

Commercial Defense Actions and Other International Trade Developments in the European Communities: 1 July 1988 - 30 June 1989

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Introduction

This is the first in a series of bi-annual reports on developments in the field of EC international trade law. This report will cover developments that occurred during the period 1 July 1988 to 30 June 1989. The second report – to appear in *EJIL* 1990/2 – will cover the period 1 July 1989 to 30 June 1990, etc. Each subsequent report will cover the six month period preceeding publication of the relevant issue of the *European Journal of International Law*.

In accordance with the wishes of the editors, the reports will be predominantly devoted to actions taken by the Community Institutions under the EC's trade protection laws. Main developments in other areas will be briefly summarized.

The reports will not attempt to exhaustively – or even extensively – describe and analyze all developments within the EC which may impact on third countries. Rather, their objective is to provide the reader with a summary overview of the most important developments and to flag his attention to newly emerging trends and concepts in the Community Institutions' thinking.

The reports will be organized by subject matter. In order to promote consistency and facilitate quick reference, they will adhere to the following template:

1. Dumping

1.1. General developments (changes in the basic anti-dumping regulation; reports of the EC Commission; press debates, etc.)

1.2. Administrative determinations (Commission and Council anti-dumping decisions and regulations)

1.3. Court cases (judgments by the European Court of Justice and – in due time – the Court of First Instance)

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2. Other trade protection laws

- 2.1. Countervailing duties
- 2.2. Safeguards
- 2.3. New commercial policy instrument
- 2.4. Unfair pricing practices in maritime transport
- 2.5. Counterfeiting

3. Miscellaneous

This last category will describe and analyze trade developments in areas not directly covered by sections 1 and 2. Examples that come to mind are the EC's General System of Preferences, external aspects of the 1992 program, origin investigations, etc.

4. Appendix: anti-dumping decisions and regulations

Dumping

1.1. General Developments

Amendments to the EEC/ECSC basic anti-dumping regulation

On 11 July 1988 the EC Council of Ministers adopted Regulation (EEC) No 2423/88.¹ In presenting its proposal to the Council of Ministers on 22 May 1988,² the Commission had briefly reviewed the nature of the proposed amendments to the Regulation as follows:

It should be emphasized that the proposed amendments would not change the general orientation of the Community's anti-dumping policy which is based on Article VI of the GATT and the GATT Anti-Dumping Code. Furthermore, all the proposed modifications are essentially a codification of the consistent practice and approach of the Commission and Council in their application and interpretation of the present legislation and as such are essentially technical in nature.

¹ Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Communities, OJ (1988) L 209/1. The Regulation entered into force on 5 August 1988. The comparable ECSC Regulation 2424/88/ECSC of 29 July 1988, OJ (1988) L 209/18, entered into force on the same day. For commentaries on the amended regulation, see Bellis, Vermulst, Waer, 'Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies', 23 *Journal of World Trade* (No. 2) (1989) 21-34; Vermulst, Waer, 'De Nieuwe EEG Anti-Dumping Verordening 2423/88: Een Stille Revolutie', 37 *Sociaal Economische Wetgeving* (1989) 151-162; Van Bael, 'EEC Anti-Dumping Enforcement: An Overview of Current Problems', *EJIL*, Section II (1989); Hailbronner, Bierwagen, 'Neuere Entwicklungen im Außenwirtschaftsrecht der Europäischen Gemeinschaften', 22 *NJW* (1989) 1385-1394; Norall, 'The New Amendments to the EC's Basic Anti-Dumping Regulation', 26 *CML Rev.* (1989) 83-103.

² Proposal for a Council Regulation (EEC) amending Regulation (EEC) No 2176/84 on protection against dumped or subsidized imports from countries not members of the European Economic Community, presented by the Commission, COM (88) 112 final, Brussels 22 March 1988, at 3.

Commercial Defense Actions

To the extent that this summary creates the impression that the changes are merely a technical codification of existing practice which is furthermore in conformity with GATT and the GATT Anti-Dumping Code, it is misleading. Regulation 2423/88 introduces a number of new concepts the GATT-legality of which seems doubtful.³ In this respect, the following amendments come to mind:

- The anti-absorption procedure of Article 13(11) which introduces the requirement that anti-dumping duties be borne by importers and their customers in the Community;
- the exhaustive list of allowable direct-selling expenses (see Article 2(10)(c)); and
- the possible disregard of 'insignificant' adjustments, i.e. individual adjustments having an ad valorem effect of less than 0.5 percent in relation to the price or value of the product under investigation (see Article 2(10)(e)).

These and other features of the amended basic Regulation have drawn criticism from other Code signatories in the meetings of the Committee on Anti-Dumping Practices. A number of signatories including the United States (which itself introduced significant changes in its anti-dumping law in 1988),⁴ Japan, Korea and Hong Kong have raised critical questions about the Regulation in this forum.

Japan challenges the 'parts' amendment in GATT

On 29 July 1988 Japan requested consultations with the EC under Article XXIII(1) GATT and Article 15 of the Anti-Dumping Code concerning the 'parts amendment'. The parts amendment was adopted by the EC Council in June of 1987 in an effort to deal with what it perceived to be circumvention of anti-dumping duties through the setting up of assembly operations in the European Community.⁵

Bilateral consultations under Article XXIII (1) GATT were held in September 1988 but failed to solve the dispute. Japan subsequently requested to institute a GATT Council in its meeting of 19-20 October 1988. Because of difficulties in formulating the terms of reference under which the panel was to operate, agreement on the composition of the panel and its terms of reference was reached only in May 1989.

³ For more extensive analyses of the amended Regulation, see the Articles *supra* note 1.

⁴ For a description of the U.S. amendments, see Holmer, Bello, 'The 1988 Trade Bill: Is it Protectionist?', 5 *I.T.R.* (1988) 1347-1351; Horlick, Oliver, 'Anti-Dumping and Countervailing Duty Law Provisions of the Omnibus Trade and Competitiveness Act of 1988', 23 *Journal of World Trade* (No. 3) (1989) 5-51.

⁵ For analyses of the parts amendment, see, e.g., Van Bael, 'Japanese Investment in the EEC: Trojan Horse or Hostage?', *International Financial Law Review* (June 1987) 10; Bierwagen, Hailbronner, 'Input, Downstream, Upstream, Secondary, Diversionsary and Components of Subassembly Dumping', 22 *Journal of World Trade* (No. 3) (1988) 27; Hailbronner, Bierwagen, "'Neue" Formen des Dumping und ihre Regelung im Außenwirtschaftsrecht der Europäischen Gemeinschaften', 9 *R/W* (1988) 705; Landsittel, 'Antidumpingzolle auf in der Gemeinschaft hergestellte Waren', *WRP* (1988) 21; Griffith, 'Anti-Dumping Duties on Parts in the EEC', in Jackson & Vermulst (eds.), *Anti-Dumping Law and Practice: A Comparative Study* (to be published by University of Michigan Press 1989); Steenbergen, 'Circumvention of Anti-Dumping Duties by Importation of Parts and Materials: Recent EEC Anti-Dumping Rules', 11 *Fordham International Law Journal* (1988) 382; Desmedt, 'EC Anti-Dumping Law: EC Applies Duties to Foreign-Owned Assembly Operations in the EC', *International Business Lawyer* (1987) 479; Dermott, 'Extending the Reach of their Anti-dumping Laws; The European Community's "Screwdriver" Assembly Regulation', 20 *L. & Pol'y Int'l Bus.* (1988).

The Japanese Government takes the position that Article 13(10) of Regulation No 2423/88 violates Articles I, II, III and IV of the GATT and cannot be justified under Article XX (d).

Whatever one may think about the GATT legality of the parts amendment, it is clear that the amendment has forced third country companies established in the EC to step up local sourcing activities. While at first sight the 60-40% rule seems preferable to the more vague origin rules applicable to products coming from third countries,⁶ experience with the first cases has shown that difficult problems may in fact arise, especially in determining the origin of sub-assemblies such as PCBs, etc.

Financial Times debate about EC anti-dumping practice

In the course of 1988 a lively debate ensued over some of the essential characteristics of the EC anti-dumping system. The forum was provided by the *Financial Times*. The discussion was initiated by Montagnon and Buchan in an article published on 3 August 1988.⁷

Arguably stimulated by this and similar attacks on the Community's anti-dumping policy, the then-Commissioner with special responsibility for external relations, Mr De Clercq, vigorously defended the Commission's point of view in an article of 21 November 1988.⁸ In particular, Mr De Clercq stressed that the EC had always strictly applied the GATT rules and that, in fact, "(t)he Community's policy in this area ... differs from those of other countries in one fundamental respect, that is it is *incontestably* by far the most liberal."⁹

Mr De Clercq's position, in turn, was strongly attacked by Brian Hindley of the London-based Trade Policy Research Centre.¹⁰ Hindley focused on the methodology em-

6 The 'normal' EEC origin rules are contained in Regulation (EEC) No 802/68. The operative Article 5 provides in relevant part that "(a) product in the production of which two or more countries were concerned shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture." See also Case 229/86 *Brother v. Council*, Judgment of 30 September 1987 (not yet reported); Case 26/88, *Brother International GmbH v. Hauptzollamt Giessen*. The origin Regulations on photocopiers and integrated circuits are discussed in Section 3 *infra*.

7 Montagnon, Buchan, 'Stretching the GATT to its limit', *Financial Times* (3 August 1988).

8 De Clercq, 'Fair practice, not protectionism', *Financial Times* (21 November 1988).

9 Mr De Clercq's statement was repeated almost verbatim by his successor, Mr Andriessen, in a speech for the *Financial Times*' Eleventh Conference on World Electronics, where Mr Andriessen said the following about the EC's anti-dumping policy:

"Our anti-dumping policy constitutes another example that the Community defends its rights and interests promptly and consistently. We have always supported the elaboration of internationally acceptable rules in that area in accordance with the existing GATT legislation. Community policy however differs from those of other countries in one fundamental respect: our policy is *incontestably* the most liberal, by far.

Every case is carefully examined in order to ensure that the anti-dumping measures eliminate dumping which is causing injury to Community Industry and re-establish a situation of open and fair competition on the Community market which is in the general Community interest."

See Andriessen, 'Trade Issues for the Electronics Industry', *Financial Times*, Eleventh Conference on World Electronics, London (27 April 1989).

10 Hindley, 'Cleverness can cost too much', *Financial Times* (25 November 1988), and - especially - Hindley, 'The Design of Fortress Europe', *Financial Times* (6 January 1989). Hindley

Commercial Defense Actions

ployed by the EC Institutions to calculate dumping margins in the case of companies selling in their home market and the EC market through related sales companies and argued that in such cases the methodology led to tilted results; Hindley's analysis was hardly new. Indeed, the same issue had been the main ground of appeal in the *Ballbearings* and the *Typewriters* cases brought in respectively 1984 and 1986 by Japanese producers.¹¹ In both cases, the European Court of Justice deferred to the discretion of the EC Institutions and upheld the administrative determinations. Nevertheless, Hindley's analysis raised a lot of dust, which presumably made it accessible to the public at large and because he was an 'outsider' with no interest whatsoever in the outcome.

Since then, the debate has continued.¹² One striking aspect of the discussion is its focus on EC anti-dumping law. In this respect, it should, in the opinion of this author, be noted that while there are undoubtedly protectionist elements in EC anti-dumping law and policy, it does not seem overall more protectionist than similar laws enacted and actively enforced by Australia, Canada and the United States. The *exclusive* focus on the EC therefore seems a bit misguided.

*The Commission's sixth annual report on anti-dumping and anti-subsidy activities*¹³

This sixth report reviews the Commission's activities in 1987. Like its predecessors, the report focuses mainly on statistical data and provides little insight to the Commission's thinking on substantive issues. The report notes that of the 39 anti-dumping investigations initiated in 1987, ten involved Japan and five Korea, these countries thereby being the main targets of the EC industry in that year.

explains his views in more detail in Hindley, 'Dumping and the Far East Trade of the European Community', 12 *The World Economy* (1988).

- 11 *Ballbearings* cases 240/84, *NTN Tokyo Bearing Company Ltd.*, 255/85, *Nachi Fujikoshi Corporation*, 216/84, *Koyo Seiko*, 258/84, *Nippon Seiko KK*, 260/84, *Minebea Company Ltd. v. Council*, Judgments of 7 May 1987 (not yet reported); *Typewriters* cases 260/85 and 106/86, *Tokyo Electric Company Ltd. et al.*, 273/85 and 107/86, *Silver Seiko Ltd.*, *Silver Reed (U.K.) Ltd.* and *Silver Reed International GmbH*, 271/85 and 300/85, *Canon Inc.*, *Canon France S.A.*, *Canon Rechner Deutschland GmbH and Canon (U.K.) Ltd.*, 301/85, *Sharp Corp.*, 308/85, *Nippon Seiko KK v. Council*, Judgments of 5 October 1988 (not yet reported).
- 12 See, e.g., Messerlin, 'EC Anti-Dumping Policy: Un chat est un chat', *Financial Times* (15 December 1988); Norall, 'Dumping dilemma', *Financial Times* (23 December 1988); Gestetner, 'EC Anti-Dumping Actions', *Financial Times* (6 January 1989); Randolph, "'Fortress Europe" and EC Anti-Dumping Actions', *Financial Times* (17 January 1989); Norman, 'EC Anti-Dumping Actions', *Financial Times* (17 January 1989); Krenzler, 'Fortress Europe is a Myth', *Financial Times* (19 January 1989); Hindley, 'Correcting the Defects of EC Dumping Regulations', *Financial Times* (24 January 1989); Spinanger, 'How Open is an "Open" Market', *Financial Times* (3 February 1989); Bronckers, Hoogakker, Quick, 'The Role of Consumer Interest in EC Trade Restrictions', *Financial Times* (14 March 1989); Farr, 'In the Interests of EC Consumers', *Financial Times* (17 March 1989). See also Nelson, 'Fighting Back', *Wall Street Journal* (21 June 1989).
- 13 Sixth Annual Report of the Commission on the Community's Anti-Dumping and Anti-Subsidy Activities, COM (89) 106 final, Brussels, 21 March 1989.

1.2. Administrative Determinations

Daisy wheel printers from Japan, OJ (1988) L 177/1 (provisional); OJ (1989) L5/23 (definitive)

A unique feature of this investigation was the fact that only two Japanese producers of daisy wheel printers decided to cooperate. Not surprisingly, the EC Institutions used the 'best information available' rule for the non-cooperating producers and found a dumping margin of 58% and an injury margin of 23.5% for this group. For them, the anti-dumping duty was therefore set at the level of the injury margin, i.e. 23.5%.

For the cooperating producers, Tokyo Electric and Tokyo Juki, on the other hand, the Commission found dumping margins of 21.05% and 22.01% respectively. The prices charged by these two producers, however, had not caused injury to the EC industry and, consequently, the producers were exempted from the duty imposed on the rest of the Japanese industry.

Other interesting issues: like product definition, OEM normal value, individual injury margins for the cooperating producers.

Copper sulphate from Bulgaria and USSR, OJ (1988) L 205/68 (provisional), OJ (1989) L 23/1 (definitive)

Following complaints by CEFIC that the exporters concerned had breached previously accepted undertakings, the Commission decided to initiate a review proceeding and impose provisional anti-dumping duties forthwith (in fact, on the same day). The level of the provisional anti-dumping duties – 39% for Bulgaria and 20% for the USSR – was based on the results of the original investigations conducted in 1984 (Bulgaria) and in 1987 (USSR).

The definitive dumping margins calculated in part on the basis of the prices for copper sulphate on the Mexican market (Mexico being the surrogate proposed by CEFIC and considered representative by the Commission) were 81% for Bulgaria and 79% for the Soviet Union. As is normal in cases involving non-market economies, the definitive anti-dumping duties of 58% for Bulgaria and 56% for the Soviet Union were based on the substantially lower injury margins established by the Commission.

Certain sheets and plates on iron or steel from Yugoslavia, OJ (1988) L 188/14 (definitive)

In this review proceeding under the ECSC Anti-Dumping Regulation, the Commission found a dumping margin of 15.4% using the 'best information available' rule, and imposed a specific duty of 48 ECU/ton because of the 'specific circumstances of the market ... in order to ensure the effectiveness of the measure.'

Oxalic acid from Taiwan and South Korea, OJ (1988) L 184/1 (definitive) (acceptance undertaking Uranus (Taiwan))

A unique aspect of the Oxalic Acid from Taiwan and South Korea proceeding was the modification of the 'best information available' rule. Use of the best information available is standard practice in the EC and in other jurisdictions in cases where parties choose

Commercial Defense Actions

not to participate or do not sufficiently cooperate.¹⁴ In cases where foreign exporters fail to sufficiently cooperate, the EC typically bases its determination on the allegations made by the EC industry in the complaint.

Accordingly since the Korean industry decided not to cooperate in the proceeding, the Commission – in its provisional determination – calculated the dumping margin for Korea on the basis of the information supplied in the complaint. This, however, led to imposition of duties on Korean exports lower than the duties imposed on the cooperating Taiwanese producers.

To rectify the disparity, in its definitive determination, the EC Institutions imposed the Taiwanese duty of 20.21% also on Korean exports on the ground that “the imposition of a lower duty on the South Korean product than that imposed on a product originating in a country which had cooperated with the investigation would reward non-cooperation and make it possible to evade duties.” The EC institutions therefore went further than the allegations in the complaint.

Oxalic acid from China and Czechoslovakia, OJ (1988) L 343/34 (acceptance undertakings, termination)

This sunset review proceeding well illustrates the difficulties the Community Institutions encounter when determining normal value in cases involving non-market economies. Initially, the Commission considered using South Korea, Taiwan, Japan, Brazil and India as analogue for the non-market economies of China and Czechoslovakia; in the end, however, it was forced to base normal value on the prices of the same Spanish producer who had requested the review, DAVSA, thereby elevating prices of an EC producer to the norm for acceptable pricing behaviour. This is the first time that the Commission used this last possibility provided for in Article 2(5)(c) of the basic Anti-Dumping Regulation.

By comparing the prices of DAVSA with the export prices of the Chinese and Czechoslovakian producers, the Commission established dumping margins of 53.73% for Chinese exports, 1.87% for products exported by Chemapol and 41.17% for other Czechoslovakian exports. The Commission found margins of price undercutting of 42.44% for the Chinese exports and 19.78% for the Czechoslovakian exports.

The Commission then decided to accept undertakings from the two main exporters Sinochem and Chemapol. Interestingly enough, the Commission refrained from its usual practice of imposing a residual duty on the rest of the industry.

Certain iron or steel coils from Algeria, Mexico and Yugoslavia, OJ (1988) L 188/18 (definitive)

In this ECSC proceeding, the Commission imposed specific duties of 15 ECU/ton on Algerian exports, 50 ECU/ton on Mexican exports (except for coils produced by Hylsa and exported by Hylsa International with respect to which duties of 39 ECU/ton were imposed) and 64 ECU/ton on Yugoslavian exports.

¹⁴ See Vermulst, ‘The Anti-Dumping Systems of Australia, Canada, the EEC and the U.S.A.: Have Anti-Dumping Laws Become a Problem in International Trade?’ in Jackson & Vermulst (eds.), *Anti-Dumping Law and Practice: A Comparative Study* (to be published by University of Michigan Press 1989).

Certain iron or steel sections from Yugoslavia and Turkey, OJ (1988) L 190/8 (provisional); OJ (1988) L 313/18 (definitive; acceptance undertakings)

The Commission found dumping margins of 38.2% for Yugoslavian exports (based on 'best information available') and of 36.5% and 15.5% for the Turkish exporters IDC/IZDAS and CEMTAS respectively. The provisional anti-dumping duties, however, were based on the substantially lower margins of price undercutting of 16% for Yugoslavia, 11.8% for IDC/IZDAS and 5% for CEMTAS.

In the definitive determination, the Commission accepted undertakings from the Turkish producers who had cooperated and from a Yugoslavian producer. In accordance with standard practice, the Commission imposed residual duties of ECU 39/ton (Yugoslavia) and ECU 30/ton (Turkey) based on the highest margins of price undercutting found with respect to producers in each country.

Despite arguments made to the contrary by the Turkish producers/exporters, the Commission decided to aggregate Turkish and Yugoslavian exports on the basis of their similarities in "quality, distribution channels, final utilization and prices on the Community market."

Video cassette recorders from Korea and Japan (Orion and Funai), OJ (1988) L 240/5 (provisional); OJ (1989) L 57/55 (definitive); OJ (1989) L 57/61 (acceptance undertakings)

Together with the *Printers and Video Cassette Tapes* proceedings, this was probably the most important proceeding during the review period, not only in terms of development of EC anti-dumping law but also because it was the first case in which the EC found substantial dumping margins for Korean companies.

The VCR complaint was the first complaint in the EC to be aimed at specific producers in one country, namely Japan. The Commission accepted the complaint on this basis and rejected arguments made by the foreign producers that selective complaints were discriminatory and manipulative, stating:

The Commission decision to initiate the present investigation against exporters in South Korea and against Funai and Orion only was based on the complaint which was expressly limited to Korea and the two Japanese firms and which did not contain any evidence of dumping or injury from any other source. At this time there was no other evidence available to the Commission which would have indicated that other imports from Japan or other countries were dumped, or that they were causing injury. Under these conditions the Commission did not in any way behave in a discriminatory manner.

The Commission is not legally required to always initiate anti-dumping proceedings against all exporters in a country concerned. There is nothing in Community law that requires the Commission to extend the scope of the investigation to all imports from a given country.

It is the Commission's practice to open investigations against all imports from a given country because, in most cases, the evidence available suggests that all imports from a certain country are dumped and are causing material injury. In the present case, not only did the evidence available not show this to be the case, but the complainant had expressly limited the complaint to certain exporters.

The Commission naturally asked itself whether the complainants' request to limit the investigation to certain companies was abusive. Allegations that the complainants had filed the complaint selectively because of their links with other exporters were

Commercial Defense Actions

not considered convincing in this respect. Indeed, in other anti-dumping cases, the same complainant companies had not hesitated to lodge a complaint against Japanese companies with which they cooperate in other areas.

As to the question of whether, subsequent to the initiation, the Commission should have extended the proceeding to include other exporters, the Commission has examined the information from the exporters about these allegedly dumped exports causing injury and found that there is no evidence at all for dumping on the basis of the data submitted which, apart from doubtful methodology, was neither supported by any documentation nor information. Nor is there evidence that the Community industry was prevented from charging prices including a reasonable profit in order to keep its market share in the face of competition from these other exporters.

Moreover, independent and representative market surveys available to the Commission showed no continuous price undercutting or gain of market share by these other suppliers as it could be found for the producers involved in the proceeding.

The Community Institutions found dumping margins ranging from 11.5% to 23.7%, but accepted price undertakings from four of the five exporters involved in the proceeding. A duty of 13% was imposed on the Japanese producer Orion while Korea was subjected to a residual duty of 23.7%.

Other interesting issues: like product definition, OEM normal value (5% profit), use of 12.7% subsidiaries' profit in the reconstruction of the export price (the highest profit margin ever used for this purpose), individual injury margins.

Paint, distemper, varnish and similar brushes from China, OJ (1988) C 25715 (notice of reopening); OJ (1988) L 272116 (provisional); OJ (1988) L 303111 (amendment provisional); OJ (1989) L 79124 (definitive)

After finding evidence that the Chinese exporter, the China National Native Produce & Animal By-Products Import and Export Corporation had broken its quantity undertaking, the Commission decided to reopen the proceeding and immediately apply provisional anti-dumping duties of 69% on brushes produced and/or exported by the Chinese company.

This duty was later extended to *all* Chinese exports of paint brushes following a finding by the Commission that the Chinese company could not control the activities of its various subsidiaries and that exports were, in fact, coming from several sources.

The Commission found a dumping margin of over 90% based on prices in Sri Lanka. The Commission used Sri Lanka as a surrogate country despite contentions of EC importers that Sri Lanka was an inappropriate choice since: the Sri Lanka products were different; the production costs were different; the production volume was much smaller; Sri Lanka was not a significant exporter; there was insufficient competition in Sri Lanka (only two producers); and one of the two Sri Lanka producers was owned by a Community firm.

The last objection perhaps deserved more weight than the Commission gave it. One general problem with the analogue country, or – more precisely – analogue producer, concept is that the analogue producer concerned has no interest in showing a low normal value. Presumably its only interest is to provide the EC Commission with the desired information at the smallest expense possible. Needless to say, the analogue producer does not spend time thinking about adjustments which would normally be made to reduce the normal value. Where an analogue producer is related to an EC complainant, however, the producer not only has an interest in cooperating but also has an interest in showing a

high normal value. Such a producer may therefore reasonably be expected *not* to claim any adjustments at all.¹⁵

In the end, the Council decided to impose definitive anti-dumping duties of 69%, based on the injury margin.

Serial impact dot matrix printers from Japan, OJ (1988) L 317/33 (definitive)

In terms of trade value of imports, the *Dot matrix* proceeding was the biggest in EC anti-dumping case ever.

In this case, the Community Institutions applied a continuum principle in their definition of the like product. The Commission decided (and the Council agreed) that in situations where there is a spectrum or continuum of products, it would be "arbitrary, open to circumvention and probably unworkable to separate the products into a number of separate articles or series of like products." As a result, all printers were lumped together.¹⁶

The Commission found dumping margins between 4.8% and 86% and injury margins between 4.8% and 47%. The Community Institutions gave the following explanation for their decision to calculate injury margins on a producer-by-producer basis:

(I)t has to be noted that injury can be determined on the basis of numerous factors. When assessing whether a duty below the dumping margin established would be adequate to remove the injury, difficult and complex economic appreciations are necessary which imply inevitably a certain use of discretion. In this context, the Council is of the opinion that in this case the effects of dumping resulted substantially in the Japanese exporters selling at lower prices than the Community industry. The reference to price undercutting and the use of target price, at which the Community would have sold had the dumping not occurred are therefore, in the opinion of the Council, proper means to establish the extent of the injury. Since the price undercutting margins were individually calculable and varied considerably, the Council is of the opinion that in the present case the amount of the price undercutting of one exporter should not be used for the duty calculation of another exporter.

It would seem from the above excerpt that the Community Institutions prefer the use of individual injury margins where such margins are individually calculable and vary substantially.

Other interesting issues: use of 37% profit margin in constructed value of those Japanese producers who had insufficient or unreliable home market sales.

Paracetamol from China, OJ (1988) L 348/11 (definitive)

The Council decided to impose a variable duty.

¹⁵ For overviews of the EC's anti-dumping policy *vis-à-vis* non-market economies, see Vandoren, 'Mise en œuvre de la politique antidumping de la CEE contre les importations en provenance des pays à commerce d'état', *Revue du Marché Commun RMC* (1988) 198; Denon, 'The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duties Legislation', 36 *International & Comparative Law Quarterly* (1987) 198-239.

¹⁶ In the early eighties, a majority of the U.S. International Trade Commission also applied the continuum principle, especially in preliminary determinations. See E. Vermulst, *Anti-Dumping Law and Practice in the United States and the European Communities* (1987) 524-526 for more detail.

Commercial Defense Actions

Synthetic fibres of polyesters from Mexico, Romania, Taiwan, Turkey, USA, Yugoslavia, OJ (1988) L 348/49 (definitive)

Following their decision in the earlier *Polyester Yarn* proceeding, the Community Institutions again rejected arguments made by a foreign exporter – in this case Romania – that imposition of anti-dumping duties is inappropriate in cases where the product concerned is already covered by quantitative restrictions pursuant to the *MFA*. The Council noted that neither Community law nor international rules (including the *MFA*) prohibit the imposition of anti-dumping duties, customs duties or any other measure affecting imports subject to quantitative restrictions provided it is established that injury has been caused despite the restrictions. As the quantitative restrictions applied only to the Benelux and Italy, and as over 80% of Romanian exports went to Germany at injurious price levels, the Council believed that anti-dumping measures were necessary.

Another interesting feature of this case is that the EC decided to exclude a number of U.S. producers from the imposition of anti-dumping duties despite the fact that at least some of them were dumping (BASF: 23.1%; Eastman Chemical: 9.9%; Celanese Fibers: 9.2%). This exclusion was a consequence of the Commission decision in the provisional determination that exports of U.S. *producers* (as opposed to exports of U.S. *dealers*) should not be cumulated with exports of other producers because the physical characteristics of the U.S. products generally differed from those of Community products and other imported products and because the U.S. exports did not compete with Community production and other imports on account of their price levels. It should be noted that it is rather exceptional for the EC Institutions to de-cumulate.

Under the Community interest heading, the EC Institutions rejected importers' and users' arguments regarding supply difficulties and the high prices charged by, and the cartel-like behavior of, EC producers. Nevertheless, the Institutions decided to suspend application of anti-dumping duties for five months on one product – fiberfill – subject to the outcome of a further investigation into supply difficulties.

Video cassettes and video tape reels from Korea and Hong Kong, OJ (1988) L 356/47 (provisional); OJ (1989) L 174/11 (definitive); OJ (1989) L 174/30 (acceptance undertaking Wing Shing)

In the EC, definitive anti-dumping duties tend to be similar to provisional anti-dumping duties. The *Video tape* proceeding was an exception to this in that the definitive duties were substantially lower than the provisional duties, as can be seen from the following comparison:

Producer	Provisional	Definitive
Kolon	7.6%	2%
Saehan	4.5%	1.9%
SKC	6.6%	2.9%
Goldstar	10.8%	3.8%
Magnetic Enterprise	20.5%	15.8%
Swilynn	8.1%	0%
Swire Magnetics	11.3%	4.9%
Hanny	59.3%	21.9%
ACME	59.3%	9.3%
Casin	59.3%	9.3%
Yee Keung	59.3%	9.3%

The Institutions refrained from imposing duties on pancakes exported by the Korean companies Saehan and SKC because the dumping margins (1.06% and 1.4% respectively) were *de minimis*.

As far as procedure is concerned, the Community Institutions modified standard practice with regard to the imposition of a residual duty in two respects. Until this proceeding, a residual duty set at the level of the highest dumping margin found for any producer cooperating in the proceedings was applied to all producers in the same country who had *either* not cooperated or cooperated insufficiently *or* who had not exported during the investigation period (so-called newcomers).

In this case, however, the Council decided that it would be inappropriate to apply the highest dumping margin found for fully cooperating Hong Kong producers to those Hong Kong producers who "for specific reasons of the companies" had not been able "to provide the necessary information on all the points necessary for a due dumping calculation." With regard to such companies, the Council decided to impose instead the weighted average dumping margin found for the Hong Kong exporters (9.3% instead of 21.9%).

Secondly, although the Council was not willing to extend the application of this weighted average margin to newcomers, it noted (presumably with approval) the Commission's willingness to initiate without delay a review proceeding for newcomers who are able to prove:

- that they did not export to the EC during the investigation period;
- that they only started exporting afterwards; and
- that they are not related to or associated with any of the companies subject to the present investigation.

While the Council's decision to impose a weighted dumping average on producers which did not cooperate fully may be limited to the specifics of this proceeding, its willingness to initiate review proceedings for bonafide newcomers should be applicable to all future cases since the modification of standard practice is couched in general language and refers to an objectively identifiable factual situation. As an effort to deal with the plight of newcomers in the EC anti-dumping system, this modification should be applauded. It should be noted, however, that it does not alleviate the structural problem inherent in the EC system that plagues newcomers, specifically, that once the newcomers have been saddled with the highest dumping duty found, it may well be impossible for them to start exporting at all.¹⁷

Cellular mobile telephones from Canada, Hong Kong and Japan, OJ (1988) L 362/59 (termination)

The Commission determined that during the (six months) investigation period the sole European producer, Motorola, was able to increase both production and market share as well as improve its financial results and therefore did not suffer injury. In view of this, the Commission did not find it necessary to investigate the dumping allegations. Following withdrawal of the complaint by Motorola (after having been informed by the Commission of its findings), the Commission terminated the proceeding.

¹⁷ Since publication of the definitive duties, the Hong Kong Government has formally requested bilateral consultations with the EC on this proceeding under Article 15(2) of the GATT Anti-Dumping Code.

Commercial Defense Actions

Certain seamless tubes of iron or non-alloy steel from Austria, OJ (1989) L 25/87 (termination)

The proceeding was terminated on the basis of 'no injury' because the market share of the Austrian exports was less than 1% and such a quantity could not cause material injury, especially when compared to the impact of other trends, such as the heavy decline in demand.

Wheeled loaders from Japan, OJ (1989) L 39/35 (termination)

After having been informed by the EC Commission that Japanese producers had not materially undercut the prices of EC producers and that, in fact, the situation of the EC producers seemed healthy, the complaining EC producers withdrew their complaint and the Commission terminated the proceeding without further examining the dumping allegations.

Low carbon ferro-chromium from South Africa, Turkey and Zimbabwe, OJ (1989) L 39/33 (termination)

After having been informed that there was no dumping, the EC industry withdrew its request for review and the Commission terminated the proceeding without further investigating the injury allegations.

Certain flat-rolled products of iron or non-alloy steel cold-rolled, from Yugoslavia, OJ (1989) L 78/14 (provisional)

Having found dumping (15.4%) and injury (price undercutting of 14.75%), the Commission imposed a specific duty of ECU 54/ton.

Calcium metal from China and the Soviet Union, OJ (1989) L 78/10 (provisional)

Using the United States as the analogue country, the Commission found dumping margins of 27.2% (China) and 19% (Soviet Union) and price undercutting margins of 10.7% (China) and 11.2% (Soviet Union). A provisional anti-dumping duty of 10.7% was imposed on both countries.

Iron or steel coils from Argentina and Canada, OJ (1989) L 112/5 (termination)

The Commission decided to terminate this review proceeding on the basis of 'no injury' in view of the small market share of the two countries (combined less than 1%) and the absence of price undercutting.

Light sodium carbonate from Bulgaria, GDR, Poland, Romania, OJ (1989) L 131/4 (definitive)

Using Mexico as the analogue country, the Commission found dumping margins in excess of 58% (Poland), 67% (Bulgaria), 35% (Romania) and 64% (GDR). Although the market share of the countries under investigation had dropped from 17% in 1982 to 4% since 1983 (when anti-dumping duties were imposed), the Council decided not to let the anti-dumping duties sunset because there was a threat of injury. The Council imposed a definitive duty equal to the difference between a minimum price and the price charged by the exporters.

Fibre building board (hardboard) from Czechoslovakia, Poland and the Soviet Union, OJ (1989) L 176/1 (termination); Romania, Brazil and Sweden, OJ (1989) L 176/51 (termination)

The Commission decided to terminate the proceeding on the basis of 'no injury' without further investigating the dumping allegations. The basis for the negative injury determination was formed by findings that the imports had not undercut or had not significantly undercut Community producers' price levels, that the imports did not really compete with the hardboard produced by the Community industry and that the situation of the Community industry had in fact improved during the reference period.

Parts cases

See the tables in the appendix.

1.3. Court Cases

Case 77/87, Technointorg v. Council, Judgment of 5 October 1988 (Deep freezers) (not yet reported)

A Russian exporter of deep freezers brought this appeal contesting a 1987 Council regulation which imposed a definitive anti-dumping duty of 33% on upright freezers from the Soviet Union. Technointorg challenged the calculation of the normal value as well as certain aspects of the injury determination.

The Court rejected Technointorg's appeal on all counts. Noteworthy is that the Court agreed with the Council that – under EC anti-dumping law – there is no room for adjustments to take account of differences between the products exported by the non-market economy producer and the products manufactured by the analogue producer to the extent that such differences are not covered by Articles 2(9) – 2(10) of the basic Regulation. The claims of Technointorg for adjustment for differences in income level and in the cost of components were consequently rejected.

The Court referred to its judgment in the *Ballbearings* cases¹⁸ to uphold the Community Institutions' determination to cumulate imports from all sources.¹⁹

Cases 260/85 and 106/86, Tokyo Company Ltd. a.o. 273/85 and 107/86, Silver Seiko Ltd., Silver Reed (U.K.) Ltd. and Silver Reed International GmbH, 277/85 and 300/85, Canon Inc., Canon France S.A., Canon Rechner Deutschland GmbH and Canon (U.K.)

¹⁸ *Supra* note 11. For an analysis of the judgments, see Vermulst, Waer, 'Zaken 240/84 NTN Toyo Bearing Company Ltd, 255/84 Nachi Fujikoshi Corporation, 216/84 Koyo Seiko, 258/84 Nippon Seiko KK en 260/84 Minebea Company Ltd. vs. Raad EG', 36 *Sociaal Economische Wetgeving* (1988) 106.

¹⁹ For more extensive discussions, see Waer, Vermulst, 'Hof van Justitie der Europese Gemeenschappen – Zaken 294/86 Technointorg vs. Commissie, 77/87 Technointorg vs. Raad – Arrest van 5 October 1988: Diepvriezers uit de Soviet Unie: De koude oorlog', 37 *Sociaal Economische Wetgeving* (1989); Herman, 'Anti-Dumping and the Euro Court', *Financial Times* (17 November 1988); 'European Court upholds EC Anti-Dumping Duties on Soviet Freezers', *Business Law Brief* (13 November 1988).

Commercial Defense Actions

Ltd., 301/85, Sharp Corp., 308/85, Nippon Seiko KK v. Council, Judgments of 5 October 1988 (Typewriters) (not yet reported)

The Court dismissed all applications filed by Japanese exporters contesting a 1985 Council Regulation imposing definitive anti-dumping duties on Japanese exports of typewriters. The applications had mainly challenged the methodology the Community Institutions employ to calculate normal value and export price in cases where foreign producers target their home market and the EC.

After the Court's 7 May 1987 judgments in the *Ballbearings* cases, the Court's judgments did not come as a surprise.

Other Trade Protection Laws

2.1. Countervailing Duties

Cases 187/85, Fediol v. Commission, Judgment of 14 July 1988 (not yet reported)

In its judgment of 14 July 1988, the European Court of Justice upheld the April 1985 Commission decisions to terminate the anti-subsidy proceedings concerning soya meal from Argentina and Brazil.

Reiterating the limits on the scope of review set out in the first *Fediol* case, the Court essentially followed not only the Commission's conclusions, but also its logic. The Court held that the Commission's definition of subsidies, especially the 'financial contribution by the government' requirement, did not contradict the Community's international obligations because neither the GATT nor the GATT Subsidies Code contain a definition of the term 'subsidy'. The Court concluded that the Commission had neither committed manifest errors nor abused its discretion when it terminated the proceedings.²⁰

2.2. Safeguards

Shoes

Following adoption of safeguard measures against Korean and Taiwanese shoes to France and Italy, the Commission decided, on 17 August 1988, to open an investigation on the trend of footwear exports from Korea and Taiwan to the Community as a whole. As of the time of writing (30 June 1989) the results of this investigation have yet to be announced.

2.3. New Commercial Policy Instrument

Case 70/87, Fediol v. Commission, Opinion of Advocate-General Van Gerven of 7 March 1989; Judgment of 23 June 1989 (not yet reported)

Fediol lodged a complaint under Regulation 2641/84 complaining about two allegedly illegitimate trade practices of the Argentinian government:

²⁰ For a critical analysis of the judgment and the Commission's practice, see Quick, *Anti-Dumping and Anti-Subsidy Measures from the point of view of the Complainant Industry*, speech for the Third Annual ETLA Conference, Brussels, 1 June 1989. See also the new commercial policy instrument case brought by Fediol against the Argentinian Government discussed in Section 2.3 *infra*.

- the system of differential taxation, intended to provide the Argentinian soybean crushers with supplies of soybeans at prices lower than the world market price; and
- quantitative restrictions on exportation of soybeans.

The Commission rejected Fediol's complaint by decision of 22 December 1986. The Commission accepted the existence of the first practice, but not its illegitimacy and rejected both the existence and the illegitimacy (if the practice had existed) of the second practice.

Fediol disagreed with the Commission's findings and brought the case to court on the basis of Article 173(2) EEC Treaty, claiming that the Argentinian practices violated a myriad of GATT provisions, to wit Article III(1), Article XI(1), Article XX(1), Article XXIII, Article XVI jo. XX jo. preamble jo. XXIII and legitimate expectations jo. XXIII GATT.

During the administrative proceeding, Advocate-General Van Gerven agreed with the Commission's conclusions that none of the above GATT provisions had been contravened. However, he disagreed with the Commission's opinion that the grounds of appeal were neither covered by Regulation 2641/84 nor by the EEC Treaty and that, consequently, the appeal was inadmissible. In Van Gerven's opinion, the correctness of the Commission's position did not turn on the admissibility issue, but rather on the extent of the Commission's powers under Articles 3(5) and 6(1) of Regulation 2641/84 and on the circumstances which would be needed for a Commission decision under these articles to be annulled due to abuse of power. After comparing in detail Regulation 2641/84 and the Community's basic Anti-Dumping and Anti-Subsidy Regulation, Van Gerven concluded that there was no reason why the point of view the Court in the first *Fediol* judgment would not apply equally as well in the case of Regulation 2641/84. In neither case did the Commission possess a discretionary power of political character not subject to judicial review. Admittedly, under Regulation 2641/84 the Commission had substantial power to interpret international law and, in an early stage of the proceeding, broad discretionary power to judge the Community interests. Both powers, however, were subject to judicial control. Therefore, the appeal should be admissible.

In its judgment of 23 June 1989 the European Court of Justice rejected Fediol's appeal. The Court essentially followed the opinion of Advocate-General Van Gerven. Noteworthy is that the Court itself examined whether the practices of the Argentinian government violated GATT provisions, a potential indication of the Court's apparent increased willingness to examine Commission determinations in the trade area most closely.

GATT panel report on Section 337 of the U.S. Tariff Act of 1930

Following a 1985 complaint by the Dutch company AKZO under Regulation 2641/84, the Commission decided in March 1987 to initiate a GATT dispute settlement proceeding against the United States challenging certain aspects of Section 337. In January 1989 the GATT panel report was distributed to the GATT Contracting Parties. The GATT panel concluded that Section 337 violated Article II(4) GATT and that the violations could not completely be justified under Article XX(d) GATT.²¹

²¹ See for more detail, Bronckers, Arnold, 'The EC New Trade Policy Instrument: Some Comments on the Application of Reg. 2641/84', 22 *Journal of World Trade* (No. 6) (1988) 19-38; Arnold, Bronckers, 'The EC New Trade Policy Instrument: A Brief Review of the Application of Regulation 2641/84', 2 *Leiden Journal of International Law* (1989). The author wishes to thank Marco Bronckers for providing him with an advance copy of the latter article.

2.4. Unfair Pricing Practices in Maritime Transport

Hyundai

On 4 January 1989 the Council decided to levy a redressive duty on containerized cargo transported in liner service between the Community and Australia by the Korean company Hyundai Merchant Marine Company.²² This was the first time the Council applied Regulation (EEC) No 4057/86 on unfair pricing practices in maritime transport.²³ The Council Regulation confirms the broad discretion enjoyed by the Community Institutions in the application of the substantive provisions of the Regulation, especially with regard to the interpretation of the concept of 'non-commercial advantages' and the establishment of a causal link between such advantages and the unfair pricing practices.

In the *Hyundai* case, the EC authorities decided that Hyundai had received the following non-commercial advantages:

- benefits accruing to Hyundai from a cargo reservation scheme. Under this scheme, the Korean government had granted Korean shipping companies sole rights to carry certain strategic commodities and preferential rights to carry other goods to and from Korea; and
- benefits received by Hyundai under a Shipping Industry Rationalization Plan (S.I.R.P.) which had been implemented by the Korean government in 1984. Under this plan, Hyundai had benefited from various support measures, including tax benefits, a debt moratorium on won loans and on foreign currency loans and the refinancing of interest accrued during the moratoria.

As far as the causal link between the non-commercial advantages and the unfair pricing practices was concerned, the Council simply stated that "(t)hese advantages were substantial enough to make it possible for Hyundai to proceed in the way found in the investigation." It therefore seems that the Institutions take the position that the simple existence of (substantial) non-commercial advantages fulfills the causal link.

Since the rates charged by Hyundai also caused injury to the Community shippers, the Council decided that a redressive duty was appropriate. The duty levied was in the form of a fixed duty of 450 ECU per twenty-foot container sizes) irrespective of the nature or the value of the goods. This duty corresponded to the difference between Hyundai's freight rate and the 'normal' freight rate.

Hyundai has challenged the Council Regulation before the European Court of Justice on the grounds that the EC Institutions failed to prove that Hyundai had received non-commercial advantages, that its ships did not take exactly the same route as the European lines and that the Commission's investigation was biased.²⁴

²² Council Regulation (EEC) No. 15/89 of 4 January 1989, OJ (1989) L 4/1.

²³ The Regulation itself is discussed in more detail in Bellis, Vermulst, Musquar, 'The New EEC Regulation on Unfair Pricing Practices in Maritime Transport: A Forerunner of the Extension of Unfair Trade Concepts to Services?', 22 *Journal of World Trade* (No. 1) (1988) 47-65; Elmsner, 'Unfair Pricing Practices in Maritime Transport', 23 *European Transport Law* (1988) 590-599; Smith, 'The EEC's Unfair Pricing Practices Regulation: New Wave of Competition or Protectionism in Community Shipping?', II *Fordham International Law Journal* (1988) 883-903.

²⁴ *Financial Times* (30 June 1989).

Miscellaneous

Generalized System of Preferences

The three EEC Regulations²⁵ and the ECSC Decision²⁶ applying the Generalized System of Preferences (GSP) for 1989 contain no major changes from those of the last two years. The Commission estimates that the 1989 offer will affect imports worth 25 thousand million ECU, which represents an increase of approximately 9 percent over the 1988 GSP. Taking into account the weighted average of the customs duties on imports (between 5.5% and 6%) and an average rate of GSP utilization of 70%, the Commission has estimated that the loss of customs receipts due to the application of the scheme could be in the order of 1 thousand million ECU.²⁷ The following briefly reviews the main features of the 1989 GSP.

a) Continuation of the graduation policy

The EC is continuing its policy of 'graduation' of preferences as first defined in 1986 on the occasion of the mid-term review of the system for the decade 1981-1990 and consisting of reducing or withdrawing preferential treatment for certain very competitive suppliers of sensitive industrial products.

The application of this policy – based on 1986-87 import statistics – has led the EC to reduce by 50% the fixed duty-free amounts in the case of five products originating in South Korea and seven (petrochemical) products originating in Saudi-Arabia. The latter reduction gave rise to intense debates within the Council, several major Member States being opposed to such a measure at a moment when the EC was planning to negotiate a free trade agreement with the Gulf Cooperation Council member countries.

The EC also decided to exclude altogether from preferential treatment in 1989 products from certain countries to which a 50 percent reduction of the fixed duty-free amounts had been applied in 1988. This measure affects three products originating in South Korea, two originating in Hong Kong and one originating in Libya.

b) No complete elimination of quotas for industrial products

In its proposal submitted on 24 June 1988, the Commission, relying on the achievement of the internal market foreseen by the "White Paper" for 1992, requested the elimination of quotas apportioned between the Member States and suggested that these quotas be replaced by fixed duty-free amounts to be used by the Member States on the basis of quantities corresponding to their needs. The Commission's position was backed by the European Court of Justice which, in a case concerning the application of the GSP for 1987, took the position that it is illegal to allocate Community quotas among the Member States unless compelling circumstances of an administrative, technical or economic

²⁵ Council Regulation (EEC) No. 4257/88 of 19 December 1988 applying generalized tariff preferences for 1989 in respect of certain industrial products originating in developing countries, OJ (1988) L 375/47; Council Regulation (EEC) No. 4259/88 of 19 December 1988 applying generalized tariff preferences for 1989 to textile products originating in developing countries, OJ (1988) L 375/83.

²⁶ Council Decision of the Representatives of the Governments of the Member States of the European Coal and Steel Community, Meeting with the Council of 19 December 1988, applying the generalized preferences for certain steel products originating in developing countries, OJ (1988) L 375/125.

²⁷ Explanatory memorandum to the Commission's proposals, COM (88) 352 final, 14 bis.

Commercial Defense Actions

character make it impossible to do otherwise.²⁸ The Council considered, however, that a transitional period was necessary to set up a centralized administration of certain preferential amounts and maintained the allocation of such amounts in national quotas for a number of products. It is expected that the complete elimination of quotas for industrial products will take place in 1990.

c) Continued suspension of the GSP for South Korea

The EC decided to continue the suspension of the application of the GSP to South Korea (the GSP was first suspended *vis-à-vis* Korea in December 1987) until Korea gives in to Community demands for more adequate protection of European intellectual property rights in Korea.

External Aspects of the 1992 Program

a) Europe World Partner

In the course of 1988, the Commission provided more clarity on the external dimension of its 1992 program. In a speech given in London on 12 July 1989, then-Commissioner with special responsibility for external relations, Mr De Clercq, stated that the GATT does not cover all trade and that – in the absence of international obligations – concessions would be negotiated on the basis of reciprocity, preferably multilaterally but also bilaterally.

On 19 October 1988, the Commission formally outlined its thinking on the single market's external effects in a document entitled "Europe 1992: Europe World Partner." The document established four basic principles:

- the single market will be of benefit to EC companies and non-EC companies alike;
- the EC will vigilantly apply its instruments of commercial policy;
- the EC will meet its international obligations; and
- where there are no multilateral rules, the Community is not disposed to grant non-EC countries and companies automatic and unilateral access to the benefits of the internal liberalization process unless they can guarantee a "mutual balance of advantages in the spirit of GATT."

b) The second banking directive

One aspect of the 1992 program that was the focus of much foreign attention in 1988 and 1989 concerned the reciprocity requirement in Article 7 of the original Commission proposal for a Second Council Directive on the coordination of banks. In its original form, Article 7(5) authorized the Commission to examine whether EC banks enjoyed reciprocal treatment in the country of a non-EC bank applying to establish a subsidiary within the EC. A finding that this was not the case could result in the suspension of authorization for establishment of the subsidiary of the non-EC parent in the Community.

In a meeting of 13 April 1989, the Commission decided to modify its proposal. The decision to suspend authorization can now only be taken in cases where non-EC countries do not provide EC banks with *national treatment*. In cases where non-EC countries do not give EC banks the same rights that their banks enjoy in the EC, the Commission may

²⁸ Case 51/87, *Commission v. Council*, Judgment of 27 September 1988 (not yet reported).

negotiate for liberalization. This more lenient approach presumably came about as a result of strong United States and Japanese pressure.

In a speech to the United States Bankers Association in Phoenix, Arizona on 1 May 1989, the Commission with special responsibility for competition, Sir Leon Brittan, asserted that the 1992 EC Banking climate would be more liberal than the financial markets in the U.S. and Japan and exhorted those countries to break down their restrictions on banking.

Article 115 Measures

Within the context of 1992, the Commission announced in July 1987 that it wants to limit new and phase out existing Article 115 measures.²⁹ Indeed, in a single market without internal border controls, such national measures are hard to apply. According to the Commission the main products presently covered by Article 115 measures are: photographic film, ball bearings, glassware, toys and tableware. The Commission has also stated, however, that in sectors such as automobiles, textiles, electronics, footwear and tableware, the abolition of national measures might have to be accompanied by some form of "back-up" measure at Community level. *Quaere* whether such measures would take the form of Community-wide safeguard action or initiation of anti-dumping proceedings.

Product-Specific Origin Regulations

a) Photocopiers

In November 1988 the Commission submitted a draft Regulation laying down rules for determining the origin of photocopiers to the Committee on Origin in accordance with Article 14(2) of Regulation No 802/68. The Committee was not able to summon a qualified majority (54 out of 76 votes) in favor of or against the Commission proposal so the Commission officially submitted its proposal to the Council in February 1989 in accordance with Article 14(3)(b) of Regulation No 802/68. Again, no qualified majority could be reached.

On 11 July 1989 the Commission therefore adopted its proposal in the form of a Commission Regulation in accordance with Article 14(3)(c).³⁰

The Commission Regulation essentially adopts a negative definition by listing the types of assembly operations which do *not* constitute a last substantial process or operation within the meaning of Article 5. Specifically, assembly operations accompanied by the manufacture of the harness, drum, rollers, side plates, roller bearings, screws and nuts will not confer origin of the country in which they were carried out.

This proceeding was the result of an origin investigation by Commission officials of Directorate-General XXI into the origin of photocopiers manufactured by the Japanese

²⁹ Commission Decision 87/433/EEC of 22 July 1987, OJ (1987) L 238/26, points out that since that date, however, not much has changed: applications have not significantly decreased, and different national policies are still possible and are, in fact, being pursued. They conclude that it seems unlikely that Article 115 measures will be outlawed without the possibility of taking alternative measures, whatever those may be (VERs, VRAs, Community-wide action, etc.).

³⁰ Commission Regulation (EEC) No. 2071/89 of 11 July 1989 on determining the origin of photocopying apparatus, incorporating an optical system of the conicat type, OJ (1989) L 196/24.

Commercial Defense Actions

producer Ricoh in the United States. In the course of that investigation, Commission officials concluded that in view of the nature of the production processes then carried out by Ricoh in the United States (presumably consisting of the operations now mentioned in the Commission Regulation), the photocopiers manufactured in Ricoh's U.S. plant had Japanese rather than U.S. origin. This conclusion was important because it potentially subjected Ricoh's photocopiers exported from the United States to the EC to the anti-dumping duties imposed on Japanese photocopiers in 1987.³¹

b) Integrated circuits

On 3 February 1989 the Commission adopted a Regulation on determining the origin of integrated circuits.³² The Regulation distinguishes three consecutive production processes: diffusion, assembly and testing. It determines that of these three processes, diffusion, defined as the "process whereby integrated circuits are formed on a semiconductors substrate by the selective introduction of an appropriate dopant", must be considered as the 'last substantial process or operation' within the meaning of Article 5 of Regulation 802/68 because it is "technically highly sophisticated, requires great precision and presupposes a large research investment."

As the Committee on Origin agreed with the Commission proposal, the proposal could be adopted on the basis of Article 14(3)(a) of Regulation 802/68.³³

While the origin rule applies equally to Community producers and non-Community producers, in practice it is most likely to affect non-Community producers, especially Japanese producers, who, at the time the Regulation was drafted, were for the most part performing the diffusion operation outside the EC (later assembling and testing the product in the EC).

It is not clear from the wording of the Regulation whether 'diffusion' should be interpreted narrowly or whether it also covers the prior processes of design of the circuit and mask construction. In addition, one may question the economic wisdom of a definition of origin which leaves producers free to conduct the relatively labor-intensive processes of assembly and testing outside the Community.

³¹ See also Agence Europe, 14 July 1989, at 7. As a consequence of the difficulties encountered by Japanese manufacturers in the EC with regard to origin issues (affecting products such as cars, semiconductors and photocopiers), the Japanese Government has requested the GATT to provide more clarity in this field. See Dullforce, 'Japan asks GATT for Rules of Origin Guidelines', *Financial Times* (30 June 1989), at 8. Ricoh has announced that the Regulation "will not lead to the imposition of anti-dumping duties on machines produced in California; many changes in the manufacturing process have come into effect, that should fully satisfy the European Commission." See Agence Europe, 15 July 1989. While this may be true, the question remains what will happen to the photocopiers exported by Ricoh from the U.S. to the EC during the period between the date of imposition of anti-dumping duties on Japanese photocopiers and the date on which the changes in the manufacturing processes were achieved.

³² Commission Regulation (EEC) No. 288/89 of 3 February 1989 on determining the origin of integrated circuits, OJ (1989) L 33/23.

³³ See also the discussions of the Regulation in European Report, 18 January 1989, at 9-10; Agence Europe, 6-7 February 1989; Agence Europe, 8 February 1989; European Report, 8 February 1989; 6 *ITR* (1989) 958.

Appendix: Anti-Dumping Decisions and Regulations

Anti-Dumping Decisions and Regulations							
Product	Exporting Country	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination	Further Developments
1985 Photo-copying apparatus (Assembling)	Japan			OJ (88) L 284/36 * Repealing OJ (89) L 43/1	OJ (88) L 284/60	OJ (88) L 284/60	
1986 Urea	Czechoslovakia, GDR, Kuwait, Libya, Saudi Arabia, USSR, Trinidad, Tobago, Yugoslavia, Austria*, Hungary*, Malaysia*, Romania*, USA*, Venezuela		OJ (88) L 235/5 OJ (88) L 355/3*	OJ (89) L 52/1 (USA, Venezuela, Saudi Arabia)	OJ (89) L 52/37 (Austria, Hungary, Malaysia, Romania)	OJ (89) L 52/37 (Austria, Hungary, Malaysia, Romania)	
Microwave ovens	Japan, Singapore, S. Korea					OJ (88) L 343/33	
* Extension							

Commercial Defense Actions

Anti-Dumping Decisions and Regulations							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination
1987							
Dot matrix printers	Japan			OJ (88) L 264/56 *	OJ (88) L 317/33		
Daisy wheel printers (serial impact fully formed SIFF character printers)	China Czechoslovakia			OJ (88) L 177/1 L 302/30 *	OJ (89) L 5/23		
Oxalic acid						OJ (88) L 343/34	OJ (88) L 343/34
Oxalic acid	S. Korea Taiwan				OJ (88) L 184/1	OJ (88) L 160/63	OJ (88) L 160/63
Synthetic textile fibres of polyesters	Mexico, Romania, Taiwan, Turkey, USA, Yugoslavia			OJ (88) L 282/27 *	OJ (88) L 348/49 Notice OJ (89) C 119/15		
Polyester yarn	Mexico, S. Korea, Taiwan, Turkey			OJ (88) L 257/24 L 282/28 *	OJ (88) L 347/10		
Compact disc players	S. Korea, Japan			OJ (89) L 205/5			
Cellular mobile radio telephones	Canada, Japan, Hong Kong						OJ (88) L 362/59
Electronic typewriters (assembling)	Japan	OJ (88) L 183/1** (Canon Bretagne) L 203/1** (Sharp UK)				OJ (88) L 183/39 (Canon Bretagne SA) L 203/25 (Sharp UK)	
* Extension ** Amending Regulation No.1022/88							

Anti-Dumping Decisions and Regulations							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination
Electronic scales (assembling)	Japan	Repealing OJ (88) L 244/1 (TEC UK) OJ (89) L 58/1** (TEC UK)				OJ (88) L 189/27 (TEC)	
Paracetamol	China			OJ (88) L 282/29 *	OJ (88) L 348/1		
Choline Chloride	Belgium						OJ (89) L 63/32
Video cassette recorders	S. Korea, Japan			OJ (88) L 240/5 L 254/14 L 355/4 *	OJ (89) L 57/55	OJ (89) L 57/61	
Video cassette tapes	S. Korea, Hong Kong			OJ (88) L 356/47 OJ (89) L 197/1			
1988							
Calcium metal	China, USSR			OJ (89) L 78/11			
Small-screen colour television receivers	S. Korea, Hong Kong *, China*		OJ (88) C 288/13 * Notice OJ (88) C 334/6				
Plain paper photocopiers (assembling)	Japan	Notice OJ (88) C 306/8 * L 355/1** Notice OJ (89) C 113/6				OJ (88) L 355/66 (Matsushita + Toshiba) OJ (89) L 43/54 (Konica) L 126/38 (Sharp Man. UK)	
* Extension ** Amending Regulation No.1022/88							

Commercial Defense Actions

Anti-Dumping Decisions and Regulations							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination
Low carbon ferrochromium	S. Africa, Turkey, Zimbabwe						OJ (89) L 39/33
Wheeled loaders	Japan						OJ (89) L 39/35
Ball bearings (Assembling)	Japan						OJ (89) L 25/90
Fibre building board (hard-board)	Czechoslovakia, Poland, USSR, Romania, Sweden, Brazil		Notice OJ (88) C 327/8 (Czech., Poland, Sweden)				OJ (89) L 176/1 (Czech., Poland, USSR)
Light sodium carbonate	Bulgaria, GDR, Poland, Romania, USSR				OJ (89) L 131/4		
Copper sulphate	Bulgaria USSR		Review: OJ (88) C 200/9	OJ (88) L 205/68 L 326/1*	OJ (89) L 23/1		
Welded tubes of iron or non-alloy steel	Romania, Yugoslavia		OJ (88) C 241/3				
Diesel engines	Finland, Sweden		OJ (88) C 251/3				
Paint, Dis-temper varnish + similar brushes	China		Reopening: OJ (88) C 257/5	OJ (88) L 272/16 L 303/11 OJ (89) L 23/5	OJ (89) L 79/24		
Ferroboron	Japan		OJ (88) C 306/7				
Barium chloride	China, GDR		OJ (88) C 308/7				
* Extension							

Anti-Dumping Decisions and Regulations							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination
Ammonium paratungstate	China, S. Korea		OJ (88) C 322/4				
Tungstic oxide + tungstic acid	China		OJ (88) C 322/5				
Tungsten metal powder	China, S. Korea		OJ (88) C 322/6				
Tungsten carbide + fused tungsten carbide	China, S. Korea		OJ (88) C 322/7				
Methanamine (hexamethylene-tetramine)	Bulgaria, Cechos., Hungary, Poland, Romania, Yugoslavia		OJ (88) C 322/8				
Photo albums	S. Korea, Hong Kong		OJ (88) C 322/9				
Mica	Japan		OJ (88) C 323/3				
SIDM printers (Assembling)	Japan		OJ (88) C 327/8				
* Extension							

Commercial Defense Actions

Anti-Dumping Decisions and Regulations							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination
1989							
Tungsten ores + concentrates	China		OJ (89) C 2/5				
Audio cassettes and audio cassette tapes	Japan, S. Korea, Hong Kong		OJ (89) C 11/9				
Polyolefin woven bags	China		OJ (89) C 21/2				
Silicon metal	China, Hong Kong		OJ (89) C 26/8				
Dicumyl peroxide	Japan, Taiwan		Review: OJ (89) C 39/4				
Synthetic fibre hand-knitting yarn	Turkey		Review: OJ (89) C 42/2 Notice C 53/8				
NPK-fertilizers	Hungary, Poland, Romania, Yugoslavia		OJ (89) C 55/3				
Dense sodium carbonate	USA		Review: OJ (89) C 64/6				
Denim	Turkey, Indonesia, Hong Kong, Macao		OJ (89) C 73/3				
* Extension							

Anti-Dumping Decisions and Regulations							
Product	Exporting Country	Investigation	Initiation Review	Provisional Duty	Definitive Duty	Undertaking	Termination
Glass textile fibres (rovings)	Czechoslovakia, GDR		Review: OJ (89) C 87/3				
Vinyl acetate monomer	Canada, USA		Review: OJ (89) C 105/3				
Ball bearings 0 greater than 30 mm	Japan	Review: OJ (89) C 133/3					
Propan-1-ol	USA		Review: OJ (89) C 140/7				
Portland cement	Yugoslavia		OJ (89) C 149/4				
Fibre building board (hard-board)	Finland, Argentina, Switzerland, Yugoslavia		Review: OJ (89) C 150/3				
Video cassette recorders (assembling)	Japan, S. Korea		OJ (89) C 172/2				
Linear tungsten halogen lamps	Japan		OJ (89) C 183/9				
* Extension							