 109 Stat. 4809 (Dec. 8, 1994) amended the Tariff Act § 781, 19 U.S.C. § 1677j (1930), as enacted in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No 100-418, § 1321(a) [hereinafter US Anti-dumping Circumvention Regulation]. For comments on the URAA, *See e.g.* David W. Leebron, *Implementation of the Uruguay Round Results in the United States*, in IMPLEMENTING THE URUGUAY ROUND *supra* note 50, at 202 (noting that under the Omnibus Trade and Competitiveness Act of 1988, anti-circumvention measures were adopted for merchandise completed or assembled in the US or in a third country. As a requirement for the extension of the anti-dumping duty order, the difference between the value of the merchandise sold in the US (or the value of the merchandise imported in the third country) and the value of the imported components had to be "small." Problems arose concerning the definition of "small difference," because it allowed a broad discretion to the national administering authority); *see also* Komuro, *supra* note 35, at 21-25; Ranier M. Bierwagen, *GATT Article VI and the Protectionist Bias in Anti-Dumping Laws (Studies in Transnational Economic Law: Vol. 7)* 58-61 (1990).

79. US Anti-dumping Circumvention Regulation *supra* note 78, at (a) and (b); *see* statement of Administrative Action, HR Doc. No 10 103-316, vol. 1 (1944) at 222-223 (expressing concern regarding assembly operations performed either in the US or in third countries).

80. US Anti-dumping Circumvention Regulation *supra* note 78.

81. *See id.* at (a)(1)(A) and (a)(1)(B).

in the US is “minor or insignificant,” and if the value of the assembled components is a “significant portion” of the total value of the merchandise.<sup>82</sup>

The second case when anti-circumvention measures can be adopted is when merchandise of the same kind or class as the merchandise which is presently subject to anti-dumping or countervailing duties or anti-dumping findings, is imported to the US after having been assembled in an intermediate country.<sup>83</sup> If, in assembling its merchandise, an exporter used components that were subject to an outstanding anti-dumping order or anti-dumping investigation, or components that were produced in foreign countries to which US anti-dumping measures were applied, anti-circumvention measures may be adopted.<sup>84</sup> Like in the case of assembly in the US, in order to apply the anti-circumvention measures some criteria must be met: the assembly operation, which took place in the foreign country, must be “minor or insignificant,” and the value of the assembled components must be a “significant portion” of the total value of the merchandise.<sup>85</sup>

The third case is when the merchandise subject to anti-dumping measures is altered “in minor respects,” regardless of the variation of

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82. See *id.* at (a)(2) (noting that to determine if the operation is “minor” or “insignificant,” the DOC shall take into account several elements like the level of investment, research and development in the US, the nature of the process which occurred in the US, the extent of production facilities herein located, and the value of the merchandise sold in the US); see also *U.S. v. Mast Industries, Inc.*, 668 F.2d 501, 506–507 (1998). For an application of the *Mast* test, see *Levi Strauss & Company v. U.S.*, 156 F.3d 1345, 1347 (1998). (noting that the US courts have developed the so-called *Mast* test of “incidental assembly,” according to which the following elements must be valued in order to determine whether or not the assembly operation was incidental and therefore not relevant for the purposes of the extension of anti-dumping duties under the minor or insignificant standard:

1. [whether] the cost of the operation relative to the cost affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered “minor” ( . . . )
2. whether the operations in question were necessary to the assembly process ( . . . )
3. whether the operations were so related to assembly that they were logically performing during assembly ( . . . )
4. whether economic or other practical considerations dictate that, the operations are performed concurrently with assembly.

83. See US Anti-dumping Circumvention Regulation *supra* note 78, at (b).

84. *Id.* at (b)(1)(A) and (b)(1)(B).

85. *Id.* at (b)(1)(C) and (b)(1)(D).

tariff classification, if any.<sup>86</sup>

Finally, the last case when anti-circumvention measures may be adopted is when merchandise is developed without substantially changing its characteristics after the anti-dumping investigation is initiated (so-called "later-development merchandise").<sup>87</sup>

Under the US Anti-dumping Circumvention Regulation, the administering authority will take into account several factors before imposing an anti-dumping measure: A) whether the later-developed merchandise has the same general physical characteristics of the (allegedly) dumped merchandise; B) whether the purchase expectations of the later-developed merchandise are the same as the (allegedly) dumped merchandise; C) whether the later-developed and the (allegedly) dumped merchandise have the same ultimate use; D) whether the sale-channels of the later-developed and the (allegedly) dumped merchandise are the same; and E) whether the later-developed merchandise is advertised and displayed in a similar manner as the (allegedly) dumped merchandise was.<sup>88</sup>

In the case of alleged circumvention, the U.S. Department of Commerce ("DOC") is the domestic authority, which determines whether to extend an existing anti-dumping measure to a particular product.<sup>89</sup> An investigation (so-called "scope ruling") can be initiated either by the Secretary<sup>90</sup> or by application filed by any interested party.<sup>91</sup> The DOC has 45 days from the receipt of an application for an investigation to issue a final ruling or to initiate a scope inquiry.<sup>92</sup> The difference between issuing a final ruling and initiating a scope inquiry is that in the first case, the DOC can determine whether it can extend the anti-dumping measure based on the filed application. In the case of a scope inquiry, the anti-dumping administering authority needs further

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86. See *id.* at (c); see also *Wheatland Tube Company v. U.S.*, 161 F.3d 1365 (1998) (holding that products which are insignificantly changed are within the scope of the anti-dumping provision even if alterations remove them from the anti-dumping duty order's literal scope).

87. *Id.* at (d)(1).

88. *Id.*

89. 19 C.F.R. § 351.225 (a) (2005).

90. *Id.* § 351.225 (b).

91. *Id.* § 351.225 (c).

92. *Id.* § 351.225 (c)(2).

information before providing the final order.<sup>93</sup>

The purpose of a scope ruling is to determine the possibility of including the circumventing merchandise within the scope of an outstanding anti-dumping order or finding.<sup>94</sup> This is possible even if the assembly or completion operation that took place in the US or in a third intermediate country is “minor” or “insignificant.”<sup>95</sup> In particular, in the case of an assembly or completion operation performed in the US, the DOC will include the imported parts, or components within the scope of the anti-dumping duty order, while taking into account their normal value.<sup>96</sup> When the DOC finds a circumvention practice, it will consider additional factors before determining whether to extend the existing anti-dumping measure, such as: a) a change in the pattern of trade (including sourcing patterns of parts used to produce the final product);<sup>97</sup> b) the affiliation, if any, between the manufacturer/exporter of the merchandise at issue and the operator who performed the assembly or completion of the merchandise within or outside the US;<sup>98</sup> and c) the increase in the import of the components after the initiation of the anti-dumping investigations.<sup>99</sup>

The DOC is required to notify the International Trade Commission (“ITC”) of the proposed inclusion of the circumvented merchandise in the anti-dumping order.<sup>100</sup> The ITC may request a consultation with the

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93. *Id.* § 351.225 (d) and (e). The extension of an anti-dumping measure is possible without further inquiry into the applicant’s allegations. The purpose of this provision is to avoid delays in initiating a scope ruling. See Rina Goldenberg, *Scope and Anti-circumvention under the Anti-dumping and Countervailing Duty Laws: Recent Statutory and Regulatory Developments*, in THE COMMERCE DEPARTMENT SPEAK ON INTERNATIONAL TRADE & INVESTMENT 933, at 946–950 (Practicing Law Institute ed., 1998).

94. 19 C.F.R. § 351.225 (a) and (d) (2005).

95. US Anti-dumping Circumvention Regulation *supra* note 78, at (a)(1)(C); 19 C.F.R. § 351.225 (i) (2005).

96. 19 C.F.R. § 351.225 (g)–(h) (2005). The normal value for the purposes of anti-dumping measure is within the scope of 19 U.S.C. § 1677b.

97. US Anti-dumping Circumvention Regulation *supra* note 78, at (a)(3)(A), (b)(3)(A).

98. *Id.* at (a)(3)(B), (b)(3)(B).

99. *Id.* at (a)(3)(C), (b)(3)(C).

100. *Id.* at (e)(1) (stating “a decision by the administering authority regarding whether any merchandise is within a category for which notice is required . . . is not

administering authority,<sup>101</sup> and if it finds that the inclusion of the alleged circumventing merchandise may constitute a significant injury, it will advise the administering authority whether the inclusion is inconsistent with the ITC's prior anti-dumping affirmative determination.<sup>102</sup> If the ITC does not object to the adoption of the anti-circumvention measure, the ultimate scope ruling will be notified to all persons that participated in any segment of the proceeding (so-called "scope service list").<sup>103</sup>

C. Consistency of the EU and the US Anti-Circumvention Provisions  
with GATT 1994

Even if differences exist with respect to the EU and US definitions of the circumvention practice<sup>104</sup> and their administration procedures for the extension of the anti-dumping duty order,<sup>105</sup> both the EU and the US regulations treat anti-dumping circumvention negatively when it consists of assembly operations that take place in third countries.<sup>106</sup> The issue of the admissibility of sanctions against third-country assembly circumvention is related to the definition of the origin of the merchandise to which the anti-dumping sanction should apply.<sup>107</sup> If the

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subject to judicial review"). See also *id.* at (a)(3)(C) and (b)(3)(C).

101. *Id.* at (e)(2).

102. *Id.* at (e)(3).

103. 19 C.F.R. § 351.225 (n) (2005).

104. See US Anti-dumping Circumvention Regulation *supra* note 78, at (b)(3)(B) (1996) (noting that under US law, in order to adopt anti-circumvention measures, evidence of the relation between the circumventing producer located in the assembly country and the original dumper is required, but no similar provision is included in the EU legislation); but see EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(10)(a), (stating that under this regulation, the relation between the assembler and the dumper is required).

105. See EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(10)(a), (recognizing that the EU legislation makes reference to a defined percentage of parts from the country subject to anti-dumping measures: 60% of the total value of the assembled parts); but see US Anti-dumping Circumvention Regulation *supra* note 78, at (b)(1)(C) and (D) (stating that the US provisions incorporate the idea that the assembly operation must be "minor or insignificant," and that the value of the merchandise produced in the dumping country must be a "significant portion" of the value of the merchandise exported to the US).

106. See EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(2)(b); see also US Anti-dumping Circumvention Regulation *supra* note 78.

107. See *id.*

assembly operation in the third country does not change its determination of the origin of the final product, no doubt should arise about the consistency with ADA provisions.<sup>108</sup> In fact, a product that is assembled in a third country is still seen as formally originating in the country to which the anti-dumping measures have been applied.<sup>109</sup> Therefore, the importation of the product seems to be within the scope of the anti-dumping duty order as it was originally adopted.

More controversial is when the assembly operation implies a change in the determination of the place of origin.<sup>110</sup> In fact, if the assembly or completion of operation determines a change in the determination of the place of origin of the dumping merchandise, the inclusion of this merchandise in the anti-dumping duty order implies the extension of the anti-dumping measure to an import activity that was not subject to the original anti-dumping investigation. This may be inconsistent with GATT 1994, which provides that

no contracting party shall levy any anti-dumping . . . duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.<sup>111</sup>

As an example, assume that Country A applies an anti-dumping

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108. David Palmetier, *A Commentary on the WTO Anti-Dumping Code*, 30 (4) JOURNAL OF WORLD TRADE 43, 65–66 (1996).

109. See GATT 1994 *supra* note 4, art. III(4) (stating that “[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”).

110. Case C 177/96, *Belgian State v. Banque Indosuez*, 1997 E.C.R. I-5659. Doubts have arisen with regard to Article 13 of the EU Anti-dumping Circumvention Regulation *supra* note 50, according to which, in the case of third-country assembly, the anti-circumvention measure will apply if the components are “from” the country subject to the anti-dumping measure. The issue has been whether the word “from” means the provenance or the origin of the components. Case law has clarified that the origin of the product is the relevant criterion for the application of the duty. See DIDIER, *supra* note 36, at 167.

111. See GATT 1994 *supra* note 4, art. VI(6)(a).

duty order to merchandise X from Country B. Under the GATT 1994, the application of an anti-dumping order to merchandise X from Country C is possible only upon proper investigation.<sup>112</sup> Under the EU and the US anti-circumvention regulations, in the case of third-country assembly, the anti-dumping order may be extended if some conditions, such as a change in the trade pattern<sup>113</sup> or a chronological link between the assembly operation and the adoption of anti-dumping duties against the dumping country, are met.<sup>114</sup> However, neither the EU nor the US has a domestic provision on circumvention that expressly requires the type of anti-dumping investigation procedure required under Article 5 and Article 6 of the ADA, and the inclusion of the merchandise in the anti-dumping order is essentially based on the mere fact that the parts or components of the merchandise are from the country subject to the original anti-dumping duty.<sup>115</sup> Therefore, in the case of third-country assembly, absent a further anti-dumping investigation, if there is a change in the determination of the place of origin of the dumped merchandise, the extension of anti-dumping duties on the grounds of the mere origin of the assembled components may result in a violation of GATT 1994.<sup>116</sup>

Another controversial issue concerning the consistency of EU and US anti-circumvention provisions with GATT 1994 is the extension of

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112. See GATT 1994 *supra* note 4, art. I (“[A]n anti-dumping measure shall be applied . . . pursuant to investigations initiated and concluded in accordance with the provisions of this Agreement.”).

113. EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(1).

114. *Id.* art. 13(4)(b)(ii)(i); US Anti-dumping Circumvention Regulation *supra* note 78, at (b)(3)(c).

115. See ADA, *supra* note 8, art. 5.4 (providing that investigation be initiated when a qualified majority of domestic producers, on behalf of a domestic industry, files an application); *id.* art. 5.2 (noting that applicants must provide relevant information of the dumping practice including a description of the product, identification of the dumping producer, countries involved in the practice, export and domestic price, and volume of exportation); *id.* art. 5.6 (noting that no investigation may be initiated absent sufficient evidence of dumping injury to the domestic economy and a causal link between them); *id.* art. 6.1 (providing that an investigation must involve all the interested parties); *id.* art. 6.2 (stating that they will have a “[f]ull opportunity for the defense of their interest”); *id.* art. 6.4 & 6.5 (requiring information collected during the investigation to be accessible, absent any confidentiality reason).

116. See DIDIER, *supra* note 36, at 155; see e.g., ANTI-DUMPING UNDER THE WTO: A COMPARATIVE REVIEW *supra* note 48, at 273–274.

anti-dumping duties in the case of assembly operations that take place in the domestic market.<sup>117</sup> This case is similar to the case of assembly operations in third-countries. In fact, both under the EU and US regulations, importing parts or components from dumping countries and assembling them in the domestic market may constitute circumvention when the assembly operation is not economically relevant with respect to the entire manufacturing procedure. In the case of a third-country assembly, both the EU and the US regulations provide the criteria to define the relevance of an assembly operation. In the case of assembly in the importing-country, the main concern with the extension of anti-dumping duties is that this extension might be applied to products, which are not like products for the purpose of the anti-dumping investigation, but instead are mere components or parts of the dumped product. In this case, therefore, the sanction would be applied to products, which are not technically “dumped,” which is inconsistent with the ADA.<sup>118</sup>

#### IV. FROM DOMESTIC TO COMMON PROVISIONS: IS THERE ANY CHANCE FOR ANTI-CIRCUMVENTION REGULATION UNDER THE WTO?

From a domestic perspective, absent any regulation under the WTO, the inclusion of anti-circumvention provisions into national anti-dumping regulation is legitimate in order to protect national industries from dumping. However, unilateral provisions may be undesirable for two reasons at least.<sup>119</sup> First, unilateral provisions create a lack of homogeneity in anti-dumping regulation.<sup>120</sup> Second, as both the EU and US regulations show, domestic rules on anti-circumvention may implicitly grant national authorities the discretionary power to apply

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117. See GATT 1994 *supra* note 4, art. VI (stating the anti-dumping and countervailing duties); see also 2001 USTR Annual Report – World Trade Organization, at 43, available at <http://www.ustr.gov> (last visited Mar. 9, 2005).

118. Compare ADA, *supra* note 8, art. 9 (stating that the imposition of anti-dumping duties must affect only dumped products); with GATT 1994 *supra* note 4, art. VI(2) (stating “a contracting party may levy on any dumped product an anti-dumping duty,” which is consistent with the ADA with regard to the absence of any provision on the applicability of anti-dumping duties to parts or components).

119. Adamantopoulos & De Notaris, *supra* note 2, at 55.

120. *Id.* at 55.



anti-dumping duties that are not necessarily consistent with the provisions under the WTO regulation.<sup>121</sup> Until recently, the Informal Group on Anti-Circumvention has focused the discussion on the definition of circumvention. In particular, the national representatives have discussed the opportunity to include within the definition of anti-dumping the case of assembly operation in third countries.<sup>122</sup> Based upon this issue, the WTO Members were not able to reach an agreement during the Uruguay Round.

The difficulty resolving this conflict between importing and exporting WTO Members is well represented in a case concerning the extension by the US of an anti-dumping duty order on color television receivers from Korea.<sup>123</sup> In 1996, Samsung Electronics filed a request to review the anti-dumping duty order imposed by the US since 1984.<sup>124</sup> The US decided to initiate a review of the anti-dumping measure, but before doing so, they commenced an anti-circumvention investigation.<sup>125</sup> The Department of Commerce initiated an anti-circumvention inquiry to determine whether the producer was exporting components to third countries (Mexico and Thailand), where they were assembled and then were exported to the US in violation of domestic anti-circumvention provisions.<sup>126</sup> On November 7, 1997, without a prompt revocation of the anti-dumping measure, Korea requested the establishment of a panel to examine whether the continuing imposition of anti-dumping measures was consistent with GATT 1994.<sup>127</sup> In particular, Korea argued that the anti-circumvention investigation initiated by the US authorities was in violation of Article VI of GATT 1994 because:

[I]n the absence of a multilateral agreement on ... anti-

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121. *Id.* at 56.

122. *Report of the Expert Meeting on the Impact of Anti -Dumping and Countervailing Duty Actions*, U.N. Conf. on Trade & Development, Agenda Items 3 & 4, U.N. Doc. TD/B/COM.1/EM.14/2 (2000).

123. *Samsung Electronics Co., Ltd. v. U.S.*, 20 C.I.T. 1306, 946 F. Supp. 5 (CIT 1996).

124. *Id.* at 1306.

125. *Id.* at 1307.

126. *Id.* at 1307–1308.

127. *United States – Imposition of Anti-Dumping Duties on Imports of Color Television Receivers From Korea: Request for the Establishment of a Panel by Korea*, W.T.O. Doc. WT/DS89/7, No. 97-4923 (7 November, 1997) available at <http://docsonline.wto.org> (last visited Feb. 22, 2005).

circumvention legislation, the United States must follow the normal procedures of GATT 1994 and the [ADA] and, if it so wishes, may initiate a normal anti-dumping proceeding against Mexico and Thailand. In this regard, the initiation of the anti-circumvention proceeding violates Article VI of GATT 1994 and Articles 1, 2.1 and 3.1 of the [ADA], because it may lead to the imposition of anti-dumping duties on imports of CTVs [color television receivers] from Mexico and Thailand without findings of dumping and resulting injury ever having been made.<sup>128</sup>

In other words, according to Korea, third-country circumvention was outside the scope of GATT 1994, and the extension of the anti-dumping duty order in the case at issue was equal to the application of the anti-dumping measure to merchandise, which was not subject to the original anti-dumping investigation. Following Korea's communication, the US took measures to revoke the anti-dumping duty order, and Korea withdrew the request for the establishment of a panel.<sup>129</sup>

Since the WTO panel was never established, it is impossible to know how the WTO panel would have settled the dispute and decided on the compatibility of third-country circumvention with GATT 1994. However, this case shows how sharp the contrast on the issue is between the WTO Members. In order to overcome the difficulties that WTO Members have had in deviating from their partisan perspectives and reconciling their positions on anti-circumvention policy, some scholars have suggested that third-country circumvention should be dealt not as an anti-dumping issue, but as an issue under rules of origin regulation.<sup>130</sup> Indeed, rules of origin are a central issue for GATT 1994 legislation both for preferential and non-preferential trade purposes, since rules of origin define important elements of trade paths like the notion of

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128. *Id.*

129. Samsung Electronics Co., LTD., 20 C.I.T. at 1306; see WT/DS89/8 *supra* note 127.

130. See e.g., Edwin A. Vermulst, *Anti-Dumping and Anti-Subsidy Concerns for Developing Countries in the Millenium Round: Key Areas for Reform*, paper presented at UNCTAD Seoul Workshop on the "Positive Agenda" held on June 8–10, 1999, as contained in UNCTAD; *Positive Agenda and Future Trade Negotiations*, United Nations, New York and Geneva, 2000, at 297–298, as reported in *Impact of Anti-Dumping and Countervailing Duty Actions*, paper presented at the United Nations Conference on Trade and Development held in Geneva, December 4–6, 2000, TD/B/COM.1/EM.14/2, note 32, at 30.

relevant product in the case of application of anti-dumping measures.<sup>131</sup> The central notion of GATT 1994 Rules of Origin is that “merchandise has a single nationality,” and, therefore, merchandise imported into a country must be treated as originated in a single nation.<sup>132</sup> This classification does not take into account the fact that in the modern system of a global economy, product manufacture may be dislocated in different countries, and that several operators may perform different steps in the manufacturing process. As a result, it is almost impossible to relate the final product to an individual producer and to an exclusive place of production, while identifying a single country of origin.

The case of third-country circumvention demonstrates the limits of an exclusive definition of country of origin. Because anti-dumping measures are directed to specific countries, the dumped product must originate in these countries. The WTO Rules of Origin do not define substantive rules for the determination of the origin of the product, and instead defer that determination to domestic legislators.<sup>133</sup> As in the case of EU and US anti-circumvention regulations, the anti-dumping duty order is extended to third-country imports on the assumption that the assembly or the completion operation is a minor part of the manufacturing process. Consequently, the final product is not considered originated in the country where the assembly operation takes place, but instead in the country where the components are from. However, this assumption may be inconsistent with the actual manufacture process because the relevance of assembly, indeed, depends on the nature of the final product (i.e. assembling chemical products is different from kit components). The assumption about the definition of origin of the assembled product may therefore be in contrast with the perception of both the original dumping and the intermediate country, because, depending on the domestic rules of origin denomination, the assembly operation may have here a different relevance than the

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131. See Agreement on Rules of Origin, art. 1.2 and art. 9.1(a) part of Annex 1A to GATT 1994 *supra* note 4 [hereinafter GATT Rules of Origin].

132. See Lan Cao, *Corporate and Product Identity in the Post national Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 469 (2002); see also Moshe Hirsch, *International Trade Law, Political Economy and Rules of Origin, A Plea for a Reform of the WTO Regime on Rules of Origin*, 36 (2) JOURNAL OF WORLD TRADE 171 (2002) (presenting a critical analysis of the present GATT Rules of Origin discipline).

133. GATT Rules of Origin *supra* note 131, art. 9.2. See Palmetier, *supra* note 108, at 66–67.

relevance estimated by the country that applies the anti-dumping measures.

In order to reconcile the different national interests of the several WTO Members, the working committee established by the WTO Agreement on Rules of Origin has proposed to create separate rules of origin for individual products, in order to qualify the origin of the product on the basis of the country where the most significant part of the operation takes place.<sup>134</sup> This classification would rely on the specificity of each process of manufacture, and it should not necessarily coincide with the place of final assembly. Concerning third-country circumvention, such a system would help in getting over the present impasse between exporting and importing WTO Members. The codification of separate rules of origins for individual products, in fact, would favor predictability in the administration of anti-circumvention measures and prevent the arbitrary extension of anti-dumping duty orders by national authorities.<sup>135</sup>

Third-country circumvention is not the only case upon which doubts have risen about the compatibility of unilateral anti-circumvention measures and the multilateral anti-dumping regulation. In 1990, Japan challenged the validity of the Council Regulation (EEC) No. 1761/81, concerning the extension of anti-dumping measures to certain products assembled in the European Economic Community ("EEC") by companies related to Japan against which an outstanding anti-dumping duty order was already applied.<sup>136</sup> The individual components, which were imported into the EEC, were not within the original anti-dumping investigation nor had they been proved to cause any material injury to a domestic industry. Therefore, it was impossible to apply the anti-dumping duty order to the individual parts, even if there was evidence that the same Japanese producers in respect to which the original anti-dumping order was levied introduced them in the EEC.

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134. See Mariana C. Silveira, *Rules of Origin in International Trade Treaties: Towards the FTAA*, 14 ARIZ. J. INT'L & COMP. L. 411, 420 (1997).

135. See Cao, *supra* note 132, at 474-480.

136. *EEC Regulation on Parts and Components*, BISD 37S/132, 1990 O.J. L 6657 (referring to the GATT provision prior to Uruguay Rule as well as to the amended version of the EU legislation on anti-dumping, the conclusions reached by the GATT panel may be interesting for analyzing the compatibility of anti-circumvention regulation with GATT rules) [hereinafter *EEC Regulation on Parts and Components*].

The EEC imposed anti-circumvention measures to the components. Japan objected and, finally, it filed a request to settle the dispute before a GATT panel.<sup>137</sup>

Japan's claim considered not only the specific measures taken by the EEC, but the entire anti-circumvention provision.<sup>138</sup> Japan alleged that the EEC provision was outside the scope of GATT and it asked to the GATT Panel not only to request the EEC to revoke the measures at issue, but also to withdraw the domestic anti-circumvention provision. The GATT Panel found that in the instant case the administration of the anti-circumvention provision and the extension of anti-dumping duties on finished product were in violation of Article III: 2 of the GATT,<sup>139</sup> and it concluded that

the anti-circumvention provision in the EEC's anti-dumping Regulation is not inconsistent with the EEC's obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General Agreement, be desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties.<sup>140</sup>

In the past, even the European Court of Justice has expressed some concerns about the extension of anti-dumping duty orders concerning the effectiveness of the principle of legal certainty and the respect of the rights to defense. In particular, the Court has held that the domestic authorities administering the application of anti-circumvention measures should take into account that the importers subject to the extension of the anti-dumping duty are entitled to enjoy the same due process rights as the importers subject to the original order.<sup>141</sup> In fact, the effect of the

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137. *Id.*

138. Commission Regulation No. 2423/88, art. 13.10(a), 1988 O.J. L 209 (allowing the extension of definitive anti-dumping order "on products that are introduced into the commerce of the Community after having been assembled or produced in the Community").

139. *EEC Regulation on Parts and Components*, *supra* note 136, at ¶ 5.9 (providing the only pre-WTO case dealing with anti-dumping circumvention).

140. *Id.* at ¶ 5.26.

141. Case T-80/97, *Starway SA v. Council*, 2000 E.C.R. II-3099, ¶ 110 (2000). This case concerned the application by a French company for the annulment of a Council Regulation extending the definitive anti-dumping duty order on bicycles originating in the People's Republic of China to certain bicycle parts imported into France from the

extension of the anti-dumping regulation is to enlarge the scope of the initial anti-dumping duty order and to include similar products or parts of those products. Consequently, importers subject to the extension of the order are in a position similar to importers subject to the original order, with the consequence that they should be granted the respect of the basic rights to defense which are granted to importers during the anti-dumping investigation.<sup>142</sup>

In order to grant due process rights to the operators who are included in the extension of the anti-dumping duty order, it is necessary to limit the discretion of domestic administering authorities including *ad hoc* rules in multilateral anti-circumvention regulations, if any.<sup>143</sup> In particular, anti-circumvention measures should be applicable only if certain requirements are satisfied. First, anti-circumvention measures should be applied only to like-products which were in the scope of the original anti-dumping investigation.<sup>144</sup> Therefore, circumvention by

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People's Republic of China. The Court annulled the Council Regulation at issue holding that the Council erred in extending the anti-dumping duty order to the French applicant merely because this importer had not required a preventive certificate of non-circumvention under, EU Anti-dumping Circumvention Regulation *supra* note 53, art. 13(4). According to the Court, requiring such a certification to exclude the extension of the anti-dumping order is not consistent with the EU Anti-dumping Circumvention Regulation because it is not possible to impose to importers potentially subject to anti-circumvention measures duties, which are not imposed to importers subject to the anti-dumping order.

142. Joined Cases T-74 & 75/97, *Buchel & Co. Fahrzeugteilefabrik GmbH v. Council and Commission*, 2000 E.C.R. II-3067, par. 53 (2000). This case concerned the application of a German company for the annulment of a Council Regulation that extended the definitive anti-dumping duty imposed on bicycles originating in the People's Republic of China to certain bicycle parts imported into Germany from the People's Republic of China. The German company initiated this action to request an annulment of a Commission Regulation denying the exemption of imports of certain parts originating in the People's Republic of China. The Court dismissed the action holding that since applicant was an importer of products subject to the original anti-dumping investigations, and since the applicant voluntarily failed to participate in the investigation, he was in a different position than importers concerned by the extension of the regulation. Consequently, "[t]he applicant is also not individually concerned by the provisions of the extension regulation by reason of its participation in the investigation." *Id.* at ¶ 62.

143. See Adamantopoulos & De Notaris, *supra* note 2, at 56–58.

144. *Id.* at 57. The article also notes that some authors have underlined that

assembly operation, which took place in the importing country, should not be sanctioned if the components of the final product were not included in the original anti-dumping order.<sup>145</sup> Second, anti-circumvention measures should be applied only to producers who were within the scope of the original anti-dumping investigation.<sup>146</sup> Extension of the anti-dumping duty order might be possible even with regard to enterprises related to the producers subject to the original sanction, but in this case precise standards must be provided in order to define the nature of the link between the dumping and the circumventing producers.<sup>147</sup> Finally, in order to extend the anti-dumping duty order, national authorities must give evidence that the alleged circumventing practice does not have a due cause rather than avoiding the application of the anti-dumping duty order.<sup>148</sup> In particular, national administering authorities must prove both a change in the pattern of trade between the country adopting the anti-dumping measure and the country where the alleged circumventing producers are from,<sup>149</sup> and that the circumvention

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multilateral provisions do not establish appropriate standards to define like products, with the result that national authorities have broad discretion in their findings, and in the past different agencies have held different findings in respect to similar product. *Id.* at 36-38.

145. RAINER M. BIERWAGEN, GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTI-DUMPING LAWS 39 (1990). This is the case with Canadian legislation, under which the national administering authority may include parts of finished goods in the anti-dumping findings.

146. *See id.* at 57. Such a provision would permit producers subject to the anti-circumvention measure to enjoy the minimum ADA due process requirements (e.g., access to the anti-dumping investigation by interested parties; time limitation of the investigation and retroactivity of the anti-dumping sanctions; right to appeal against the anti-dumping duty order.). *See* LOWENFELD, *supra* note 1, at 279.

147. Art. 12.1 (ii) of the Dunkel Draft provided that the inclusion within the scope of the application of the existing definitive anti-dumping duty was possible when the "assembly or completion in the importing country of the product . . . is carried out by a party which is related to or acting on behalf of an exporter producer whose exports are subject to the definitive anti-dumping duty." According to Comment 2 of this article, the relation between the circumventing importer and the dumping exporter must consist of "[a] contractual arrangement . . . covering the sale of the assembled product in the importing country." *See* Note 2 to art. 12.1(ii) of the Dunkel Draft *supra* note 28.

148. *See* Adamantopoulos & De Notaris, *supra* note 2, at 57.

149. *See* EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(1); *see also* US Anti-dumping Circumvention Regulation *supra* note 78 at (a)(3)(A).

practice has undermined the application of the anti-dumping duty.<sup>150</sup>

## V. CONCLUSIONS

The above analysis of the EU and US anti-circumvention regulations shows that unilateral provisions may allow the extension of anti-dumping duty orders to import activities that were not within the scope of the anti-dumping investigation. Such an extension may raise several doubts concerning the respect of due process rights. The adoption of multilateral anti-circumvention provisions would be desirable for two reasons. First, setting multilateral provisions would define the minimum due process standards required for the application of anti-dumping duty orders. Second, multilateral binding provisions would limit the discretion of domestic authorities in administering the extension of anti-dumping duty orders in the case of anti-dumping circumvention. Generally, multilateral anti-circumvention provisions should not provide negative treatment of third-country circumvention although third-country circumvention might indirectly be ruled by setting new principles of rules of origin. On the other hand, multilateral anti-circumvention provisions should provide the extension of the anti-dumping duty order only with respect to merchandise that was within the original anti-dumping investigation, and only in the case of unequivocal evidence of the link between the dumping practice and the circumvention operation.

Until now, the negotiations on multilateral anti-circumvention legislation have not led to any tangible result. Indeed, not only has the Informal Group on Anti-Circumvention been unable to draft any proposal, but it has also been unable to define the concept of circumvention and the various related strategies. In order to overcome the present stalemate in the negotiations, the discussion on anti-circumvention should be raised to the level of negotiations concerning rules of origin and anti-dumping legislation, instead of focusing on anti-circumvention as an isolated issue. In particular, provisions defining the origin of merchandise based on the specificity of manufacture process, along with new rules defining the extent of the anti-dumping investigation with regard to both the like-product and the operators

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150. See EU Anti-dumping Circumvention Regulation *supra* note 50, art. 13(1).



involved in the investigation, would indirectly benefit multilateral anti-circumvention legislation.