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European Antidumping Law and Procedure

DIETER OLDEKOP & IVO VAN BAEL

DR. OLDEKOP

The question of protection against dumping cannot be completely isolated from economic policy considerations. And it is impossible to overlook the present economic conditions in our countries when you look at dumping or antidumping law as it is practiced. That does not mean that protection against dumping should be allowed to degenerate into protectionism. There is certainly a very strong difference between protection and protectionism. It has taken a long time to put antidumping measures behind the bars of commonly accepted rules. I am referring here to the Antidumping Code of GATT, and everybody knows that it would be disastrous to go back to the state of affairs before the adoption of that Code. The position of the European Commission in that regard has been made clear, very clear, on quite a number of occasions. For example, there are the statements made by Vice-President Haferkamp in a recent debate in the European Parliament which dealt with a motion on "The Practice of Dumping and the Threat Posed to Europe by Uncontrolled Competition." And you can see from the title of that motion that it favored rather radically protectionist measures.

In that debate, the Vice-President of the Commission said, among other things, that dumping cases are subject to legal provisions and rules. "We have observed these and shall continue to observe them, and we cannot stick the dumping label on everything that we find inconvenient. We cannot fish the dumping label out of the drawer

This article is adapted from the presentations made by Messrs. Oldekop and Van Bael at the Symposium on Antidumping Law held at the University of Michigan Law School on November 3 and 4, 1978. Dr. Oldekop is counselor, Legal Service of the Commission of the European Communities. Mr. Van Bael is a partner in the firm of Debandt, van Hecke, van Gerven, Lagae & Van Bael, Brussels, Belgium. The views expressed herein are those of their author and not necessarily those of the Commission or Mr. Van Bael's clients or partners.

whenever competition gets awkward. We must ask ourselves whether it would not be better to improve our own competitive ability." I think that's quite clear. And I might add that in the debate, practically all political groups spoke out clearly against the protectionist attitudes which were expressed in the motion. And these protectionist elements were then eliminated in the resolution of the Parliament which was finally adopted.¹

But sticking to the rules does not mean that antidumping policy could remain isolated from the economic conditions which prevail. When exporting industries are faced with declining demand and declining prices in domestic markets, they will generally be less reluctant to keep up production levels by resorting to something like dumping. At the same time the industries injured by low-price imports will turn more frequently to the authorities which administer antidumping laws and ask for help, and, in such a situation, these authorities will normally be more inclined to make use of the legal possibilities to give such relief. The result will be all the more significant, first, if there is a large range of discretion whether to grant protective measures when dumping and injury have been shown, and second, if these authorities have been rather reluctant in more prosperous times to make full use of the possibilities they had.

Let me now turn in a more precise way to the antidumping legislation of the European Communities. When the Commission first submitted its proposal for an antidumping regulation in 1965 to the Council of Ministers, that was done for a number of different reasons. First, the legislation of the various member states in this field was very different. For example, the three Benelux countries did not have any antidumping rules in the proper sense—they just had general safeguard clauses. Second, the differences in national legislation would have had a very negative effect on the coherence of the Common Market as such. The full customs union and the free movement of goods within the Community could have made it very easy to circumvent the antidumping measures of individual member states by indirect importation through other member states. Finally, Community regulation of dumping was necessary to comply with the mandate of Article 113 of the EEC Treaty requiring that the EEC institute a commercial policy by 1970.

One of the main features, I think, which distinguishes the European legislation from the United States legislation is the strong dose of policy elements in the European antidumping legislation. In this respect it is important to consider the position of Article 113, which is the basis for antidumping measures, within the general framework of the Treaty. It is situated in the part of the Treaty which is entitled, "The Policy of the Community," and, more specifically, in the chapter which deals with commercial policies. This policy orientation, or

leitmotiv if you wish, is reiterated in the preamble of the antidumping regulation, which was finally adopted in 1968, where it is said that protective measures against dumping or the granting of bounties or subsidies are an important part of the common commercial policy.² But even more importantly, a number of features of the system set up by the regulation make it clear that considerations of economic policy play a considerable role in the concept and application of this system, and that it is less of an administrative system than that established by the United States.

This corresponds to the position which the Community adopted in the negotiations which led to the adoption of the Antidumping Code in the GATT. I am referring to three features of the system: first, the distribution of authority in the decision-making process among Community institutions—that is to say, the Council and the Commission on the one hand, and member states on the other hand; second, the margin of discretion concerning the adoption of protective measures once injury from dumping has been established; third, the nature of the legal acts by which protective measures are taken.

With regard to the first point, it is important that the final word on the question of whether or not protective measures are to be taken—and that, after all, is the real policy issue in these cases—lies to a large extent with the Council of Ministers, the highest political level of decision-making within the Community. This is true both in cases where the Commission, after it has terminated its investigation, comes to the conclusion that there should be no protective measures, and in cases where it determines that there should be protective measures. In the case of a negative conclusion, the Commission may terminate its investigation, but only if there are no objections raised within the EC Antidumping Committee, which is comprised of representatives of the member states. If there are objections within that Committee, then the matter is referred to the Council of Ministers, which can request that the Commission resume the examination.³ The same procedure is followed where an antidumping procedure is to be terminated because of a satisfactory price undertaking by the enterprises concerned.⁴ In case of a positive conclusion—that is to say, where the Commission arrives at the conclusion that there should be protective measures—the Council also decides on the imposition of antidumping duties.⁵

The implementation of provisional measures is of course a decision of the Commission, but the Council again has the power either to confirm that decision or to choose a different action.⁶ Furthermore, it is the council that decides about the possible prolongation of provisional measures,⁷ and about the final collection of duties which had been collected under provisional antidumping measures.⁸ I am not going to continue this enumeration of instances in which the Council

has the last word, but it shows, at any rate, that the Council has retained its basic powers under Article 113 in the antidumping procedure. This underlines the importance that is given to these measures, and the policy character that they have, even though in practice the Commission may have a strong position *vis-à-vis* the Council. After all, the Council may in most cases decide on a course of action different from that envisaged by the Commission only by a qualified majority, and sometimes that is not very easy to get.

The second point that I wanted to mention refers to the margin of discretion left to the Commission and to the Council with regard to the adoption of protective measures. The imposition of antidumping duties is never mandatory under Community law. It is not a statute in which the remedy is built in; therefore, even if the existence of dumping and injury has been clearly established, the Council and the Commission can still refrain from imposing an antidumping duty. The criterion for the decision is whether the interests of the Community call for intervention.⁹ A similar assessment, by the way, has to be made by the Commission at the time it opens an antidumping procedure, because the rule says that only where the information received by the Commission shows that protective measures against dumping may be necessary and only then, is the Commission under a duty to continue the examination of the matter.¹⁰ These rules constitute a large opening for the influence of policy considerations into the Community's procedure. This is certainly different from the United States situation. In practice, the Commission has tried right from the start to avoid opening procedures where these would lead to measures which, in the light of the general Community interest, would be undesirable. Additionally, there have been cases where the procedure was already initiated, but where antidumping duties were not imposed despite strong evidence of dumping and injury.

The third point which I mentioned in the beginning refers to the nature of the legal acts by which these measures are implemented. According to the rules, it is done by regulations, not decisions.¹¹ Regulations are defined by the EEC Treaty as being of general application, binding in their entirety, and as being directly applicable in all member states;¹² therefore, they are essentially acts of a legislative nature, not of an administrative nature. Regulations are traditionally used to implement the Community's commercial policies; for example, the common customs tariff and all other policy measures concerning imports and exports are defined and put into force by regulations. These measures must apply to all importers, whether they are known or unknown at the time the measures are adopted. They are different from the decisions with which, for example, the Community implements antitrust measures. Those are individual decisions directed or addressed to individual enterprises. The nature of these legal acts

reflects also on some other questions as well; for example, to what extent must the Community institutions give reasons for the regulations, and also to what extent are they subject to legal remedies.

Now, some words on the practical impact of our legislation. First, who deals with antidumping matters within the Commission? It is in principle the Commission as such—the collegium consisting of the thirteen commissioners—but in a more specific way the antidumping matters are dealt with by the member of the Commission who is responsible for external affairs. Within the Commission Service, there is an Antidumping Division which has about, all in all, twenty-five officials. That is certainly a small unit. Its smallness is to some extent compensated for by the fact that it can rely on other departments in the Commission for economic data on the industries concerned, and also, of course, for legal advice. Moreover, it is in permanent contact with the experts of the member states, who are responsible for implementing—for really executing—the antidumping measures adopted by the Community. Now, by way of statistics, you might be interested to know that from 1970, which was the first year in which we had a case under our antidumping law, until now, the Commission has officially opened antidumping procedures in about 116 cases—and that includes cases under the European Coal and Steel Community. The figure of 116 is based on the number of exporting countries per product. If you take multicountry cases as one case, then the figure is only fifty-four. Of these, approximately three quarters have in the meantime been officially terminated—the great majority of them because settlements were reached with the exporters. In only sixteen cases have definitive antidumping duties been imposed—all of them, by the way, since November, 1977. The rest of the procedures are still pending. Let me also note that, all in all, only about one-third of the complaints introduced led to the official opening of antidumping procedures; the rest were rejected.

Now, from these statistics I think one can discern three trends. First, the Community applied its legislation with great reserve. If I am right, between 1970 and mid-1977 the figures in the United States were something like two hundred antidumping investigations and seventy countervailing duty investigations.

Second, there has been a preference for terminating antidumping procedures by settlements with the exporters, rather than by imposing antidumping duties. This approach has an express legal basis in the Antidumping Code and in our regulations. It is sufficiently effective. It normally saves time, and, of course, it is also financially more beneficial for the exporters than is the imposition of antidumping duties.

Thirdly, there has been a significant increase in the number of antidumping procedures and duties in the last two years. That is due,

as I said in the beginning, to developments in the general economic situation, to changes in the steel sector, and to the introduction of a basic price system by the Community. This is our version of the trigger price system, and it was introduced after the United States announced that it would adopt its trigger price system. I will not describe this system in detail. I would just like to say that the undercutting of the basic prices is just *prima facie* evidence of dumping, and that it doesn't take away any obligation of the Community to go through the normal procedures. We have a number of court cases now in the antidumping field, but all of them are still *sub judice*. Therefore, a number of questions, which relate to the procedures adopted and to the possibility of attacking Community measures directly before the court, have not yet been decided. It seems that we will have to await the outcome of these court cases for clarification.

MR. VAN BAEL

I am very grateful to have the floor for a few minutes because, as a practitioner, the dish served by the Commission is a bit too sweet, and I would like to add a few bitters to give you a more realistic picture.

Looking back on ten years of enforcement—and Dr. Oldekop confirms my views—one notices that Community authorities have opted for a policy of negotiating settlements rather than investigating matters in depth to establish a finding of dumping and injury. Dr. Oldekop mentioned some 116 cases. I would leave the block of steel cases aside, because they all came about earlier this year as a clear measure of commercial policy, where the antidumping regulation was used as an instrument to cause foreign governments to enter into bilateral agreements. So I think those cases are quite special, and I'm hopeful will remain exceptional and shouldn't cloud the picture I want to present to you. So, basically, I'm talking about the fifty-five cases which have been handled by the Commission, out of which only four ever went to affirmative findings and a majority of the others ended with price assurances. As a practitioner, I have had problems with price assurances because the basic elements of a price assurance are the unilateral promise by the exporters to raise their prices in successive steps, over a number of months, combined with anti-evasion provisions and with reporting requirements. I have also run into a case where the arrangement which the Commission proposed to my client went further and included a provision limiting quantities. In this regard one must be careful, whenever the price assurances are submitted in draft form, to eliminate whatever is not proper under the antidumping regulation, because quota arrangements fall under quite a

different legislation and are more difficult, politically speaking, to obtain. Therefore, an antidumping regulation should not become the means to more easily obtain quotas.

Looking at the pros and cons of the settlement approach, it will be obvious to anyone that the great advantage for the interested parties is that, on the average, everything is over within six months. It also requires very little staff on the part of the Commission—only a smoke-filled room. In fact, I remember that in 1973 one of those sessions went on until three o'clock in the morning. And when I made a head count of the Commission's staff—the professionals—a year ago, I counted only five, not twenty-five. Their number may have doubled since last year, but I guess the twenty-five figure mentioned by Dr. Oldekop includes clerical staff as well. So it's quick, it requires little staff, and the exporters avoid getting the stigma of dumping stuck on their backs, so they're happy.

What I'm wondering, though, is whether the emphasis on obtaining price assurances hasn't unduly stimulated inflationary pressures to the detriment of consumers. Several times I have had clients walk out of my office very happy about the settlement with the Commission because they could still export the same quantities and get a better price. Who would quarrel with such a formula, except maybe consumers? Therefore, to safeguard their interests, it might be a good idea to have the exact terms of the secret price assurances which are accepted by the Community authorities made public, so that users and ultimate consumers could have an opportunity either to intervene in the course of the proceedings or possibly to file an appeal against the end result.

Another possible disadvantage of the settlement approach, as I see it, is that it reduces the role of the antidumping regulations to a mechanism to trigger negotiations. I remember this quite well, for in the *Ferro-chrome* case,¹³ I had a client whose invoices were all clean. We went over the whole package and submitted the full case to the Commission authorities. And so, very confident, I went to the hearing (which is the climax in the rather simple procedure) and I found that after half an hour at the hearing, the chairman got restless in his chair and started inducing both sides to start discussions on the possible arrangements of a settlement. So I told the chairman that maybe we should first all agree on whether indeed dumping had gone on. However, that statement of mine was viewed as a little naive. The chairman responded by saying, "Well, you think you're big on all the invoices you've submitted, but wait until I send an inspector down to Sweden to investigate your cost of production." I said, "You can't do that." "Oh, yes I can," he retorted. I said, "You can't because under the regulation there has to be a 'particular market situation.'" Now, when you compare the market for

ferro-chrome in Sweden with the market in the EEC, it's quite comparable; we are not talking about an insignificant market. Yet less than ten days later, there was an inspector in Sweden for one day. He did not disclose his findings to the client or to myself, and some two weeks later a provisional duty was levied. I must say, as a partner in a law firm, I sometimes have trouble figuring out at what cost we are operating—although I am living in that partnership on a daily basis. So, I wonder how the Commission inspector in one day can find out the cost of production in a manner sufficiently precise for the Commission to base a duty on his findings.

Obviously, when Dr. Oldekop a few minutes ago talked about commercial policy and the policy elements, I had sympathy for his position. I would only change the word "policy" into "politics." Additionally, I would make the point that it is difficult to compare the situation in Europe and our new federal government—the Council of Ministers—with your own federal government, because the federal powers enjoyed by the Council of Ministers are of course extremely limited, and there are nine member states—some stronger than others—so you can imagine how difficult it can sometimes be to reach a compromise which satisfies both the bigger and the smaller countries.

The last point I would like to mention about the price assurance approach is that whenever United States companies are involved, they are extremely hesitant and reluctant even to envisage the possibility of entering into a price assurance because of United States antitrust considerations. The *Kraft Liner* case¹⁴ is one example. It's obviously not my role to say whether United States antitrust laws would apply to a unilateral undertaking. By way of example, let us say that I am a United States producer, that there is also a Canadian producer, and that I know the Commission is going to propose more or less the same terms to the Canadians as to myself, so that the only way out for me would be to view the Commission as more or less imposing a settlement! However, since it's a voluntary undertaking, I don't know how far the proposals of the Commission will help, legally speaking, with regard to the United States Antitrust Division.

The composite picture one gets when reading the texts of the four affirmative findings is rather limited. Unfortunately, they only state that the Commission has applied the antidumping regulation and has found dumping and injury to exist. It is a very cryptic, standardized version. It includes only three or four paragraphs for the dumping finding and about the same number of paragraphs for the injury finding. Once you have read one affirmative determination, you've read almost all of them.¹⁵

My first critical example is the case of *Roller Bearings from Japan*.¹⁶ It states both in the provisional and the final ruling, "In view of the many different types of bearings concerned, the price

comparison was made on the basis of a certain number of types representative of the price structure of the products concerned," without actually disclosing which types and prices had been compared. When I attended the hearing, the chairman wanted us to give him the export and home market prices for three very common types out of some 3,000 types that the Japanese were selling in the EEC. We ended up giving the data for only one of the three types. Yet on that basis, two weeks later, the provisional duty was imposed. And what's even more remarkable is that, for two of the four major producers of Japanese bearings, the duty was fixed at ten percent, and for all the others, the provisional duty was levied at twenty percent—again without any explanation for the difference in treatment. As a result, even the producers of miniature bearings going in watches or spacecraft had to post bond, because an across-the-board dumping duty was imposed rather than a floor price, so everybody was very much annoyed by this sudden measure.

Additionally, the Commission stated that in view of the close association between the Japanese exporters and the importers in Europe—they are, in fact, all affiliated companies—the Commission constructed the export prices on the basis of the first resale price to independent buyers, after making due allowance for costs and profits between importation and resale. But again, the information published by the Commission gives no indication whatsoever as to which amounts were subtracted from such independent resale prices as costs and profits, to be allocated to the previous level.

In the case of *Ferro-chrome from Sweden*,¹⁷ the Commission found that the domestic sales of the Swedish producer were relatively low compared to its total sales. Consequently, recourse was had to the criterion of cost of production. Nonetheless, the Commission didn't say what percentage of the sales of the Swedish producer were on the Swedish market. In any event, recourse to the third country price or to a cost of production test can only be had when there is a particular market situation.¹⁸ This requirement of the regulation was not followed, since as I said, prices and circumstances of sale in Sweden are completely comparable with those in the EC.

As to requirement of causality, the regulations published by the Commission hardly give any clue. In fact, in an article I recently had published, the printer managed to misprint what I had called the "causal" relationship—the printer turned that into the "casual" relationship.¹⁹ At first, I was very much upset about that misprint, but I thought afterward that that may be a good way of characterizing the kind of relationship that is involved.

Coming back to *Roller Bearings from Japan*,²⁰ the injury finding is completely silent about the impact of the economic recession which in those days was especially severe in the automobile sector, in view

of the oil crisis. By the same token, several bearing manufacturers had gone through considerable technological changes in their manufacturing process, which were certainly in part responsible for the layoffs claimed.

In another case, I retained a firm of economists to go through the statistics and put the impact of various other possible causes of injury in graphic form. At the hearing, I had the impression that both the Commission and the European producers found the flip charts I used very interesting, and since they were unable to refute the points made, the chairman said that they could respond in writing in a few weeks so that they would have time to think about the issues we raised. Yet, two or three weeks later a provisional duty was assessed, and we have never seen any attempt to respond to the beautiful charts and graphs plotted by the economists. As a practical lesson, I no longer suggest to clients that they go to all that very fine trouble, but rather that the help of a congressman might occasionally prove to be more effective.

You may wonder how all of these bitter ingredients are possible, despite the procedural safeguards built into the Antidumping Code. We have the right of access to the file, but the only thing one gets is the complaint, nothing about the follow-up and the processing of the complaint. For example, recall the investigation made on the spot during that one day in Sweden. If we don't get the results of that, what good does it do to have a right of access to the file? The same thing applies to the hearing. What good did it do our client when we presented those charts and graphs, and the chairman said (and the European producers agreed) that they would come up with answers to the points we made, if later on everybody remained silent? And we—can't refer back to a transcript of what transpired at the hearing, because there isn't any. So it's just our word against that of the other side.

As to the right of appeal, that issue is now pending before the Court of Justice; this is a very important point. I obviously disagree with the analysis made by the Commission representative that antidumping regulations, because of their legal form, are of a legislative or a rule-making rather than an adjudicatory nature. If you get an antidumping complaint in your hands, the first thing you'll see is that all the exporters—even very small ones—are mentioned, identified by name, corporate address, and so on. They get a questionnaire that may require disclosure of their past conduct, operations, and property. In my opinion, the analysis of past conduct is of an adjudicatory nature. In the provisional assessment of duties on bearings, the four major Japanese producers were in fact named in the regulation. Firms should not be deprived of their interest in operating under a given level of the customs tariff, without at least having had the opportunity to express their views on a more neutral platform. This is

not to say that I do not sympathize with the position of Commission administrators, but between the start of the investigation and the final proposal made by the Commission to the Council, it is always the same administrators who are working under fire throughout. And just as lawyers can get excited about their client's position, I presume that administrators—civil servants—may also start identifying the Commission's interests as the goals that they are representing.

DR. OLDEKOP

When I saw Mr. Van Bael pointedly sitting on the other side of the table, I knew that I had to brace myself. And when he was talking about smoke-filled rooms, I was wondering whether he wouldn't say that we had installed special torture chambers in the basement of the Berlaymont (EC Headquarters). It is impossible, of course, for me to respond in the short time available to all the criticisms and reproaches which have been made against our practice. Of course, Mr. Van Bael's position and point of view are determined by the position which he has had in cases *vis-à-vis* the Commission. It would be nice to have somebody on the part of the European industries on my side to help me in rebutting his criticisms.

Now I would just want to make a few comments on what Mr. Van Bael said. First of all, with regard to our practice of accepting price arrangements, that is something that is expressly provided for both by the Antidumping Code²¹ and by the EEC antidumping rules.²² It is a voluntary pricing arrangement, and nobody is forced to give a price undertaking. On the contrary, it says in our regulation, the fact that exporters do not offer to give an undertaking or do not accept an invitation made by the Commission to do so shall in no way be prejudicial to the outcome of the case²³—and it isn't. If somebody doesn't want to give a price undertaking, well then we just continue our investigation, and there is the possibility of getting judicial review. I'm coming to that point later on. And as to the argument that price undertakings reinforce inflation, well, I understand that it would be the best course of action from that point of view not to have price arrangements or antidumping duties. Of course, from the point of view of fighting inflation, that would—at least in the short run—be the best way to approach these problems. But it would not solve the problem of injury.

As to the *Ferro-chrome* example, I think it's sufficient to say that with regard to that product, measures have also been taken—as far as I understand, in the United States, and might also be taken in Japan—so that one can say that we weren't too far off the target when we took a look at the *Ferro-chrome* situation.

Moving on to the *Roller Bearings* case. That is one of the cases which is presently being considered by the Court of Justice in Luxembourg, and, therefore, I'm rather reserved about going into the details of that case. I just want to say that it is not correct that we based our calculations on only three types out of three thousand. We did, in fact, investigate thirty-six types, which were listed to a large extent by the Japanese enterprises themselves, and which cover—if I remember correctly—about 30 to 40 percent of their turnover. So I think that one cannot say that we have been arbitrary in that regard.

Now, with regard to across-the-board antidumping duties, as far as provisional antidumping duties are concerned, of course our evaluation of the facts with regard to dumping margins and to injury is preliminary. It has to be, because the Commission can be under terrific time pressure in these cases. If a member state requests immediate action to be taken by the Commission, the Commission has five days—five working days—to make up its mind about the imposition of a duty. And as far as final antidumping duties are concerned, our technique is to assess duties on a kind of an average. On the other hand, it is possible for the importers or exporters to claim refunds of antidumping duties when it is shown that the dumping margin of their particular imports was less than that which was established by the Community institutions.

The fact that our reasoning in our regulation does not go as far as the enterprises sometimes wish is due, as I said, to the fact that we consider these regulations to be general measures because in fact they do apply to all the importers of specific products. We feel that we are in complete compliance with the standards set up for general measures by the Court of Justice, and we feel that we cannot recite all of the considerations which we have gone through in the course of our investigations in the published reasoning of these regulations.

One more word on the question of legal remedies; as I said, we hold the opinion that a direct complaint to the Court of Justice against regulations by which we impose antidumping duties is not the correct way of attacking them. Our position corresponds, more or less, to the situation which prevails here in the United States. We feel that the correct way of attacking antidumping measures is before the courts of the member states—the member states who implement the antidumping measures imposed by the Community institutions. So an importer who thinks he has reason to complain should address himself to the national court, attacking the individual assessment of duties against his imports. There is the possibility that the national court—if it thinks that the regulation which imposed the antidumping duty is not in compliance with Community Law—can refer this case to the Court of Justice in Luxembourg (for a preliminary ruling under Article 177), which then may review the regulation. Apart from that, as I said,

there is the possibility of turning to the Commission and claiming a refund if an importer is not happy.

MR. VAN BAEL

As to price arrangements, the criticism I wanted to make—is that, in my experience, a number of exporters will not find it in their interest to fight the conclusion of the price arrangement, because who would object to selling at higher prices as long as the market would still allow them to sell their product?

Mr. Oldekop's comment about *Ferro-chrome* seems to be that if something is also going on in Japan and in the United States, they must have been right in Brussels as well. I would say that in the United States, our client happens to be opposing South African imports of ferro-chrome, and it's not an antidumping proceeding, as I understand—it's a countervailing duty procedure.

As to my comment that the Commission handed down the provisional decision on the *Japanese Roller Bearing* case on the basis of one price comparison out of three thousand, I assume that Mr. Oldekop is confused between the provisional decision and the final. I'm not disputing that between the provisional and the final decisions, the Commission inspectors did go to Japan and did do a more thorough check. But at the time the provisional across-the-board duty was set, only one type was known. I have it in writing in correspondence with Dr. Beseler, who heads the Commission staff in this area, and I presume that that piece is now before the court as part of the record. And don't forget that in the final ruling, the Council decided to collect the provisional duties levied, so was it really only a provisional decision? I feel that at the time the Commission handed down its provisional decision, it did not have adequate facts for reaching such a farfetched order covering so many producers other than the four major ones.

As to the reasoning of the four affirmative determinations, so far as being adequate or not, I would say that the record speaks for itself. And if you would, for instance, compare the provisional decision in the *Taiwanese Bicycle Chains* case with the *Japanese Roller Bearings* case, you would see that the injury finding is verbatim the same.²⁴ Now I know that customs people like to work with rubber stamps, and that it is easier to use forms, but as a lawyer interested in issues I find it rather discomfoting.

I would also say that the interest in having sufficient reasoning in decisions is not just my own, but is required by Article 6(h) of the GATT Code,²⁵ and the Treaty of Rome.²⁶ And just imagine how difficult it is for the business community, they have to function in the

market without adequate information on a difficult subject, and yet, very severe sanctions threaten their commercial operations.

Aside from the interest of the business community, I would also say that the Antidumping Code is an international obligation and I wonder, in light of Article 6(h) of the Code, what the EEC trading partners can say about the four determinations that the Commission and Council have handed down thus far. But all this is to show that it would be nice for the exporters concerned to get the feeling that they had their day in court and to see on what grounds they were sentenced. Moreover, the whole trading community should know whether the Code works as it was designed—that is, to punish unfair competition rather than to be only a means to negotiate settlements for which it was not designed.

NOTES

1. O. J. EUR. COMM. (No. C 108) 21 (1978).
2. Council Regulation (EEC) No. 459/68, 11 O. J. COMM. EUR. (No. L 93) 1 (1968), *as amended* by Council Regulation (EEC) No. 2011/73, 16 O. J. EUR. COMM. (No. L 206) 3 (1973), and by Council Regulation (EEC) No. 1411/77, 20 O. J. EUR. COMM. (No. L 160) 4 (1977), preamble, para. 5 [hereinafter cited as Antidumping Regulation].
3. *Id.* art. 14(1).
4. *Id.* art. 14(2).
5. *Id.* art. 17.
6. *Id.* art. 16(1).
7. *Id.* art. 16(2).
8. *Id.* art. 17(2).
9. *Id.* art. 15(1)a, 17(1).
10. *Id.* art. 10(2).
11. *Id.* art. 19(1).
12. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11, art. 189.
13. Ferro-chromium from Sweden (provisional duty imposed) Commission Regulation (EEC) No. 1355/78, 21 O. J. EUR. COMM. (No. L 165) 20 (1978), *extended*, Commission Regulation (EEC) No. 1682/78, 21 O. J. EUR. COMM. (No. L 193) 14 (1978).
14. Kraft Liner from U.S.A. (provisional duty imposed) Commission Regulation (EEC) No. 511/78, 21 O. J. EUR. COMM. (No. L 69) 9 (1978), *extended*, Council Regulation (EEC) No. 1226/78, 21 O. J. EUR. COMM. (No. L 153) 1 (1978) (definitive duty imposed) Council Regulation (EEC) No. 2133/78, 21 O. J. EUR. COMM. (No. L 247) 22 (1978) (exporters in the six other countries under investigation gave price assurances).
15. Cycle Chains from Taiwan, Commission Regulation (EEC) No. 2757/76, 19 O. J. EUR. COMM. (No. L 312) 41 (1976); Ball Bearings and Tapered Roller Bearings from Japan, Commission Regulation (EEC) No. 261/77, 20 O. J. EUR. COMM. (No. L 34) 60 (1977); Kraft Liner from U.S.A., Commission Regulation (EEC) No. 511/78, 21 O. J. EUR. COMM.

- (No. L 69) 9 (1978); Ferro-chromium from Sweden, Commission Regulation (EEC) No. 1355/78, 21 O. J. EUR. COMM. (No. L 165) 20 (1978).
16. Ball Bearings and Tapered Roller Bearings from Japan (provisional duty imposed) Commission Regulation (EEC) No. 261/77, 20 O. J. EUR. COMM. (No. L 34) 60 (1977), *extended*, Council Regulation (EEC) No. 994/77, 20 O. J. EUR. COMM. (No. L 112) 1 (1977) (definitive duty imposed) Council Regulation (EEC) No. 1778/77, 20 O. J. EUR. COMM. (No. L 196) 1 (1977).
17. Ferro-chromium from Sweden, *supra* note 13.
18. Antidumping Regulation, *supra* note 1, art. 3(2).
19. Van Bael, *The EEC Antidumping Rules—A Practical Approach*, 12 INT'L LAW. 523, 528 (1978).
20. Ball Bearings and Tapered Roller Bearings from Japan, *supra* note 15.
21. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *opened for signature* June 30, 1967, [1967] 19 U.S.T. 4348, T.I.A.S. No. 6431, 651 U.N.T.S. 320, art. 7.
22. Antidumping Regulation, *supra* note 1, art. 14(2).
23. *Id.* art. 14(2)(c).
24. *Supra* note 15.
25. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *supra* note 20, art. 6(h).
26. Treaty Establishing the European Economic Community, *supra* note 11, art. 190.