
Appendix B

EC Contingent Protection: Antidumping and Other Trade Instruments

After a brief survey of the EC antidumping cases initiated between 1980 and 1999, the first section of this appendix examines whether EC antidumping cases are dealing with competition issues. It reaches the conclusion that they are not—a conclusion that completes one of the chapter 4 results (antidumping measures are procartel actions). The second section briefly presents the other instruments of contingent protection available to the EC.

Antidumping

As is well known, the EC's most important instrument of contingent protection is the antidumping regulation, which was lately amended several times, in 1995, 1996, and 1998 (for a survey of the post-Uruguay EC regulations from a legal perspective, see Bronckers [1995]). These repeated amendments aim at conforming the EC provisions to the Uruguay Antidumping Agreement, but they also reflect tense negotiations between member-states on EC's internal procedures, such as the voting system for adopting or rejecting antidumping measures. Conflicts between EC member-states, and between member-states and the Commission, have been recurrent. They have even generated proposals by member-states to shift antidumping enforcement out of the Commission to an "independent"

(from the Commission, not from the Council) authority, although it is hard to know whether these proposals were genuine, or prompted by pressure for tougher use of antidumping (the French proposal on such an independent authority followed a series of failures to adopt antidumping measures in cotton fabric cases requested by small, but politically powerful, French firms).

From a WTO consistency perspective (a point of some interest, although far from being one of the most essential aspects of the antidumping problem, as underlined in chapter 4), the existing EC antidumping regulations raise two main issues. First, they include two procedures that are not covered by the Uruguay Antidumping Agreement: an ‘antiabsorption’ procedure (dealing with prices that are not increased by the full amount of the imposed antidumping duties) and an ‘anticircumvention’ procedure (dealing with assembly operations in the EC or in third countries, or other similar practices, which could allow escaping payment of antidumping duties [Holmes 1995]). Both these procedures have been subject to recent inquiries by WTO members (one may recall that following a complaint by Japan, the initial EC anticircumvention procedure introduced in 1987 to target Japanese ‘screwdriver plants’ in the electronics sector had been found inconsistent with GATT provisions before the end of the Uruguay Round).

Second, the WTO Antidumping Agreement requires WTO members to make available judicial review mechanisms that enable the “prompt” review of antidumping measures. Such mechanisms are hardly available in the EC: procedures are cumbersome, slow, and hardly available to exporters who did not participate in the antidumping investigation. (The best way to challenge antidumping measures may be to go to national courts.) Moreover, the EC Court of Justice and the national courts have consistently refused to look at the substance of the cases: they have limited their decisions to cases of manifest errors of law by the Commission. The only case (the 1988 calcium metal case) where the Court of Justice looked at substance—by underlining the necessity to take into account the impact of the adopted antidumping measures on the level of competition in the markets involved—has ultimately delivered a very negative signal: a few months after the Court’s ruling, the Commission Trade Directorate General reinitiated the case *ex officio*, and the new investigation has led to duties more than three times higher than the initial ones, sending a clear message that antidumping measures dominate competition aspects (all the more because the Court and the Commission Competition Directorate General did not react).

A Census of EC Antidumping Cases, 1980–99

Table B.1 presents the total number of EC antidumping cases by year for the period 1980–99. EC antidumping cases are defined as complaints

Table B.1 Major outcomes of EC antidumping cases, 1980–99

Year	All cases (total number)	Provisional measures				Ad valorem duties				Definitive measures				"Direct impact" ratio ^a
		Number of cases		AVD		Number of cases		MDG		Number of cases		MDG		
		Sum	Average	Sum	Average	Sum	Average	Sum	Average	Sum	Average	Sum	Average	
1980	25	12	14.1	13.2	11	13.4	11.7	1	41.8	1	9.6	48.0		
1981	47	10	49.9	23.6	2	21.6	22.0	1	41.8	31	39.5	72.3		
1982	55	24	46.6	22.6	6	44.1	19.6	9	49.8	25	45.0	72.7		
1983	43	13	33.2	17.0	3	17.7	19.7	3	46.3	21	22.1	62.8		
1984	42	11	44.0	19.4	6	33.5	17.3	3	46.3	17	38.0	54.8		
1985	35	3	79.6	18.0	3	79.5	17.4	3	50.7	17	57.9	57.1		
1986	31	21	64.2	26.0	5	47.6	26.5	3	50.7	13	57.3	67.7		
1987	36	25	33.0	19.7	16	20.8	16.2	4	49.3	10	33.9	55.6		
1988	43	18	32.7	16.4	9	19.6	17.0	5	32.0	10	33.9	55.8		
1989	28	10	49.5	34.2	4	45.1	28.2	1	38.7	6	20.1	73.3		
1990	45	28	30.1	18.2	20	22.7	16.3	7	45.6	4	30.1	70.8		
1991	24	14	37.5	24.2	10	54.7	37.4	3	49.7	2	37.5	54.8		
1992	42	23	29.7	20.9	13	22.2	20.6	8	47.7	1	33.3	81.0		
1993	21	19	41.8	41.8	9	38.8	38.7	7	43.6	4	54.4	45.5		
1994	44	20	45.7	40.1	11	37.8	35.0	5	52.5	4	54.4	45.5		
1995	36	12	40.2	27.9	16	38.1	25.0	3	19.6	4	15.2	60.7		
1996	28	20	23.1	22.8	11	37.0	37.3	2	18.2	6	13.3	62.0		
1997	50	37	36.3	25.8	24	48.2	28.3	1	31.7	11	56.1	58.3		
1998	24	16	50.3	35.3	3	38.0	30.6	5	41.2	6	35.7	58.2		
1999	67	41	27.4	21.5	28	28.9	23.0	5	41.2	6	35.7	58.2		
All years	766	377	37.6	24.7	210	33.5	24.2	67	43.7	179	39.5	59.5		
1980–84	212	70	38.6	18.4	28	25.3	16.2	13	48.4	95	36.5	64.2		
1985–89	173	77	45.4	22.5	37	31.5	19.2	13	42.1	40	51.7	52.0		
1990–94	176	104	36.1	29.0	63	32.6	27.0	30	47.3	17	33.3	62.5		
1995–99	205	126	33.5	25.5	82	37.8	27.1	11	30.3	27	36.0	58.5		

AVD = ad valorem antidumping duties (see text)
MDG = margin of dumping (percent).

a. Number of cases terminated by official measures, as a percentage of all the cases initiated.

Sources: *EC Official Journal*; author's computations.

lodged by EC producers and initiated by the Commission for a given product and exporting country. There current or expiring cases. However, table B.1 leaves aside the reviews, despite the fact that they can extend two or three times the time length of the measures (in fact, reviews largely annihilate the impact of the five-year “sunset” clause imposed by the Uruguay Antidumping Agreement).¹ Moreover, table B.1 gives a limited view of EC antidumping activity to the extent that there is no information about the cases for which the Commission has received an antidumping complaint, but that it has rejected: these cases are said to represent at least one-third of the officially initiated complaints, and they may have an indirect protectionist (deterrent) impact.

Table B.1 shows two main results. First, there is no correlation between the initiation of cases and the EC business cycle. EC antidumping enforcement became stable after a peak in the early 1980s. This peak could leave the impression of a relationship between increased demand for protection and the more difficult economic conditions of the time; but it is smaller than the previous peak, which occurred in the late 1970s, despite a better economic environment then. The 1999 peak is not related to the EC business cycle: 1999 was the best year for EC growth in a decade or two (this peak in EC antidumping was justified by the Commission because of alleged dumping by Asian firms, after the Asian financial crisis).

Second, table B.1 reveals the frequency, rapidity, and severity of EC antidumping measures. EC cases can be terminated by four different measures: ad valorem duties, specific duties, undertakings (commitments by foreign firms to raise their export prices in the EC market to an agreed level or to restrict their quantities exported to the EC to an agreed level), or no official measure of protection (because of no dumping or no injury, or because the Community is not interested in taking such a measure) and withdrawal of their complaint by the plaintiffs.²

Table B.1 allows for three observations. First, the likelihood of measures of protection is high, as shown by the average of 61 percent for the “impact” ratio (the number of cases not terminated by negative outcomes, as

1. As a result, it is difficult to give a precise mean duration of the measures enforced since it depends on the definition of what a “case” is (does it include reviews or extensions?). A conservative estimate is six to seven years for the EC cases (compared to four years in Australia and 11 years in the United States) (CBO 1998). However, it is not rare to find in the *EC Official Journal* the official recognition of a much longer duration: for instance, 11 years on ferrosilicium imported from Brazil (*EC Official Journal*, L42, 14 February 1998, 1), 13 years on artificial corundum from China (*EC Official Journal*, L276, 9 October 1997, 9), etc.

2. A case can be terminated by a mix of these five basic outcomes (such mixed outcomes are not shown independently in table B.1). All the estimates presented in this section are unweighted averages of the antidumping duties imposed on specific firms and of the antidumping “residual” duties (i.e., the duties imposed on firms that have not provided information during the investigations or on firms that have not been taken into account for various reasons during the investigations) when these residual duties have been expressly mentioned in the *EC Official Journal*.

a percentage of the total number of cases). This direct impact ratio provides a *minimal* estimate of the impact of EC antidumping activity because it does not take into account the withdrawals of complaints, which can be the result of private agreements between EC plaintiffs and foreign firms, and because it ignores the fact that the termination of the investigation by a “no dumping” or “no injury” conclusion can send a clear message to foreign firms to restrain their competitive pressures in the future.

The second observation is that almost 50 percent of the cases initiated are subject to provisional measures, which are taken rapidly (within a few months) and which already represent high trade barriers (on average, roughly 24 percent).³ This feature becomes more marked with time.

The third observation is that the average amount of the *definitive* antidumping duties imposed during the entire period is 24 percent—two to three times the EC average *ad valorem* applied GATT tariffs, and may increase further (see table 2.1). This feature also becomes more marked with time: average antidumping duties have increased from 16 percent in the early 1980s to 27 percent in the late 1990s. This result leaves aside the *ad valorem* equivalents of specific duties, undertakings, or mixed measures on which information is scarce. However, available *ad hoc* evidence suggests that all these measures are also very high—the dumping margins on which they are based being generally higher than those leading to *ad valorem* antidumping duties (see table B.1).

Information on the number of tariff lines and average antidumping measures by industry has already been provided in table 2.1 (see chapter 2). It suffices to say here that the mere number of cases (the “unit” of information used in this appendix) does not fully reflect the level of “harassment” accompanying a substantial number of cases. Harassment can flow from recurrent cases: a noticeable number of tariff lines are common to several antidumping cases (and are increasing since the late 1990s, see chapter 2), as best illustrated by the 1994, 1996, and 1997 cotton fabric cases. It can also be observed within a given case: for instance, between April 1998 and May 1999, the 1996 Atlantic salmon case led to no fewer than 10 different decisions on the measures to be imposed, with a strongly protectionist drift from an initial decision imposing a specific duty on “salmon” to a final decision establishing a set of minimum prices on 12 types of salmon products.

Table B.2 provides basic information on the coverage of antidumping cases by trading partner. From an economic perspective, such information is less important than the breakdown of cases by industry. But it sheds

3. All the estimates presented in this appendix are unweighted (as they should be) averages of the antidumping duties imposed on specific firms and of the antidumping “residual” duties (i.e., the duties imposed on firms that have not provided information during the investigations or on firms that have not been taken into account for various reasons during the investigations) when these residual duties have been expressly mentioned in the *EC Official Journal*.

Table B.2 EC antidumping cases: Shares in cases by trading partner, 1980–99

Group/country	All cases (total number)	Definitive measures										“Direct impact” ratio ^a	
		Provisional measures		Ad valorem duties		Specific duties		Undertakings					
		Number of cases	MDG	AVD	Number of cases	MDG	AVD	Number of cases	MDG	Number of cases	MDG		
1980–89													
OECD countries	146	55	29.7	17.5	34	20.5	15.0	7	41.1	37	38.8	53.4	
Portugal, Spain	20	3	19.4	15.0	1	25.6	14.2	2	11.2	6	30.5	45.0	
Austria, Finland, Sweden	11	2	31.8	4.9	1	6.1	6.7			6	19.1	63.6	
EEA, EFTA members	5									3	26.8	60.0	
Turkey	10	4	18.8	13.0	2	13.9	8.8			2	59.8	40.0	
Yugoslavia	28	10	42.5	16.1	3	25.7	16.1	3	46.2	9	52.8	53.6	
United States	28	15	13.8	13.8	14	13.4	11.8			6	49.6	71.4	
Japan	36	17	37.2	25.2	13	28.8	19.9			3	30.8	44.4	
Other OECD countries	8	4	42.9	15.0				2	63.3	2	37.1	50.0	
Non-OECD countries	239	92	49.7	22.6	31	38.0	20.7	19	46.8	98	41.8	61.9	
Central Europe	106	26	59.0	25.7	3	46.0	22.4	4	62.3	67	43.8	69.8	
Eastern Europe	20	11	83.6	19.1	4	72.1	22.9	3	89.9	7	59.9	70.0	
Euro-Med countries	4	1	5.8					1	5.8			25.0	
Asian Tigers	37	14	25.9	13.8	10	20.5	13.6	2	31.5	3	12.5	40.5	
China	26	16	55.9	30.2	7	46.5	28.3	2	56.9	8	37.7	65.4	
Other Asian countries	8	4	32.3	19.1	1	6.7	6.7	2	40.8	1	58.0	50.0	
Mercosur countries	15	7	24.4	13.2				3	16.6	6	25.3	60.0	
Mexico, South Africa	9	5	32.8	20.3	3	26.3	15.9	2	28.4	2	37.7	77.8	
Other countries	14	8	48.6	28.6	3	44.8	31.8	2		4	30.4	50.0	
All countries	385	147	42.2	20.7	65	28.9	17.7	26	45.3	135	41.0	58.7	

some light on the relations between the EC and its trading partners: as a result, table B.2 groups these partners by the type of agreements with the EC.⁴ It provides five main results. First, there is a shift (in absolute and relative terms) of the main targets of the EC antidumping activity, away from OECD countries to non-OECD countries—in particular, the Asian Tigers, China, and other Asian emerging economies (this geographical shift mirrors a change in the EC industries using antidumping procedures, and, in particular, the emergence of the electronics and textile industries as heavy users). Second, being candidates to the EC or being close to concluding a preferential trade agreement with it does not necessarily grant protection from EC antidumping, as best shown by the Central European and EuroMed countries. Third, the frequency of provisional measures largely differs by country: less than 50 percent for most of the OECD countries, but up to 70 percent for Central Europe, China, EuroMed, Mercosur, and other Asian countries. Fourth, the level of antidumping duties imposed varies hugely—with peaks on imports from Japan, Mexico, South Africa, and the nonmarket economies (former USSR and China). Lastly, the type of antidumping measures differs noticeably, with countries under preferential agreements getting undertakings more easily than the others.

Antidumping and Predation

Is there any evidence that EC antidumping cases have been related to “monopolizing” behavior (predation or strategic dumping) from foreign exporters? Inquiries about antidumping cases as protecting competition from predation are mostly related to the importing market, whereas inquiries about strategic dumping are more related to the exporters’ markets. Because this appendix relies on the information provided in the antidumping procedures published by the EC *Official Journal*, it is adequately equipped only to examine predation. What follows thus presents five successive simple tests (“screens”) about the following question: is there any evidence showing that antidumping cases are antipredation cases (for details, see Bourgeois and Messerlin 1998)?⁵

4. EEA and EFTA members include Iceland, Norway, and Switzerland. The other OECD countries refer to the 1985 definition of the OECD. Central Europe includes the countries under the Europe Agreements (except Slovenia); Eastern Europe refers to the former USSR (except the Baltics); the Asian Tigers include Hong Kong, Korea, Macau, Singapore, and Taiwan; and the other Asian countries cover all the emerging economies (from Indonesia, Malaysia, or Thailand to India or the Philippines).

5. The method used has the advantage of relying exclusively on information published in the official proceedings of EC antidumping cases—hence on sources that are not biased in favor of the conclusion finally reached by the appendix (i.e., there is almost no evidence of antidumping as an antipredation device).

The first screen aims to assess the capacity of the foreign firms involved in antidumping cases to behave as predators. At first glance, it seems reasonable to assume that plausible predatory behavior would require as a precondition a *dominant* position of the foreign firm in the EC market. Under such a hypothesis, a precise set of circumstances for predation must coexist: (1) very important static or dynamic economies of scale for producing the good in question; (2) a large size of the exporter's home market, both in absolute and relative (*vis-à-vis* the EC markets) terms; (3) closure of the exporter's home market to EC firms (either because EC firms cannot export to the exporter's home market, or because they do not own subsidiaries in the exporter's home market); and (4) significant size of each independent exporter's share of the home market.

Absent this set of circumstances, a foreign firm with a small market share in the EC markets is unlikely to behave as a predator; it could not quickly supply a dominant part of the EC market, and lacking dominance, it would be unable to exercise market power. The concrete criteria used to assess possible dominance are drawn from the history of competition enforcement in the EC, which, in general, suggests a market share of 40 percent as necessary for a dominant position.

However, an approach much more severe than this reasonable hypothesis has been adopted in the appendix to allow for the possibility of rapid entry of foreign firms into EC markets—that is, to allow for very successful predation. Instead of merely screening out all the antidumping cases where a foreign firm would have an observed market share lower than 40 percent of the EC market for the last year examined by the antidumping investigation, the first screen is based on the foreign firm's *forecasted* market share, namely, the foreign market shares that would have existed in the first year *after* the year of the decision to take (or not) antidumping measures. Because of the average duration of antidumping investigations, this approach assumes that when EC petitioners make the decision to launch a complaint, they are looking two years ahead. Moreover, the forecasting method chosen is very conservative, so that it tends to provide high estimates of the computed market shares.⁶

A last problem has to be solved. In many cases, EC antidumping proceedings do not provide market shares by individual foreign firm. They merely provide the aggregate EC market share of all the foreign firms involved in the same case, whether these firms are originating from one or

6. The forecasting method chosen rests on the annual compound growth rate computed on the basis of the initial and final market shares given by the official investigations. These calculated growth rates are then used to extrapolate the market shares that the foreign firms would have enjoyed in the EC market for the product examined one year after the end of the investigation and after the imposition of the antidumping measures (should these measures not have been taken). Because this approach ignores the likely correlation between low growth rates and large foreign firms' market shares, it tends to overestimate the likelihood of predation—and all the more when foreign firm market shares start from a very low base.

several exporting countries. For all these cases, the first screen thus tests for forecasted aggregate market share of 40 percent or more held by foreign firms in the EC—making the approach adopted in the appendix even more conservative. In sum, the first screen eliminates only the cases where the foreign firms' market shares—once extrapolated (for the year following the decision about imposing antidumping measures), and aggregated when no data by exporting firm are available—are lower than 40 percent.

This severe first screen can be imposed on only the 461 cases (out of 658 cases initiated between 1980 and 1997) for which information on foreign market shares in the EC markets is available in the official proceedings. Table B.3 presents the breakdown of the 461 cases by industry. The 197 cases left out of this first screen (because of no available information) can be split into three groups. First, there are anticircumvention cases, which are the aftermath of some of the 461 antidumping cases eliminated by the screening procedure at one stage or another. Second, there are cases not terminated by *official* antidumping measures (including the cases terminated by the withdrawal of the complaint by the EC firms); however, one should consider the possibility that these antidumping procedures have been used (at least partly) to monitor or enforce “grey area” barriers. Third, there are a few cases terminated by antidumping measures but for which the official proceedings give no information.

Table B.3 shows that the first test screens out 311 cases of the 461 cases examined. It seems useful to test the robustness of this result—by assuming even longer forward forecasts—with the following question: How often would the market share threshold of 40 percent have been reached during the second year (or the third year, etc.) after the end of the investigation? The answer is: not often. The 40 percent threshold is projected to have been reached in only 55 additional cases during the second year after the investigation (i.e., two to three years after the lodging of the complaints and the initiation of the investigations), in 93 cases (including the previous 55) during the third year, in 132 cases (including the previous 93) during the fourth year, and in 165 (including the previous 132) cases during the fifth year—only half of the 311 cases screened out. As a result, the market share reached at the end of the first year seems a robust basis for the screening exercise.

The second screen examines the 150 cases left by the first screen; it consists of eliminating the cases terminated by a *negative outcome*. There is no reason to consider antidumping cases a response to predatory behavior where the EC investigations have concluded that “no injury” or “no dumping” was present.⁷ When the information is based on market share

7. A foreign firm can behave as a predator in its home and export market without “dumping.” This possibility is not covered by GATT Article VI in a straightforward manner—confirming that antidumping has never been really concerned with predation per se.

Table B.3 Five tests for screening EC antidumping cases, 1980–97

ISIC Code	Industry	Total number of cases	Cases with information		Cases left after screen				
			Number	Percent	No. 1	No. 2	No. 3	No. 4	No. 5
321	Textiles	64	36	56.3	8	8	2	1	
331	Wood products	27	7	25.9					
351	Industrial chemicals	204	164	80.4	53	46	19	16	5
362	Glass products	13	13	100.0	12	12			
369	Other nonmetals	17	12	70.6	1				
371	Iron and steel	86	67	77.9	14	13	4	1	1
372	Nonferrous metals	24	16	66.7	3	2	2	2	
381	Metal products	24	21	87.5	10	10	4	4	2
382	Nonelectrical machines	41	23	56.1	5	5	5	1	
383	Electrical machines	81	49	60.5	17	16	9	4	
	Subtotal	581	408	70.2	123	112	45	29	8
	Other industries	77	53	68.8	27	24	16	15	4
	Total	658	461	70.1	150	136	61	44	12

Sources: EC Official Journal; author's calculations.

for all the exporters involved in the same case, a conservative approach has been taken; only cases terminated by negative outcomes for all the countries involved have been eliminated. On the basis of this conservative assumption, 14 cases can be screened out—leaving 136 cases to be examined more closely in the third screen.

The third screen takes into account the *number of countries* involved in a given case. The two previous screens have been based on the implicit assumption that all the foreign firms are able to collude perfectly for predatory behavior whether or not they are based in different countries. It seems reasonable to relax this hypothesis. If four or more countries are involved in simultaneous antidumping actions on the same product, the possibility of joint predatory behavior seems rather low; collusion between firms coming from so many countries (and particularly from non-market economies, as is often the case) would have required a level of coordination and consistency that is implausibly high.⁸ Table B.3 shows that 75 cases can be screened out on this basis.

The fourth screen looks at the 61 cases left by the third screen. It aims to take into account another aspect of the costs of colluding: the *number of firms* involved in a given case. If a case involves eight or more different firms, the possibility of predatory behavior seems rather low, because the costs of colluding required by joint predatory behavior among so many firms are likely to be very high, and because the costs of maintaining a “joint monopoly” in such circumstances are likely to be even higher. The figure chosen—of eight firms—happens to be convenient for several reasons: there is no case with six firms; several cases with eight firms involve two different trading partners; and if one excepts four cases with nine firms, all the other cases involve 10 to 19 different firms. This fourth test screens out 17 more cases, leaving 44 cases—already less than 10 percent of the total number of cases under examination in this screening procedure.

The fifth and last test introduces the information available on the *EC firms* involved in the 44 remaining cases, which can be divided into two groups. Group I consists of 16 cases for which the only additional information available on the EC firms is their number. Although this limited information does not allow us to go very far, in two cases, foreign firms held market shares that were very small (4.5 and 6.1 percent) in the final period examined in the official investigations, whereas these firms faced five and nine EC firms, respectively. Both reasons (low foreign market shares and many EC competitors) do not suggest the existence of noncompetitive markets favorable to predatory behavior. It thus seems reasonable to screen out these two cases and to leave the remaining 14 cases of Group I without a definitive conclusion because of the lack of information.

8. The criteria used for the last two screens are usually those most commonly found in the economic literature (see, e.g., Scherer 1980, 56–57).

For the 28 cases of Group II, information is available on the number of EC firms and on their aggregate market shares (for both the initial and final periods considered in the investigations) of EC consumption. Hence, it is possible to compute two Herfindahl-Hirshmann indices (HHIs) for each of the two periods.⁹ Minimum HHIs are based on the assumption that the aggregate market share for the foreign firms is split equally among them and that the aggregate market share for the EC firms is split equally among them. Maximum HHIs are based on the assumption that all foreign firms except one have market shares close to zero and all EC firms except one have market shares close to zero.¹⁰

These indices allow the division of the 28 cases into three subsets. First, four cases have both minimum and maximum indices in the final period lower than the threshold of 0.18; thus they can be safely screened out. Second, 12 cases exhibit minimum HHIs lower than 0.18 (for both the initial and final periods) and maximum indices higher than 0.18 (also for both the initial and final periods): despite such a high stability of the pairs of indices, a definitive conclusion is not possible without information on individual market shares by firm. Third, 12 cases exhibit both minimum and maximum HHIs higher than 0.18 in the final period.

To conclude, the final test of the 44 antidumping cases having passed the four previous screens suggests keeping these last 12 cases—that is, only 2 percent of the 461 cases screened—as *mere* possible candidates for a closer examination of possible predatory behavior. This conclusion is very conservative for three reasons: seven of these 12 cases exhibit declining or stable minimum and maximum HHIs between the initial and final periods; four other cases involve China (for which our HHI estimates always assume the existence of one producer and exporter, and hence systematically underestimate the level of competition and overestimate the HHIs); and none of these 12 cases involves sophisticated products for which entry barriers could be high.

Four Final Comments

In sum, the past 20 years of EC antidumping enforcement have clearly not addressed predation issues. This result—which is similar to what has been found for US antidumping cases (Shin 1997)—deserves four important final remarks.

9. The Herfindahl-Hirshmann index (HHI) is defined as the sum of the squares of the market shares held by all the firms operating in the market examined. An index close to zero means that the market is not concentrated (there are many firms with similar weights), whereas an index close to one means that the market is close to monopoly (there is one firm with a very large market share).

10. Maximum HHIs have been computed by assuming that all foreign firms but one have zero market shares and that all EC firms but one have zero market shares.

First, these five tests have examined only the mere possibility of the existence of the *first* stage of predatory pricing: the acquisition of a large market share. But they have not looked at the *second* (and necessary) stage of a predatory pricing analysis: the capacity to exercise and keep market power once a large market share is obtained—a stage that the theoretical and empirical studies of industrial organization suggest as very difficult.¹¹

Second, antidumping actions are industrial disputes more than international conflicts. There are many cases where EC complaining firms are owners of the respondents or of the firms used for determining the dumping margins, where foreign respondents supply EC complaining firms, where foreign firms export from several countries to the EC, where foreign firms produce in the Community, and so on. All these links make assessing the existence of predation more complex. In particular, the screening tests have ignored an alternative hypothesis for the emergence of dominant positions by foreign exporters: the fall of highly dominant positions held by EC firms.¹²

Third, there have been endless suggestions for “improving” (making less protectionist) the EC antidumping regime. One of the most interesting set of suggestions comes from the Kommerskollegium (1999) in Sweden, because it reflects the views of the “free trade” group of EC member-states. After noting the risk of even more protectionist use of the antidumping instrument by the EC, once Central European countries accede to the EC, the Kommerskollegium suggests 10 recommendations: (1) dumping should be the *principal* cause of material injury; (2) “double” protection (antidumping measures on top of quantitative restrictions) should not be allowed; (3) measures should last 5 years *at most*; (4) the Commission should produce short *disclosure* documents; (5) *cumulation* should be restricted (and banned under WTO rules)¹³; (6) “zeroing” (only export transactions that have been found dumped are used to calculate dumping margins) should be abandoned (all export transactions should be used); (7) *repeated* initiations in a short period of time should not be allowed; (8)

11. The EC and US competition laws are very different with respect to predation. The US law requires the recoup step (*Brooke Group* case, 1992), whereas the EC law requires showing the existence of pricing below marginal cost (*Tetrapak* case), making predation similar to price discrimination.

12. This is a hypothesis well documented in 1 of the 12 cases left by the five tests: In the glycine case against Japan (1984), the EC antidumping proceedings discuss the point that EC antidumping measures might protect the sole EC competitor more than they protect competition.

13. Tharakan et al (1998) have shown the huge impact of cumulation on the type and level of antidumping measures taken: cumulation increases the probability of taking an antidumping measure by nearly 42 percent, and the capacity to find injury by about two in cases terminated by undertakings. It should be noted that the European Commission, unlike the US antidumping authorities, is not obliged to follow that practice.

aggregating products under the “*one single product*” procedure should be restricted; (9) the EC member-states should get *more* time before meetings in the WTO antidumping committees (currently they get only half an hour in the morning on the day of the meeting); and (10) the “*de minimis*” rule should be expanded (and EC practices conformed totally with WTO requirements). In this context, it is interesting to note that the recent (2001) WTO dispute settlement requested by India against an EC case (bed linen) has led to an Appellate Body ruling stating that “zeroing” (suggestion f) is inconsistent with the Uruguay Antidumping Agreement.

Lastly, in recent years, certain EC exports have been subject to an increasing number of antidumping measures taken by EC trading partners—roughly 50 cases per year since 1997. One may argue that this situation may induce the EC to be less active in implementing its own antidumping regulations. This argument is not very convincing for two reasons. First, the markets closed to EC products by foreign antidumping measures are generally much smaller than the EC markets closed to foreign products—a situation unlikely to be perceived by the Commission or the EC member-states as a reason to constrain the use of antidumping by EC firms (and the persistence of EC antidumping cases against US imports confirms the weakness of the argument). Second, many foreign antidumping cases echo EC antidumping cases: they deal with the same or very similar goods (canned fruit, paperboard, LdPE and PVC-based products, steel goods, ball bearings, etc.). In other words, they may contribute to the same goal as the corresponding EC cases—segmenting the world markets—and, to that extent, they may well be seen as a “positive” development by EC plaintiffs.

Other EC Trade Instruments

There are four major trade instruments in the EC legal apparatus. First, there are two EC antisubsidy regulations (one for iron and steel products subject to the Treaty of Paris, the other for all other products) with their latest versions reflecting the WTO Agreement on Subsidies and Countervailing Measures. Until 1996, these regulations were barely used: ten cases were initiated between 1977 and 1983, and only two between 1984 and 1996. These antisubsidy cases duplicated antidumping cases, and antisubsidy measures were not enforced (only antidumping measures were). Since 1996, one witnesses an increasing use of this instrument by the EC—mostly against India, South Korea, and Saudi Arabia on steel and chemicals (polypropylene, polyethylene).

These few recent cases, which often echo antidumping cases, deserve two remarks. One, antisubsidy investigations have allowed the EC to indirectly take into account some new arguments in favor of protection,

such as the trade and labor issue; for instance, the investigation in the salmon case against Norway has examined whether differentiated social security schemes constitute countervailable subsidies. Two, the antisubsidy procedures have been subject to biases leading to protectionist measures (in particular, a very limited scope for deductions) as shown in detail by Waer and Vermulst (1999).

Second, the Trade Barriers Regulation (TBR, nicknamed EC Section 301) came into force in January 1995. If trading activities in third countries are being affected by obstacles imposed by a foreign country, or if there is a threat of future damage, an individual firm, group of firms, or EC member-state can submit a formal complaint to the Commission for investigation. Trade barriers include tariffs and nontariff barriers to trade in goods and services, and the protection of TRIPS and they include practices forbidden by the WTO rules as well as those not forbidden but considered as having adverse trade effects on EC firms (it must be shown that EC company exports or imports are being prevented, impeded, or diverted). About 15 cases have been submitted to the TBR procedure, covering a wide range of countries, products, services, and intellectual property rights: leather (Argentina and Japan), cognac, sorbitol, and regional aircraft (Brazil), pharmaceuticals (Korea), musical works (Thailand and the United States), geographical indication (Canada), and the US Antidumping Act of 1916. The TBR has been related to the “market access database” initiative, which allows the Commission to collect the information provided by EC firms on trade barriers in third countries (echoing similar initiatives in the United States and Japan). A key goal of the TBR is to prepare the initiation of WTO dispute settlement cases by the EC: indeed, many of the above cases have led to EC complaints in the WTO dispute settlement system.

Third, there is an antidumping regulation in the shipping services industry, the first-ever antidumping procedure in services. It has been used only once (against the Hyundai Shipping Company operating between Europe and the Pacific Islands), clearly to protect the existing market-sharing of the route between EC shipping companies. There is also an instrument concerning the sale of newly built ships, the so-called Injurious Pricing Regulation. Application of this regulation has been suspended pending the ratification by the United States of the OECD agreement on shipbuilding and ship repairing, but the EC threatens to initiate a WTO dispute settlement case against Korean subsidies.

Fourth, the EC (following a request by a member-state) can impose safeguard measures in accordance with GATT Article XIX. (These measures can be Community-wide or regional, that is, for specific member-states.) There is no specific EC regulation for such cases. As noted in chapter 4, the EC has recently (between 1997 and 1999) removed six measures: on coal in Germany and Spain (but a few months later, a high antidumping specific duty was imposed on coke imports from China), on potatoes

in the Canary Islands (Spain), on Japanese cars (the whole of EC), and on minimum prices for dried grapes and for preserved cherries (the whole of EC) (WTO, *Trade Policy Review: The European Union*, 2000). Moreover, the EC considers two types of measures as safeguards: quotas on imports of footwear, porcelain, and ceramic tableware from China similar to safeguards (ironically they are incorporated into EC Regulation 519/94 establishing free importation (meaning “no quantitative measures”, in EC parlance) as the general rule of the EC Common Import Regime); and the “surveillance” regime based on a system of automatic import licensing.

