COMMISSION RECOMMENDATION No 3018/79/ECSC

of 21 December 1979

on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 74 and 86 thereof,

Whereas by virtue of Article 74 of the Treaty the Commission is empowered, in cases of dumping or subsidization by countries which are not members of the Community, to take any measures which are in accordance with the Treaty and to make any necessary recommendations to Member States;

Whereas by virtue of Article 86 of the Treaty the Member States have undertaken to facilitate the performance of the Community's tasks;

Whereas, in view of the existence of a common market in coal and steel, the taking of national measures would not in general, and even in the case of mutual cooperation, constitute an effective and adequate protection against dumping or subsidies but would, on the contrary, entail a risk of hindering the working of the common market and of compromising its achievements, and in particular the unified customs tariff applicable to third countries;

Whereas, therefore, the Commission will normally use the powers given to it under Article 74 and will, in suitable cases, recommend Community defensive measures;

Whereas to enable the Commission to exercise its powers rapidly and effectively it is necessary to establish certain rules of procedure and to organize the cooperation with the Member States;

Whereas with a view both to avoiding contradictions between the actions of the Commission and those of the Member States and to ensuring that, in cases where there is no Community interest involved, Member States can take appropriate measures to protect a national industry, it is necessary to provide that, in the absence of Community action, national investigations and protective measures may be initiated, after consultation;

Whereas for these reasons, the Commission, by recommendation 77/329/ECSC [1], as last amended by recommendation No 158/79/ECSC [2], adopted common rules for protection against dumped or subsidized imports from countries which are not members of the European Coal and Steel Community;

Whereas these rules were adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement on tariffs and trade (hereinafter referred to as GATT) and from the first Agreement on Implementation of Article VI of the GATT (1968 Anti-Dumping Code);

Whereas the multilateral trade negotiations concluded in 1979 have led to a new Agreement on Implementation of Article VI of the GATT (1979 Anti-Dumping Code) and an Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, which concern subsidies and countervailing measures;

Whereas it is therefore appropriate to amend the Community rules in the light of the 1979 Agreements, in particular of their provisions relating to subsidies and possible countermeasures, to the determination of injury, especially the criteria to be applied and the new rules on causality and regional protection, to undertakings and their monitoring, to the period of validity of provisional duties and to the possible retroactive application of anti-dumping and countervailing duties;

Whereas in implementing these rules it is essential, in order to maintain the balance of rights and obligations which these Agreements sought to establish, that the Community take account of their interpretation by the Community's major trading partners, as reflected in legislation or established practice;

Whereas it is therefore desirable that the rules for determining normal value should be presented clearly and in sufficient detail; whereas it should be specifically provided that where sales on the domestic market of the

(1) OJ No L 114, 5. 5. 1977, p. 6.
(2) OJ No L 21, 30. 1. 1979, p. 14.

country of export or origin do not for any reason form a proper basis for determining the existence of dumping recourse may be had to a constructed normal value; whereas it is appropriate to give examples of situations which may be considered as not representing the ordinary course of trade, in particular where a product is sold at prices which are less than the costs of production, or where transactions take place between parties which are associated or which have a compensatory arrangement; whereas it is appropriate to list the possible methods of determining normal value in such circumstances;

Whereas it is expedient to define the export price and to enumerate the necessary adjustments to be made in those cases where reconstruction of this price from the first open-market price is deemed appropriate;

Whereas for the purpose of ensuring a fair comparison between export price and normal value, it is advisable to establish guidelines for determining the adjustments to be made in respect of differences in physical characteristics, in quantities, in conditions and terms of sale, and in the level of trade and to draw attention to the fact that the burden of proof falls on any person claiming such adjustments;

Whereas the term 'dumping margin' should be clearly defined and the Community's established practice for methods of calculation where prices or margins vary codified;

Whereas it seems advisable to lay down in adequate detail the manner in which the amount of any subsidy is to be determined;

Whereas it seems appropriate to set out certain factors which may be relevant for the determination of injury;

Whereas it is necessary to lay down the procedures for anyone acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports to lodge a complaint; whereas it seems appropriate to make it clear that in the case of withdrawal of a complaint, proceedings may, but need not necessarily, be terminated;

Whereas there should be cooperation between the Member States and the Commission both as regards information about the existence of dumping or subsidization and injury resulting therefrom, and as regards the subsequent examination of the matter at Community level; whereas, to this end, consultations should take place within an advisory committee;

Whereas it is appropriate to lay down clearly the rules of procedure to be followed during the investigation, in particular the rights and obligations of the Community authorities and the parties involved, and the conditions under which interested parties may have access to information and may ask to be informed of the essential facts and considerations on the basis of which it is intended to recommend definitive measures;

Whereas, in order to discourage dumping, it is appropriate to provide, in cases where the facts as finally established show that there is dumping and injury, for the possibility of definitive collection of provisional duties even if the imposition of a definitive anti-dumping duty is not decided on, on particular grounds;

Whereas it is essential, in order to ensure that anti-dumping and countervailing duties are levied in a correct and uniform manner, that common rules for the application of such duties be laid down; whereas, by reason of the nature of the said duties, such rules may differ from the rules for the levying of normal import duties;

Whereas it is appropriate to provide for open and fair procedures for the review of measures taken, and for the investigation to be reopened when the circumstances so require;

Whereas appropriate procedures should be established for examining applications for refunds of anti-dumping duties;

Whereas this recommendation should not prevent the adoption of special measures where this does not run counter to the Community's obligations under the GATT;

Whereas for the European Economic Community, the Council has taken advantage of this occasion to proceed to a general streamlining, linguistic simplification and consolidation of the EEC rules on protection against dumped or subsidized imports, now embodied in Regulation (EEC) No 3017/79 [1];

Whereas it is appropriate to ensure that the legislation governing external trade should be as homogeneous as possible in the two Communities; whereas, therefore, it is appropriate to provide for analogous application to coal and steel products of the principles and definitions contained in Regulation (EEC) No 3017/79;

Whereas with regard to the decision making process account must be taken of the different conceptions of the two Treaties, while remaining as close as possible to the provisions of Regulation (EEC) No 3017/79,

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[1] See page 1 of this Official Journal.

MAKES THE FOLLOWING RECOMMENDATION:

Article 1

Applicability

This recommendation lays down provisions for protection against dumped or subsidized imports from countries which are not members of the European Coal and Steel Community.

Article 2

Dumping

A. PRINCIPLE

1. An anti-dumping duty may be applied to any dumped product whose entry for consumption in the Community causes injury.

2. A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.

B. NORMAL VALUE

3. For the purposes of this recommendation the normal value shall be:

(a) the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin; or

(b) when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison:

(i) the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price, or

(ii) the constructed value, i.e. the costs in the ordinary course of trade, of materials and manufacture, in the country of origin, plus a reasonable margin for overheads and profit; as a general rule, and provided that a profit is normally realized on sales of products of the same general category on the domestic market of the country of origin, the addition for profit shall not exceed such normal profit. In other cases, the addition shall be determined on any reasonable basis, using available information.

4. Whenever there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for consumption in the country of origin is less than all costs, both fixed and variable, ordinarily incurred in its production, sales at such prices may be considered as not having been made in the ordinary course of trade if they:

(a) have been made over an extended period of time and in substantial quantities; and

(b) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.

In such circumstances, the normal value may be determined on the basis of the remaining sales on the domestic market made at a price which is not less than the cost of production or on the basis of export sales to third countries, on the basis of the constructed value or by adjusting the sub-production-cost price referred to above in order to eliminate loss and provide for a reasonable profit. Such normal-value calculations shall be based on available information.

5. In the case of imports from non-market economy countries and, in particular, those to which Regulations (EEC) No 2532/78 (1) and (EEC) No 925/79 (2) apply, normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(a) the price at which the like product of a market economy third country is actually sold:

(i) for consumption on the domestic market of that country, or

(ii) to other countries, including the Community; or

(b) the constructed value of the like product in a market economy third country; or

(c) if neither price nor constructed value as established under (a) or (b) above provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin.

(1) OJ No L 306, 31. 10. 1978, p. 1.
(2) OJ No L 131, 29. 5. 1979, p. 1.

6. (a) Where a product is not imported directly from the country of origin but is exported to the Community from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the domestic market of either the country of export or the country of origin. The latter basis might be appropriate *inter alia,* where the product is merely trans-shipped through the country of export, where such products are not produced in the country of export or where no comparable price for it exists in the country of export.

(b) Where several suppliers from one or more countries are involved and it is deemed appropriate to establish a basic price system, normal value shall be determined on the basis of the lowest normal value in the supplying country or countries where normal conditions of competition are prevailing.

7. For the purpose of determining normal value, transactions between parties which are associated or which have a compensatory arrangement may be considered as not being in the ordinary course of trade unless the Commission is satisfied that the prices and costs involved are comparable to those involved in transactions between parties which have no such link.

C. EXPORT PRICE

8. (a) The export price shall be the price actually paid or payable for the product sold for export to the Community.

(b) In cases where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party, or that for other reasons the price actually paid or payable for the product sold for export to the Community is unreliable, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer, or if the product is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis. In such cases, allowance shall be made for all costs incurred between importation and resale, including all duties and taxes, and for a reasonable profit margin.

Such allowances shall include, in particular, the following:

(i) usual transport, insurance, handling, loading and ancillary costs;

(ii) customs duties, any anti-dumping duties and other taxes payable in the importing country by reason of the importation or sale of the goods;

(iii) a reasonable margin for overheads and profit and/or any commission usually paid or agreed.

D. COMPARISON

9. For the purposes of a fair comparison, the export price and the normal value shall be on a comparable basis as regards physical characteristics of the product, quantities, and conditions and terms of sale. They shall normally be compared at the same level of trade, preferably at the ex-factory level, and as nearly as possible at the same time.

10. If the export price and the normal value are not on a comparable basis in respect of the factors mentioned in paragraph 9, due allowance shall be made in each case, on its merits, for differences affecting price comparability. Where an interested party claims such an allowance, it must prove that its claim is justified. The following guidelines shall apply in determining these allowances:

(a) differences in physical characteristics of the product: allowance for such differences shall normally be based on the effect on the market value in the country of origin or export; however, where domestic pricing data in that country are not available or do not permit a fair comparison, the calculation shall be based on those production costs accounting for such differences;

(b) differences in quantities: allowances shall be made when the amount of any price differential is wholly or partly due to either:

(i) price discounts for quantity sales which have been made freely available in the normal course of trade over a representative preceding period of time, usually not less than six months, and in respect of a substantial proportion, usually not less than 20 % of the total sales of the product under consideration made on the domestic market or, where applicable, on a third-country market; deferred discounts may be recognized if they are based on consistent practice in prior periods, or on an undertaking to comply with the conditions required to qualify for the deferred discount, or

(ii) to savings in the cost of producing different quantities.

However, when the export price is based on quantities which are less than the smallest quantity sold on the domestic market, or if applicable, to third countries, then the allowance shall be determined in such a manner as to reflect the higher price for which the smaller quantity would be sold on the domestic market, or, if applicable, on a third-country market;

(c) differences in conditions and terms of sale: allowances shall be limited, in general, to those differences which bear a direct relationship to the sales under consideration and include, for example, differences in duties and indirect taxation, credit terms, guarantees, warranties, technical assistance, servicing, commissions or salaries paid to salesmen, packing, transport, insurance, handling, loading and ancillary costs; allowances generally will not be made for differences in overheads and general expenses, including research and development costs, or advertising; the amount of these allowances shall normally be determined by the cost of such differences to the seller, though consideration may also be given to their effect on the value of the product;

(d) differences in the level of trade: where sales at the same level of trade do not exist or are insufficient to be regarded as representative, the allowance to be made on sales at a different level of trade shall be based on the costs directly attributable to that difference;

(e) allocation of costs: in general, all cost calculations shall be based on available accounting date, normally allocated, where necessary, in proportion to the turnover for each product and market under consideration.

11. No product shall be considered to have been dumped by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or export, or by reason of the refund of such duties or taxes.

E. LIKE PRODUCT

12. For the purpose of this recommendation 'like product' means 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 has characteristics closely resembling those of the product under consideration.

F. DUMPING MARGIN

13. (a) 'Dumping margin' means the amount by which the normal value exceeds the export price.

(b) Where prices vary, the dumping margin may be established on a transaction-by-transaction basis or by reference to the most frequently occurring, representative or weighted average prices.

(c) Where dumping margins vary, weighted averages may be established.

Article 3

Subsidies

1. A countervailing duty may be imposed for the purpose of offsetting any subsidy bestowed, directly or indirectly, in the country of origin or export, upon the manufacture, production, export or transport of any product whose entry for consumption in the Community causes injury.

2. Subsidies bestowed on exports include, but are not limited to, the practices listed in the Annex.

3. The exemption of a product from import charges or indirect taxes, as defined in the notes to the Annex, effectively borne by the like product when destined for consumption in the country of origin or export, or the refund of such charges or taxes, shall not be considered as a subsidy for the purposes of this recommendation.

4. (a) The amount of the subsidy shall be determined per unit of the subsidized product exported to the Community.

(b) In establishing the amount of any subsidy the following elements shall be deducted from the total subsidy:

(i) any application fee, or other costs necessarily incurred in order to qualify for, or receive benefit of, the subsidy;

(ii) export taxes, duties or other charges levied on the export of the product to the Community specifically intended to offset the subsidy.

Where an interested party claims a deduction, it must prove that the claim is justified.

(c) Where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount shall be determined by allocating the value of the subsidy as appropriate over the level of production or exports of the product concerned during a suitable period. Normally this period shall be the accounting year of the beneficiary. However, where the subsidy is based upon the acquisition or future acquisition of fixed assets the period shall correspond to a reasonable period for depreciation, except where the assets are non-depreciating in which case the subsidy shall be valued as an interest free loan.

(d) The value of loan or guarantee subsidies shall generally be considered as the difference between interest rates paid or payable by the beneficiary and normal commercial rates effectively payable on comparable loans or guarantees.

(e) In the case of imports from non-market economy countries and in particular those to which Regulations (EEC) No 2532/78 and (EEC) No 925/79 apply, the amount of any subsidy may be determined in an appropriate and not unreasonable manner, by comparing the export price as calculated in accordance with Article 2 (8) with the normal value as determined in accordance with Article 2 (5). Article 2 (10) shall apply to such a comparison.

(f) Where the amount of subsidization varies, weighted averages may be established.

Article 4

Injury

1. A determination of injury shall be made only if the dumped or subsidized imports are, through the effects of dumping or subsidization, causing injury i.e., causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry. Injuries caused by other factors, such as volume and prices of imports which are not dumped or subsidized, or contraction in demand, which, individually or in combination, also adversely affect the Community industry must not be attributed to the dumped or subsidized imports.

2. An examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

(a) volume of dumped or subsidized imports, in particular whether there has been a significant increase, either in absolute terms or relative to production or consumption in the Community;

(b) the prices of dumped or subsidized imports in particular whether there has been a significant price undercutting as compared with the price of a like product in the Community;

(c) the consequent impact on the industry concerned as indicated by actual or potential trends in the relevant economic factors such as:

— production,

— utilization of capacity,

— stocks,

— sales,

— market share,

— prices (i.e., depression of prices or prevention of price increases which otherwise would have occurred),

— profits,

— return on investment,

— cash flow,

— employment.

3. A determination of threat of injury may only be made where a particular situation is likely to develop into actual injury. In this regard account may be taken of factors such as:

(a) rate of increase of the dumped or subsidized exports to the Community;

(b) export capacity in the country of origin or export, already in existence or which will be operational in the forseeable future, and the likelihood that the resulting exports will be to the Community;

(c) the nature of any subsidy and the trade effects likely to arise therefrom.

4. The effect of the dumped or subsidized imports shall be assessed in relation to the Community production of the like product when available data permit its separate identification. When the Community production of the like product has no separate identity, the effect of the dumped or subsidized imports shall be assessed in relation to the production of the narrowest group or range of production which includes the like product for which the necessary information can be found.

5. The term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like product on to those of them whose collective output of the products constitutes a major proportion of the total Community production of those products except that:

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

— in exceptional circumstances the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a Community industry if,

(a) the producers within such market sell all or almost all their production of the product in question in that market, and

(b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community.

In such circumstances injury may be found to exist even where a major proportion of the total Community industry is not injured provided there is a concentration of dumped or subsidized imports into such an isolated market and provided further that the dumped or subsidized imports are causing injury to the producers of all or almost all of the production within such markets.

Article 5

Complaint

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint.

2. The complaint shall contain sufficient evidence of the existence of dumping or subsidization and the injury resulting therefrom.

3. The complaint may be submitted to the Commission, or a Member State, which shall forward it to the Commission. The Commission shall send Member States a copy of any complaint it receives.

4. The complaint may be withdrawn, in which case proceedings may be terminated unless such termination would not be in the interest of the Community.

5. Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.

6. Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of dumping or subsidization and of injury resulting therefrom for a Community industry, it shall immediately communicate such evidence to the Commission.

Article 6

Consultations

1. Any consultations provided for in this recommendation shall take place within an advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately on request by a Member State or on the initiative of the Commission.

2. The Committee shall meet when convened by its chairman. He shall provide the Member States, as promptly as possible, with all relevant information.

3. Where necessary, consultation may be in writing only; in such case the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation.

4. Consultation shall in particular cover:

(a) the existence of dumping or of a subsidy and the margin or amount thereof;

(b) the existence and extent of injury;

(c) the causal link between the dumped or subsidized imports and injury;

(d) the measures which, in the circumstances, are appropriate to prevent or remedy the injury caused by dumping or the subsidy and the ways and means for putting such measures into effect.

Article 7

Initiation and subsequent investigation

1. Where, after consultation it is apparent that there is sufficient evidence to justify initiating a proceeding the Commission shall immediately:

(a) announce the initiation of a proceeding in the *Official Journal of the European Communities*; such announcements shall indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing and may apply to be heard orally by the Commission in accordance with paragraph 5;

(b) so advise the exporters and importers known to the Commission to be concerned as well as representatives of the exporting country and the complainants;

(c) commence the investigation at Community level, acting in cooperation with the Member States; such investigation shall cover both dumping or subsidization and injury resulting therefrom and shall be carried out in accordance with paragraphs 2 to 8.

2. (a) The Commission shall seek all information it deems to be necessary and, where it considers it appropriate, examine and verify the records of importers, exporters, traders, agents, producers, trade associations and organizations.

(b) Where necessary the Commission shall, after consultation, carry out investigations in third countries, provided that the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection. The Commission shall be assisted by officials of those Member States who so request.

3. (a) The Commission may request Member States:

— to supply information,

— to carry out all necessary checks and inspections, particularly amongst importers, traders and Community producers,

— to carry out investigations in third countries, provided the firms concerned give their consent and the government of the country in question has been officially notified and raises no objection.

(b) Member States shall take whatever steps are necessary in order to give effect to requests from the Commission. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out.

(c) The Commission shall forward this information to the other Member States forthwith.

(d) Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.

4. (a) The complainant and the importers and exporters known to be concerned, as well as the representatives of the exporting country, may inspect all information made available to the Commission by any party to an investigation as distinct from internal documents prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. To this end, they shall address a written request to the Commission, indicating the information required.

(b) Exporters and importers of the product subject to investigation and, in the case of subsidization, the representatives of the country of origin, may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties or the definitive collection of amounts secured by way of a provisional duty.

(c) (i) requests for information pursuant to (b) shall:

(aa) be addressed to the Commission in writing,

(bb) specify the particular issues on which information is sought,

(cc) be received, in cases where a provisional duty has been applied, not later than one month after publication of the imposition of that duty;

(ii) the information may be given either orally or in writing, as considered appropriate by the Commission. It shall not prejudice any subsequent decision which may be taken by the Commission. Confidential information shall be treated in accordance with Article 8;

(iii) information shall normally be given no later than 15 days prior to the making of any recommendation by the Commission for final action pursuant to Article 12. Representations made after the information is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.

5. The Commission may hear the interested parties. It shall so hear them if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard orally.

6. Furthermore, the Commission shall, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and any rebuttal, argument put forward. In providing this opportunity the Commission shall take account of the need to preserve confidentiality and of the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

7. (a) This Article shall not preclude the Commission from reaching preliminary determinations or from applying provisional measures expeditiously.

(b) In cases in which any interested party or third country refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation, preliminary or final findings, affirmative or negative, may be made on the basis of the facts available.

8. Anti-dumping or countervailing proceedings shall not constitute a bar to customs clearance of the product concerned.

9. A proceeding is concluded either by its termination or by definitive action. Conclusion should normally take place within one year of initiation of the proceeding.

10. Where there is no proceeding at Community level, a Member State may, after consultation, examine the matter at national level; it shall so inform the Commission, send to it the results of such examination and consult before taking any action.

Article 8

Confidentiality

1. Information received in pursuance of this recommendation shall be used only for the purpose for which is was requested.

2. (a) Neither the Commission, nor Member States, nor the officials of any of these, shall reveal any information of a confidential nature received in pursuance of this recommendation or any information provided on a confidential basis by a party to an anti-dumping or countervailing investigation, without specific permission from the party submitting such information.

(b) Each request for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary.

3. Information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.

4. However, if it appears that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded.

5. This Article shall not preclude the disclosure of general information by the Community authorities and in particular of the reasons on which decisions taken in pursuance of this recommendation are based. Such disclosure must take into account the legitimate interest of the interested parties that their business secrets should not be divulged.

Article 9

Termination of proceeding where protective measures are unnecessary

1. If it becomes apparent after consultation that protective measures are unnecessary, the proceeding shall be terminated by the Commission.

2. The Commission shall inform any representatives of the country of origin or export and the parties known to be concerned and shall announce the termination in the *Official Journal of the European Communities* setting forth its basic conclusions and a summary of the reasons therefor.

Article 10

Undertakings

1. Where, during the course of a proceeding, undertakings are offered which the Commission after consultation considers acceptable, anti-dumping/anti-subsidy proceedings may be terminated by the Commission without the imposition of provisional or

definitive duties. Information shall be given and notice published in accordance with Article 9 (2). Such termination does not preclude the definitive collection of amounts secured by way of provisional duties pursuant to Article 12 (2).

2. The undertakings referred to under paragraph 1 are those under which:

(a) the subsidy is eliminated or limited, or other measures concerning its injurious effects taken, by the government of the country of origin or export; or

(b) prices are revised or exports cease to the extent that the Commission is satisfied that either the dumping margin or the amount of the subsidy, or the injurious effects thereof, are eliminated. In case of subsidization the consent of the country of origin or export shall be obtained.

3. Undertakings may be suggested by the Commission, but the fact that such undertakings are not offered or an invitation to do so is not accepted, shall not prejudice consideration of the case. However, the continuation of dumped or subsidized imports may be taken as evidence that a threat of injury is more likely to be realized.

4. If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the Commission, after consultation so decides or if request is made, in the case of dumping, by exporters representing a significant percentage of the trade involved or, in the case of subsidization, by the country of origin or export. In such a case, if the Commission, after consultation makes a determination of no injury, the undertaking shall automatically lapse. However, where a determination of no threat of injury is due mainly to the existence of an undertaking, the Commission may require that the undertaking be maintained.

5. The Commission may require any party from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. Non-compliance with such requirements shall be construed as a violation of the undertaking.

6. Where an undertaking has been withdrawn or where the Commission has reason to believe that it has been violated and that further investigation is warranted, it shall forthwith inform the Member States and reopen the proceeding. Furthermore, where the Community interests call for such intervention, it shall immediately apply provisional measures where warranted using the information available.

Article 11

Provisional duties

1. Where preliminary examination shows that dumping or a subsidy exists and that there is sufficient evidence of injury caused thereby and the interests of the Community call for intervention to prevent injury being caused during the proceeding, the Commission, acting at the request of a Member State or on its own initiative, shall impose a provisional anti-dumping or countervailing duty. In such cases entry of the products concerned for Community consumption shall be conditional upon the provision of security for the amount of the provisional duty, definitive collection of which shall be determined by the subsequent recommendation of the Commission under Article 12 (2).

2. The Commission shall take such provisional action after consultation or, in cases of extreme urgency, after informing the Member States. In this latter case, consultations shall take place 10 days at the latest after notification to the Member States of the action taken by the Commission.

3. Where a Member State requests immediate intervention by the Commission, the Commission shall within a maximum of five working days of receipt of the request, decide whether a provisional anti-dumping or countervailing duty should be imposed.

4. A decision by the Commission not to impose a provisional duty shall not preclude the imposition of such duty at a later date, either at the request of a Member State, if new factors arise, or on the initiative of the Commission.

5. Provisional duties shall have a maximum period of validity of four months. However, where exporters representing a significant percentage of the trade involved so request or, pursuant to a notice of intention from the Commission, do not object, provisional anti-dumping duties may be extended for a further period of two months.

6. After expiration of the period of validity of provisional duties, the security shall be released as promptly as possible to the extent that the Commission has not recommended its definitive collection.

Article 12

Definitive action

1. Where the facts as finally established show that there is dumping or subsidization and injury caused thereby, and the interests of the Community call for Community intervention, the Commission, after consultation, shall recommend that a definitive anti-dumping or countervailing duty be imposed.

2. (a) Where a provisional duty has been applied, the Commission shall recommend irrespective of whether a definitive anti-dumping or countervailing duty is to be imposed, what proportion of the provisional duty is to be definitively collected.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there has been dumping or subsidization and injury. For this purpose, 'injury' shall not include material retardation of the establishment of a Community industry, nor threat of material injury, except where it is found that this would, in the absence of provisional measures, have developed into material injury.

Article 13

General provisions on duties

1. Anti-dumping or countervailing duties, whether provisional or definitive, shall be imposed by a Commission recommendation.

2. Such recommendation shall indicate in particular the amount and type of duty imposed, the product covered, the country of origin or export, the name of the supplier, if practicable, and the reasons on which the recommendation is based.

3. The amount of such duties shall not exceed the dumping margin provisionally estimated or finally established or the amount of the subsidy provisionally estimated or finally established; it should be less if such lesser duty would be adequate to remove the injury.

4. (a) Anti-dumping and countervailing duties shall be neither imposed nor increased with retroactive effect and shall apply to the products which, after entry into force of such duties, are entered for Community consumption. For this purpose, the date of acceptance by the customs authorities of the declarant's statement of his intention to enter the goods for consumption shall be determinant.

(b) However, where the Commission determines:

(i) for dumped products:

— that there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and

— that the injury is caused by sporadic dumping i.e., massive dumped imports of a product in a relatively short period, to such an extent that, in order to preclude it recurring, it appears necessary to impose an anti-dumping duty retroactively on those imports; or

(ii) for subsidized products:

— in critical circumstances that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from export subsidies paid or bestowed inconsistently with the provisions of the GATT and of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the GATT, and

— that it is necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on these imports; or

(iii) for dumped or subsidized products:

— that an undertaking has been violated,

the definitive anti-dumping or countervailing duties may be imposed on products which were entered for Community consumption not more than 90 days prior to the date of application of provisional duties, except that in the case of violation of an undertaking such retroactive assessment shall not apply to imports entered before the violation.

5. Where a product is imported into the Community from more than one country, duty shall be levied at an appropriate amount of a non-discriminatory basis on all imports of such product found to be dumped or subsidized and causing injury, other than imports from those sources in respect of which undertakings have been accepted.

6. Where the Community industry has been interpreted as referring to the producers in a certain region, the Commission shall give exporters an opportunity to offer undertakings pursuant to Article 10 in respect of the region concerned. If an adequate undertaking is not given promptly or is not fulfilled, a provisional or definitive duty may be imposed in respect of the Community as a whole.

7. In the absence of any special provisions to the contrary adopted when a definitive or provisional anti-dumping or countervailing duty was imposed, the rules on the common definition of the concept or origin and the relevant common implementing provisions shall apply.

8. Anti-dumping or countervailing duties shall be collected by Member States in the form, at the rate and

according to the other criteria laid down when the duties were imposed, and independently of the customs duties, taxes and other charges normally imposed on imports.

9. No product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from the granting of any subsidy.

Article 14

Review

1. The recommendations to impose provisional or definitive anti-dumping or countervailing duties and the decisions to accept undertakings shall be subject to review where warranted. Such review may be held either at the request of a Member State or on the initiative of the Commission or if any interested party so requests and submits positive information substantiating the need for review. Such requests shall be addressed either to a Member State or to the Commission. A Member State receiving any such request shall inform the Commission, which shall notify the other Member States. Where the Commission receives the request, it shall inform the Member States.

2. Where, after consultation, it becomes apparent that review is warranted, the proceedings shall be re-opened in accordance with Article 7, where the circumstances so require. Such re-opening shall not *per se* affect the measures in operation.

3. Where warranted by the review, carried out either with or without re-opening of the proceeding, the measures shall be amended, repealed or annulled by the Commission.

Article 15

Refund

1. Where an importer can show that the duty collected exceeds the actual dumping margin or the amount of the subsidy, consideration being given to any application of weighted averages, the excess amount shall be reimbursed; where provisional measures were taken, the same shall apply in respect of release of securities.

2. For this purpose, the importer may within three months of the date on which the products were entered for consumption, submit an application to the Member State in the territory of which they were so entered. That Member State shall forward the application to the Commission as soon as possible, either with or without an opinion as to its merits. The Commission shall examine the merit of the application and, after consultation, decide whether and to what extent the Member State should grant the application.

Article 16

Final provisions

This recommendation shall not preclude the application of:

1. any special rules laid down in agreements concluded between the Community and third countries;

2. special measures, provided that such action does not run counter to obligations under the GATT.

Article 17

Repeal of existing legislation

Recommendation 77/329/ECSC is hereby repealed.

References to the repealed recommendation shall be construed as references to this recommendation.

Article 18

Implementation by Member States

Member States shall take all appropriate measures to implement, within the time limit laid down, the obligations which devolve upon them concerning protection against dumped or subsidized imports, under the terms of this recommendation. They shall accordingly inform the Commission. The Commission shall communicate this information to the other Member States.

Article 19

Entry into force

This recommendation shall be notified to the Member States and published in the *Official Journal of the European Communities*.

It shall apply with effect from 1 January 1980.

Done at Brussels, 21 December 1979.

For the Commission

Wilhelm HAFERKAMP

Vice-President

ANNEX

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use on the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

(e) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises. Notwithstanding the foregoing, deferral of taxes and charges referred to above need not amount to an export subsidy where, for example, appropriate interest charges are collected.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption. The problem of the excessive remission of value added tax is exclusively covered by this paragraph.

(h) The exemption, remission or deferral of prior stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product. This paragraph does not apply to value added tax systems and border tax adjustments related thereto.

(i) The remission or drawback of import charges in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported good as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years. This paragraph does not apply to value added tax systems and border tax adjustments related thereto.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain

funds of the same maturity and denominated at the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms. Provided, however, that if the country of origin or export is a party to an international undertaking on official export credits to which at least 12 original signatories to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice the country of origin or export applies the interest rate provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the GATT.

Notes:

For the purposes of this Annex the following definitions apply:

1. The term 'direct taxes' shall mean taxes on wages, profits, interest, rents, royalities, and all other forms of income, and taxes on the ownership of real property.

2. The term 'import charges' shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in these notes that are levied on imports.

3. The term 'indirect taxes' shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges.

4. 'Prior stage' indirect taxes are those levied on goods or services used directly or indirectly in making the product.

5. 'Cumulative' indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production.

6. 'Remission' of taxes includes the refund or rebate of taxes.