# OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 8 February 1990 *

*Mr President,*
*Members of the Court,*

1. This reference for a preliminary ruling under Article 177 of the EEC Treaty from the tribunale di Genova (District Court, Genoa) in the case pending before that court between Cartorobica SpA and the Italian Ministry of Finance is concerned with the validity and the interpretation of Council Regulation (EEC) No 551/83 of 8 March 1983 [1] imposing a definitive anti-dumping duty on kraftliner paper and board originating in the United States of America and accepting undertakings given in connection with the review of the anti-dumping proceeding on kraftliner paper and board originating in Austria, Canada, Finland, Portugal, the Soviet Union and Sweden.

2. Regulation No 551/83 is based on Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community, [2] as amended by Regulation No 1580/82. [3]

Regulation No 3017/79 was in turn adopted by the Community pursuant to Article VI of the General Agreement on Tariffs and Trade (GATT) and to the Agreement on Implementation of that article [4] (hereinafter referred to as 'the 1979 Anti-Dumping Code').

3. The facts may be summarized very briefly. In September 1985 and April 1986 Cartorobica imported kraftliner paper and board from the United States without paying the anti-dumping duty imposed by Regulation No 551/83. On 19 June 1987 the Italian Finance Ministry served on the company a demand for the payment of a total of LIT 13 481 060. However, Cartorobica challenged the demand for payment on the ground in particular that the Community regulation imposing the duty was unlawful.

The tribunale di Genova, before which the action was brought, stayed the proceedings and referred three questions to the Court for a preliminary ruling.

4. The national court's first question concerns the validity of Article 2(1) of Regulation No 551/83, which provides that the amount of duty is to correspond to the difference between the normal value in the United States of America, determined in accordance with Article 2(2), and the free-

* Original language: Italian.

1 — OJ L 64, p. 25.

2 — OJ 1979, L 339, p. 1. In the period during which Regulation No 551/83 was in force, Regulation (EEC) No 3017/79 was replaced by Regulation No 2176/84 (OJ 1984, L 201, p. 1), as amended by Regulation No 1761/87 (OJ 1987, L 167, p. 9). The basic rules in the field of anti-dumping are now laid down in Regulation No 2423/88 (OJ 1988, L 209, p. 1).

3 — OJ 1982, L 178, p. 9.

4 — OJ L 71, 17.3.1980, p. 90.

at-frontier Community price, duty-unpaid, per tonne net to the first purchaser in the customs territory of the Community.

5. There are in fact two distinct aspects to that question, as, moreover, emerges even more clearly from Cartorobica's written observations.

6. On the one hand, it is argued that Article 2(1) of Regulation No 551/83 is invalid because the basic regulation and the 1979 Anti-Dumping Code do not permit the Community institutions to adopt such a variable duty — based on the difference between a specific basic value fixed beforehand and the price actually paid for the imported goods — which is especially affected by currency fluctuations.

7. On the other hand, it is claimed that the provision is unlawful because, as a result, the Community institutions delegated the task of determining the amount of the duty to the national customs authorities, without having previously established sufficiently precisely the reference criteria for calculating the price of the goods. Instead they merely referred to the vague and imprecise concept of the free-at-frontier price, thus creating a serious risk that the duty will not be applied uniformly throughout the Community.

8. With regard to the first aspect, let me say straight away that neither the basic regulation nor the 1979 Anti-Dumping Code contains any provision or principle prohibiting the Community institutions from adopting a variable duty such as the one provided for in Regulation No 551/83.

9. It is plain from the reference made by the national court to some of the provisions of the basic regulation and from Cartorobica's written observations that the question referred is in fact based on a misinterpretation of that regulation.

It is claimed that Regulation No 3017/79, and in particular Article 2(9) and (13), conferred on the Community institutions alone the power to determine both the normal value of the goods in question in the exporting country and the export price of the goods to the Community and that the task of the national customs authorities must be confined to converting the duty expressed in ecus into the national currency.

It is argued that that provision is intended both to avoid discrimination caused by external factors and to prevent distortions due to the exercise by the national authorities of a discretionary power which is not sufficiently circumscribed by the Community legislation.

Because such a 'normal' method of calculation is already laid down, it follows that the use of alternative methods not explicitly provided for is precluded.

10. However, closer consideration of the basic regulation reveals that it contains a somewhat different scheme.

The abovementioned provisions — and Article 2(6) of the 1979 Anti-Dumping Code, which is also cited — refer in fact to the criteria which the Community institutions must apply for the purposes of calculating the dumping margin during the investigation prior to the decision to impose the duty, and not to the type of duty to be

imposed. The type of duty is governed by Article 13 of Regulation No 3017/79, paragraph 2 of which merely provides that regulations imposing anti-dumping duties are to indicate *inter alia* the type of duty imposed. Regulation No 3017/79 does not contain any further provisions in that regard.

11. Moreover, Article 8(4) of the 1979 Anti-Dumping Code makes express provision for the possibility of applying a system of variable duties based on establishing a basic price, a possibility also provided for in Article 8(d) of the previous 1968 Anti-Dumping Code.

12. That is the applicable legislation; it should be pointed out that in practice the Community institutions employ essentially three types of anti-dumping duty, namely specific duties, *ad valorem* duties and variable duties, each of which has advantages and disadvantages.

13. Specific duties, consisting of a fixed amount of duty per unit of goods imported, and *ad valorem* duties, which are fixed as a percentage of the price of the goods at the Community frontier, have the advantage of being easier to apply and more difficult to evade. However, they lack flexibility. In order to take account of any variations in the price of the goods in question the regulation imposing the duty must be amended using the review procedure.

14. That disadvantage can be overcome by using variable duties the amount of which corresponds to the difference between the import price and a fixed amount commonly referred to as the minimum price or the normal or basic value.

The use of a such duty by the Community institutions is by no means uncommon.[5] Even though a variable duty is more difficult to apply, it has the advantage of encouraging exporters to raise prices and thereby contributes more effectively to stabilizing the market in the goods in question.

15. Moreover, I should add that all three types of duty are affected by currency fluctuations to some extent, albeit to varying degrees.

16. As a result, I agree with the view recently expressed by Mr Advocate General Van Gerven — with regard precisely to the lawfulness of using a variable duty — to the effect that, having regard to the applicable legislation, the institutions may adopt the anti-dumping measures in the form which appears to them to be most suitable for removing the injury caused by the dumping.[6] Consequently, I consider that the first of the grounds for the alleged unlawfulness of Article 2(1) of Regulation No 551/88 is unfounded.

17. The second ground for maintaining that Article 2(1) of Regulation No 551/83 is invalid is unfounded, as I have already stated, on the fact that that provision refers

5 — See Council Regulation (EEC) No 864/87 (OJ 1987, L 83, p. 1), Council Regulation (EEC) No 338/86 (OJ 1986, L 40, p. 25), Council Regulation (EEC) No 2370/83 (OJ 1983, L 228, p. 28) and Commission Regulation (EEC) No 3542/82 (OJ 1982, L 371, p. 25).

6 — See the Opinion delivered at the hearing of 8 November 1989 in Joined Cases 304/86 and 185/87, 305/86 and 160/87, 320/86 and 188/87 and in Case 157/87, respectively, [1990] ECR I-2976, paragraph 39. It should be pointed out that even if the regulation at issue in the abovementioned cases was based on the subsequent basic regulation, Regulation No 2176/84, the legal background was, for present purposes, entirely analogous.

to the concept of the free-at-frontier price. Because that concept is general in nature and, unlike the concept of customs value, not determined by detailed rules,[7] it does not guarantee that the duty will be imposed uniformly by the various customs authorities.

18. It should be pointed out first of all in that connection that the net free-at-frontier Community price is in fact a sufficiently clear concept for international traders. It is used quite simply to refer to the price of the goods on leaving the factory plus all the costs incurred before the Community frontier is crossed.

19. Moreover, the Commission has made it clear that it has gradually stopped referring to customs value in anti-dumping regulations and tends to use the different concept of the net free-at-frontier price, for two main reasons: firstly, it is easier to apply because reference to the net free-at-frontier price obviates the necessity for customs authorities to have to perform calculations which take account of complex commercial variables, as is required under the customs legislation on customs value; secondly, the need to ensure that reference is made to uniform values, given that anti-dumping duties are usually calculated by expressing the dumping margin and the injury threshold as percentages of the net free-at-frontier price.

It should also be pointed out that reference to uniform values is more likely to ensure that the amount of the duties does not exceed the dumping margin and should be less if such lesser duty would be adequate to remove the injury, as is required under Article 13(3) of Regulation No 3017/79.

20. It should also be emphasized that the Community institutions normally refer to that concept even when they impose *ad valorem* duties which are determined as a percentage of the free-at-frontier price.

21. Moreover, as against considerable litigation concerning customs value, no question relating to the application of the concept of the net free-at-frontier price in the field of anti-dumping has yet been referred to the Court of Justice, which would seem to provide further support for the Commission's argument that the net free-at-frontier price is easier to apply.

Moreover, it is evident that if a question of that kind should arise before a court of a Member State, that court can in any event apply to the Court of Justice for clarification, thereby ensuring that the legislation in question is applied uniformly.

22. In conclusion, it should therefore be stated that, in the absence of any provision to the contrary in Regulation No 3017/79, there is nothing to stop the Community institutions making reference to the concept of the net free-at-frontier price for the purposes of imposing anti-dumping duties.

23. The national court's second question is whether Regulation No 551/83 is invalid in

7 — See Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980, L 134, p. 1).

so far as it fixes the amount of the threshold price, which is to be used to calculate the anti-dumping duty, in US dollars and not in ecus, thereby using as a reference criterion a currency whose fluctuations are beyond the control of the Community institutions.

24. In this regard, it must be pointed out in the first place that, contrary to what is suggested by the wording of the question, while the Community institutions have no control over movements of the dollar, the situation is no different as regards the exchange rate of the ecu.

25. Moreover, even though, as the Commission acknowledges, the Community institutions tend to give preference to the use of the ecu, Community law as it currently stands does not require them to do so and Regulation No 551/83 is not an isolated case of the use of other currencies such as, for example, the United States dollar. [8]

In the present case the dollar was used because the production costs of US producers were expressed in that currency and the export prices themselves were expressed, in many cases, in US dollars.

26. Nor is it of any consequence that in the proposal of 28 July 1987 for a regulation to replace Regulation No 551/83 the Commission determined the threshold prices in ecus.

The abovementioned proposal — which, moreover, was not even adopted by the Council — was submitted more than four years after the adoption of Regulation No 551/83. The fact that, in the light of experience and of changed circumstances, the Commission decided to use the ecu as the reference currency is therefore entirely understandable and it is not possible to infer that the previous choice was necessarily unjustified or unlawful.

27. In fact, the argument put forward by Cartorobica in its written observations is the product of *ex post facto* reasoning. It claims that as the use of the US dollar as the reference currency resulted in distortion of competition (favouring traders in countries with strong currencies) due to subsequent currency fluctuations, Regulation No 551/83 is invalid because it infringed the prohibition on discrimination.

Leaving aside the question of the accuracy of Cartorobica's calculations of the damage suffered by Italian importers, the reply to that argument is simply that even if the Council had used the ecu, that would not necessarily have afforded traders protection against distortions due to external factors such as, for example, exchange-rate fluctuations. That is particularly so given that in point of fact the distortion complained of is due, not to fluctuations in the dollar, but to the change in the relative exchange rates of the currencies of Member States.

8 — See Council Regulation (EEC) No 191/80 (OJ 1980, L 23, p. 19) and Council Regulation (EEC) No 407/80 (OJ 1980, L 48, p. 1).

28. At this point it seems to me to be necessary to make — albeit very briefly — a number of more general observations on the influence which a change in circumstances may have on trade protection measures.

In so far as regulations which impose anti-dumping duties freeze a situation at a given moment in time, and in the light of certain circumstances, they may turn out to be inadequate and to need adjustment if the economic context changes, not only with regard to exchange rates but also in relation to other factors, irrespective of the type of duty imposed or the currency used as a reference.

However, it obviously does not follow that the relevant regulation is invalid because the circumstances taken into account at the time when it was adopted have changed. The basic regulation itself makes provision for steps which may be taken to deal with such a situation; not only can the regulation be reviewed at the request of a Member State or on the initiative of the Commission (Article 14 of Regulation No 3017/79) but an importer can apply for amounts paid in excess to be refunded if he can show that the duty collected exceeds the actual dumping margin (Article 15 of Regulation No 3017/79).[9]

29. I would add, incidentally, that Cartorobica's claim that the Commission rejected, without good reason, an application for a review of Regulation No 551/83, is of no relevance in this case. The applicants, of which Cartorobica was not one, should possibly have challenged the Commission's refusal. Moreover, a refusal to review a measure, albeit possibly unjustified, does not necessarily cause the measure itself to be invalid.

30. I shall not dwell on the third question referred by the national court, which concerns the exchange rate to be used in order to convert the basic value into the currency of the importing Member State, since, in my view, the answer to that question is sufficiently clear from simply reading the relevant provisions.

In the absence of specific provisions in Regulation No 551/83, the provisions in force relating to customs duties are to apply, as referred to in the second paragraph of Article 1 of Regulation No 551/83.

Under those provisions, in particular Article 9 and Article 1(1)(g) of Regulation (EEC) No 1224/80, the exchange rate to be used is, as a general rule, the rate in force at the date of acceptance by the customs authorities of the declarant's statement of his intention that the goods should enter into free circulation.

9 — Similar provisions are contained in the subsequent basic regulations referred to in footnote 2.

31. In the light of the foregoing considerations, I therefore suggest that the Court should rule that consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Council Regulation (EEC) No 551/83 and that that regulation must be interpreted as meaning that the minimum prices laid down in US dollars in Article 2 must be converted into the currency of the importing Member State at the exchange rate applicable at the time the goods enter into free circulation.