OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 7 February 1991 *

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Mr President,
Members of the Court,

I — General

1. In the present action the Saudi Arabian companies Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company (hereinafter referred to as 'the applicants') seek a declaration that Article 1 of Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia [1] is void in so far as it concerns them.

2. The applicant companies are joint ventures with a common shareholder, Saudi Basic Industries Corporation, a company set up in 1976 by the Saudi Government. According to the applicants their first exports of urea to the Community began in 1985. From May 1986 onwards the applicants chose to stop exporting urea in order not to expose themselves to the falling prices on the Community market.

1 — OJ 1987 L 317, p. 1.

3. The relevant facts may be summarized as follows. On 11 November 1986 the Commission initiated an anti-dumping proceeding [2] concerning imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago, and Yugoslavia. On 8 May 1987 it adopted a regulation imposing a provisional anti-dumping duty on those imports. [3] The duty was 'equal to the amount by which the price per tonne net, free-at-Community-frontier, before duty, is less than ECU 133'. [4] It was extended for a period not exceeding two months by Council Regulation (EEC) No 2691/87 of 3 September 1987. [5]

4. On 4 November 1987 the Council adopted Regulation No 3339/87, which imposed definitive anti-dumping duties of 40% on imports from Saudi Arabia and 34% on imports from Libya, and accepted the undertakings given by the firms in the other non-member countries affected by the proceeding. It is this regulation which is the subject of the present action.

5. It should be added that Council Regulation (EEC) No 450/89 of 20 February 1989, [6] which is the subject of an action for annulment in Case C-193/89, reduced the amount of the duty on imports of urea from Saudi Arabia to 12.8%. [7]

6. In support of their action the applicants put forward four submissions, alleging in turn the denial of their right to a fair hearing, an inadequate statement of reasons, manifest errors of appraisal and, lastly, errors of law and distortion of the facts. It should be noted that the first submission includes two complaints about the refusal of the Community institutions to grant certain allowances, and this refusal is also the subject of the fourth submission.

7. I propose to defer to the end the question of the denial of the right to a fair hearing, since the problems involved — the importance of which need hardly be emphasized — has not so far attracted, in the context of dumping, the lengthy consideration by the Court and by legal commentators which may be observed in the domain of competition law. The issue therefore warrants further enlargement on my part.

II — Inadequacy of the reasons given

8. The second submission consists of a single complaint. The applicants accuse the Council of failing to provide an adequate statement of reasons for having replaced the provisional anti-dumping duty fixed by reference to a threshold price with a definitive *ad valorem* duty.

2 — OJ 1986 C 254, p. 3.

3 — Commission Regulation (EEC) No 1289/87 of 8 May 1987 imposing a provisional anti-dumping duty on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago, and Yugoslavia (OJ 1987 L 121, p. 11).

4 — Article 1(2) of Regulation No 1289/87.

5 — Council Regulation No 2691/87 extending the provisional anti-dumping duty imposed on imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago, and Yugoslavia (OJ 1987 L 254, p. 20).

6 — Imposing a definitive anti-dumping duty on imports of urea originating in the United States of America or Venezuela and adjusting the definitive anti-dumping duty for Saudi Arabia laid down by Regulation (EEC) No 3339/87 (OJ 1989 L 52, p. 1).

7 — Article 2.

9. The preamble to the contested regulation contains no recital on that specific point. The Council and the Commission contend, however, that there is no cause to give reasons for the change in the method of calculating the anti-dumping duty, and stress that the provisional duty and the definitive duty are independent.

10. It is true that the former is adopted by the Commission and the latter by the Council. In my view, the independence of the two duties is expressed in particular in Article 12(2)(a) of the basic regulation,[8] which provides that 'where a provisional duty has been applied, the Council shall decide, irrespective of whether a definitive anti-dumping duty or countervailing duty is duly imposed, what proportion of the provisional duty is to be definitively collected'. Nothing therefore precludes the collection of the provisional anti-dumping duty where no definitive duty has been imposed, as indeed was the case for exporters in Czechoslovakia, the German Democratic Republic, Kuwait and the Soviet Union.[9]

11. It may also be recalled — without dwelling on the point — that the definitive anti-dumping duty is not a correction or a revision of the provisional duty. The only connection between the two relates to the amount of the duty definitively collected, which may not exceed the amount provisionally estimated or the injury suffered by Community industry.[10]

8 — At that time, Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 19).

9 — Article 3(2) of the contested regulation.

10 — See Article 13(3) of the basic regulation.

12. Indeed, it is evident from the case-law of the Court that the Community institutions enjoy a wide discretionary power to determine, in each case, the 'type of duty' best suited to affording protection against dumped imports.[11] On the other hand, the Court has never held that, in choosing the method of calculating the definitive duty, the Council had to take account of the assessment made by the Commission when establishing the provisional duty, or *a fortiori* that it was obliged to give reasons for departing from that method of calculation. Accordingly, the requirement of a statement of reasons as laid down in Article 190 of the EEC Treaty cannot apply to the difference between the method of calculation used by the Council for the definitive duty and the method adopted by the Commission for the provisional duty. The second submission challenging the regulation cannot therefore be accepted.

13. Furthermore, the Council states in its defence that adequate reasons for both the principle of imposing a definitive anti-dumping duty and the amount of that duty are given at recitals 44 and 45 of the preamble to the contested regulation. I shall merely note that the applicants do not take issue with that point.

III — Manifest error of appraisal

14. The third submission calls for an assessment of the *substantive legality* of the

11 — Judgment of 27 March 1990 in Case C-189/88 *Cartorobica* v *Ministero delle Finanze* ([1990] ECR I-1269, at paragraph 25), which deals with the identical provisions of Article 13 of 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 (OJ 1979 L 339, p. 1) — the basic regulation in force at the time; see also the judgment of 11 July 1990 in Case C-305/86 *Neotype* v *Council* ([1990] ECR I-2945, at paragraph 58).

contested regulation. The submission refers to the presence of manifest errors of appraisal in the adoption of the definitive anti-dumping duty on Saudi Arabian imports. It comprises four heads of complaint.

15. The first alleges that the relatively high definitive anti-dumping duty on urea from Saudi Arabia is at odds with the evidence. The applicants maintain that, according to Eurostat import statistics for 1986 and 1987, Saudi Arabian urea was priced higher than urea from other non-member countries, imports from which were subjected to lower anti-dumping duties. Similarly, the complaint filed by the European industry showed a greater margin of price undercutting for imports from the other non-member countries affected by the enquiry than for Saudi Arabian imports. Lastly, the answers to the Commission's questionnaire clearly show that Libyan urea was priced lower than urea from Saudi Arabia.

16. It is true that the broad logic of the anti-dumping provisions is to identify imports suspected of being dumped by taking into account — initially at least — the situation on both the domestic market and the market for exports to the Community in the non-member country concerned.[12] Moreover, in view of the fact that production costs in particular may vary widely from one non-member country to another, the fact that the export prices charged by an undertaking in one of those countries are lower than those of an undertaking established in another non-member country in no way rules out the possibility that the second undertaking may be using a larger dumping margin.

17. Nevertheless, since the amount of the duty is determined not by reference to the dumping margin but in terms of the injury suffered by the Community industry, the Community institutions must fairly ascertain the amount of the duty by comparing the export prices of the relevant undertakings in the non-member countries and the threshold of injury. That requirement may be clearly inferred from Article 13(5) of the basic regulation, which prohibits discrimination in the imposition of anti -dumping duty when a product is imported into the Community from more than one country.

18. The amount of the definitive anti-dumping duty on imports from Libya was fixed in Article 1(2) of the contested regulation at 34%. The replies to the questionnaire given by two Italian importers,[13] on the other hand, show that as far as they were concerned the prices charged on the Community market for Libyan urea were considerably lower than those for Saudi Arabian urea.[14] As we have seen, the applicants also point to the Eurostat statistics and the figures regarding price undercutting which appear in the anti-dumping complaint.

12 — The Court has recently restated what is meant by 'dumping', in its judgment of 11 July 1990 in Case C-157/87 *Electroimpex and Others* v *Council* [1990] ECR 3021, at paragraphs 21 and 22

13 — Annex 12 to the application.

14 — Cereal Toscana SpA paid USD 118 (C&F price) for Saudi Arabian urea and USD 82 (C&F price) for Libyan urea, whilst Attilio Cormagni 'AC' SpA shows prices of USD 84, 78, 75 and 69 in respect of Libyan urea

19. The Council contends that the data supplied by the two Italian importers are extremely limited and that the definitive duty was quantified by calculating an average export price for the entire reference period for each of the non-member countries covered by the investigation. The Council further argues that Eurostat statistics are not reliable, although it concedes that they were used for determining the Libyan prices in the absence of any other information.

20. However, in view of its case-law, the Court will certainly not need to give a ruling as to whether or not there is discrimination, or to choose between the one-sided but disturbing evidence put forward by the applicants and the very general answers given by the Council. In the field of dumping the Court has previously refused to declare void a regulation imposing definitive duties notwithstanding proof that a company affected by another decision had enjoyed more favourable treatment, on the grounds that only the first regulation was the subject of an action and that it had been adopted on the basis of findings correctly made in the course of the anti-dumping investigation and in accordance with the provisions of the basic regulation. [15]

21. The applicants in those cases pleaded discrimination on the grounds that

'the anti-dumping proceeding concerning the importation of electronic typewriters manufactured by Nakajima subsequently led to the adoption of Commission Decision 86/34/EEC [16] of 12 February 1986 ... which established that Nakajima's dumping margin was to be regarded as insignificant'. [17]

The Court held, in that regard, that

'since Nakajima's exclusion from the number of companies subject to a definitive anti-dumping duty stems from that decision, discrimination in favour of Nakajima could not, even if it were established, lead to the annulment of the regulation imposing a definitive anti-dumping duty on Sharp, which was adopted on the basis of findings correctly made in the course of the anti-dumping investigation and in accordance with the rules laid down by Regulation No 2176/84'. [18]

22. As the Advocate General, Sir Gordon Slynn, pointed out at the time in his Opinion in the Sharp Corporation case,

'If an exporter is dumping, it is dumping, and it cannot exculpate itself by pointing to another exporter which may or may not be dumping'. [19]

23. It must therefore be concluded that, even if discrimination between imports from Libya and imports from Saudi Arabia were established, such discrimination could at most call in question the anti-dumping duty

15 — Judgment of 5 October 1988 in Case 301/85 *Sharp Corporation* v *Council* [1988] ECR 5813, at paragraph 22; judgment of 5 october 1988 in Joined Cases 260/85 and 106/86 *TEC* v *Council* [1988] ECR 5855, at paragraph 18; judgment of 5 October 1988 in Joined Cases 273/85 and 107/86 *Silver Seiko* v *Council* [1988] ECR 5927, at paragraph 55.

16 — The decision closing the proceeding.

17 — Case 301/85, cited above, at paragraph 21; see also Joined Cases 273/85 and 107/86, cited above, at paragraph 54.

18 — Case 301/85, cited above, at paragraph 22; see also Joined Cases 260/85 and 106/86, cited above, at paragraph 18; and Joined Cases 273/85 and 107/86, cited above, at paragraph 55.

19 — [1988] ECR 5844; see also his Opinion in the *TEC* case, [1988] ECR 5894.

on Libyan imports, to the extent that they had enjoyed an unjustified preference, but could not lead to the annulment of Regulation No 3339/87 to the extent that it applies to Saudi Arabian imports, in as far as it was adopted on the basis of findings correctly made and in accordance with the basic regulation. [20]

24. The first complaint contained in the submission cannot therefore be upheld.

25. The second criticism concerns the failure to extend the investigation to imports from Canada. The applicants point out that they informed [21] the Commission that Canadian urea was imported at an average price ECU 5.7 per tonne lower than the average import price from Saudi Arabia. Recital 36 in the preamble to the contested regulation deals with that difficulty: 'As to imports from third countries not involved in these proceedings which took place prior to the initiation of these proceedings, the Commission examined the shares held by each of these exporting countries on the Community market, on the basis of the *prima facie* evidence submitted by the complainants. It was found that these countries did not hold market shares important enough to contribute significantly to the alleged injury . . . '.

26. The Council explains that the Commission did not wish to extend the investigation to imports from Canada because, first, they were not mentioned in the complaint and, secondly, they amounted in volume to only 0.7% of the Community market in urea. It should be recalled that, as a letter of the Commission dated 13 August 1987 [22] shows, the market share of Saudi Arabian firms in the Community was 3.11% for the first nine months of 1987.

27. We are dealing here merely with another allegation of discrimination. The applicants are taking issue with the supposedly very favourable treatment given to imports from Canada. However, the judgments cited above render that complaint immaterial. It is, incidentally, appropriate to point out the strong similarity, as to the issues involved, between the *Sharp Corporation*, *TEC* and *Silver Seiko* cases and the present proceedings. In those cases the dispute related to the termination of the anti-dumping proceeding in so far as it concerned Nakajima on the ground that its dumping margin was negligible, whilst here criticism is directed at the failure to include Canadian imports in the investigation on the grounds that their market shares were not significant.

28. Thus the second head of criticism, too, is bound to fail, without there being any need to consider whether the market shares of the Canadian firms were in fact negligible. [23]

20 — It may further be noted that the Court has held that 'a regulation imposing different anti-dumping duties of a series of traders is of direct concern to any one of them only in respect of those provisions which impose on that trader a specific anti-dumping duty and determine the amount thereof, and not in respect of those provisions which impose anti-dumping duties on other undertakings' judgment of 14 March 1990 in Case C-156/87 *Gestetner v Council and Commission* [1990] ECR 781, at paragraph 12; this would render inadmissibile any claim by the applicants, in this action for annulment, challenging the regulation in its imposition of an anti-dumping duty on imports from Libya.

21 — By letter of 11 March 1987 (Annex 13 to the application).

22 — Annex 9 to the application.

23 — In previous judgments, incidentally, the Court has not attached a decisive value to the criterion of a small market share; in its judgment of 5 October 1988 in Joined Cases 294/86 and 77/87 *Technointorg v Commission and Council* [1988] ECR 6077, at paragraph 41, the Court held that it was in conformity with the basic regulation for account to be taken of the effect of all the imports on Community industry, and consequently for appropriate measures to be adopted in respect of all exporters, even if the volume of exports of any one of them, taken in isolation, is insubstantial.

29. In the third complaint the applicants claim that inadequate account was taken of the declining production costs of the Community industry. It is not denied that those costs did decline in the course of the reference period, by 16% in Italy, 31% in France and 20.4% in Ireland for the first nine months of 1986 as compared with the previous year.[24] Specifically, the applicants criticize the Commission's use of an average of those production costs during the investigation period, inasmuch as such a method produces, at the end of that period, a higher average cost than the production cost observable at the time, and hence a higher anti-dumping duty than was necessary to remove the injury. It is alleged that the Community institutions, by acting in that manner, infringed the provisions of Article 13(3) of the basic regulation.

30. According to the Council that decline in production costs relates, in each of the countries concerned, merely to a single producer and occurred after the costs had risen appreciably the previous year. Moreover, the production costs in other Member States, in particular the United Kingdom, had remained stable or had risen.

31. Recital 32 in the preamble to the contested regulation also contains a great deal of information about the national producer in the United Kingdom, whose costs of production (per unit) in 1985 were 15% higher than in 1984 and remained relatively stable during the first nine months of 1986, and about the sole domestic producer in Ireland, whose production costs rose by 41.6% between 1984 and 1985. Similarly, recital 31 in the preamble to Regulation No 1289/87 imposing the provisional anti-dumping duties states that the production costs per unit of one of the two Italian producers were 15% higher in 1985 than in 1984, whereas the average net sales price decreased by approximately 2% during the same period. On the other hand, whilst the costs of production per unit actually decreased by 16% during the first nine months of 1985 as compared with the first nine months of the previous year, the average net price per unit after discount had fallen by 27%. According to recital 32 in the same regulation, the average production costs of one of the French producers at its plant remained practically stable whereas the French producer whose production costs effectively decreased by 31% incurred a fall in profits of approximately 83%.

32. In any event, the main difficulty appears to lie in establishing *the period* during which the level of the injury suffered by the Community industry is to be assessed. The applicants interpret Article 13(3) of the basic regulation, under which 'the amount of [the duty] ... should be less if such lesser duty would be adequate to remove the injury' as necessarily requiring the threshold of injury to be established *at the time of the imposition of the duties.* The Council, on the other hand, contends that the threshold of injury is to be calculated by reference to the injury suffered *during the investigation period* rather than to the injury as ascertained at the time of the imposition of the anti-dumping duties.

24 — Paragraph 66 of the application; see also recitals 31 and 32 in the preamble to Regulation No 1289/87 and recital 32 in the preamble to Regulation No 3339/87.

33. Consideration of Article 4 of the basic regulation leads me to believe that the Council's view is the only acceptable one. The rules laid down by Article 4 require *inter alia* an examination not only of the volume and prices of the dumped imports (the volume and prices of non-dumped imports or contraction in demand being excluded, as far as their effects are concerned, from the determination of the injury) but also of the resultant impact on the Community industry concerned. That examination can only be conducted at the same time as the examination to determine the dumping margin. That is, indeed, what Article 7(1)(c) of the basic regulation *expressly* requires when providing that the investigation, which must normally cover a period of not less than six months immediately prior to the initiation of the proceeding, 'shall cover both dumping ... *and injury resulting therefrom*'.[25] The view put forward by the applicants is therefore directly at odds with the provisions of the basic regulation. It also conflicts with the provisions of the Second GATT Anti-Dumping Code, Article 5(2) of which specifies that 'the evidence of both dumping and injury shall be considered simultaneously ... during the course of the investigation ...'.

34. Moreover, the solution advocated by the applicants would entail a considerable risk of fraudulent practices. Once they were aware of the commencement of an anti-dumping investigation, exporters in the non-member countries concerned would then be at liberty to raise their export price levels — if only temporarily — so as to forestall not only the finding that dumping had occurred but also the finding as to the extent of the injury suffered by the Community industry, which would for a time be able to recover the market shares it had recently lost.

35. The Court has, indeed, already dismissed that possibility in its judgment in *Toyo* v *Council*,[26] in which it held as follows:

'Regulation No 3107/79[27] makes no provision for the taking into account of voluntary price increases made after the period covered by the investigation. The decision-making process includes an investigation, the initiation and course of which are governed by Article 7. By allowing interested parties to make known their views, the investigation is intended to allow the establishment of incontrovertible evidence providing a basis for the termination of the proceeding or the imposition of an anti-dumping duty. It is, at the same time, clear from the 14th and 15th recitals in the preamble to the regulation that the investigation procedure should not prevent rapid and efficient action by the Community. In order to reconcile those two objectives, it is essential that the period covered by the investigation, during which the facts to be established occurred, should be of specified and limited duration.'[28]

The Court concluded that:

'With regard to NTN's claim that Articles 2A and 13 of Regulation No 3017/79, which link the imposition of an anti-dumping duty to the existence of injury,

25 — Emphasis supplied.

26 — Judgment of 7 May 1987 in Case 240/84 [1987] ECR 1809.

27 — The basic regulation in force at the time.

28 — Paragraph 26.

were infringed, it should be noted that price increases decided upon after the end of the period covered by the investigation may, where appropriate, give rise to a review pursuant to Article 14 of that regulation or result in the refunding of the duty collected, in accordance with Article 15 thereof. It is therefore impossible to accept that the anti-dumping proceeding may not be terminated or a decision to impose a definitive anti-dumping (duty) may not be adopted merely because the companies which are subject to the provisional anti-dumping duty have made voluntary price increases after the end of the period covered by the investigation.' [29]

36. As Mr Advocate General Mancini noted in his Opinion [30] in the *Toyo* case,

'There is nothing in Regulation No 3017/79 which requires the Commission or the Council to take account of exporters' price increases. ... it is not unusual ... for an exporter who is under investigation or whose goods are subject to a provisional anti-dumping duty to increase his sales price, especially when the importer is related to the exporter. In any event, it seems clear to me that, if the applicants' argument were to be upheld, it would lead to the establishment of a permanent system of investigation and, even worse, deprive any attempt to establish the existence of a dumping margin of any possibility of success.'

37. Those reasons are valid in respect not only of the export prices but also of the production costs of the Community industry. The argument put forward by the applicants that exporters in non-member countries have no control over production costs is irrelevant. Although they cannot, of course, control those costs in the way that they control the level of their export prices, the fact remains that their conduct as traders, and in particular their pricing policy after the end of the investigation period, may temporarily alter the extent of the injury suffered by the Community producers, as those producers recover for a while the market shares lost on account of dumped imports.

38. The moment at which the injury to the Community industry must be assessed and the obligation to disregard events occurring after the investigation period are, of course, two closely linked factors. It follows that only the calculation of the average production costs *during the investigation period* meets the requirements of the anti-dumping provisions. That complaint, too, must therefore be rejected.

39. Admittedly, as was observed above, Regulation (EEC) No 450/89 reduced the definitive anti-dumping duty on imports of urea originating in Saudi Arabia to 12.8%. [31] The investigation period for that proceeding, from 1 October 1986 to 30 September 1987, follows immediately the period under review in the contested regulation, which ran from 1 July 1985 to 30 September 1986. Recital 29 in the preamble

29 — Paragraph 27; see also the similar wording of paragraphs 52 and 53 of the judgment of 7 May 1987 in Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923.

30 — [1987] ECR 1847.

31 — Article 2.

to Regulation No 450/89 states that 'review of those measures led the Commission to recalculate the definitive anti-dumping duty for Saudi Arabia on the basis of the new threshold of injury determined in this proceeding, with a view to taking account of changes in the costs of production of the representative Community producer'. None the less, in view of the marked changes in production costs recorded during 1984 and 1985 (for example a decrease of 31% in the production costs of a French producer) which were pointed out above, there is nothing *a priori* abnormal in a reduction of the anti-dumping duty from 40% to 12.8% as a consequence of the decline in the production costs of the Community industry over twelve months — subject, however, to the observations regarding the confidentiality of those costs which I propose to make when considering the submission alleging denial of the applicants' right a fair hearing.

40. The fourth complaint refers to imports of urea from Abu Dhabi, Libya and the Soviet Union by Italian producers at dumped prices. It is claimed that, by refusing to take those imports into account, the Commission committed an error of appraisal in determining the injury.

41. Recital 26 of the contested regulation reflects that difficulty. It states that: 'Several parties interested in the outcome of these proceedings argued that account should be taken of dumped imports by Community producers after the end of the investigation period. This argument has to be rejected since it would be contrary to Article 7(1)(c) of Regulation (EEC) No 2176/84, which provides that the investigation of dumping shall cover the period prior to the initiation of the proceeding, to take into consideration dumped imports made after the end of the investigation period'.

42. The applicants claim in the first place that the provisions of Article 7(1)(c) relate to the determination of the dumping margin rather than that of the injury.

43. As was observed above, the very wording of Article 7 appears to rebut the applicants' claim ('such investigation shall cover both dumping or subsidization *and injury resulting therefrom*' [32]).

44. The applicants maintain in the second place that the basic regulation does not prevent consideration being given to events occurring after the end of the investigation period. They cite a number of Commission decisions [33] and the judgment in the *Gerlach* case. [34]

45. A reading of the *Gerlach* judgment, which in fact concerned the anti-dumping provisions of the ECSC Treaty, shows that the Court did not actually give a ruling on the problems at issue here. The case dealt with the question whether it was legitimate in the light of the basic recommendation, Recommendation No 77/329/ECSC, [35] for

32 — Emphasis supplied.

33 — Application, paragraph 77 and footnote 36.

34 — Judgment of 24 October 1985 in Case 239/84 ([1985] ECR 3507).

35 — Commission recommendation of 15 April 1977 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Coal and Steel Community (OJ 1977 L 114, p 6)

the Commission to adopt a method of calculating anti-dumping duties by reference to basic prices in ECU and conversion rates published on an appointed day, and not to the system under the normal rules whereby the value of the ECU and the conversion rates are quoted every day on the currency markets and are published daily in the Official Journal of the European Communities.

46. However, the discussion above of the time at which the injury had to be assessed, and in particular the reference to the judgments of the Court in the *Toyo* and *Nippon Seiko* cases, are equally valid in this connection as well. Imports by Community producers *after the end of the investigation period* were not to be taken into consideration by the Community institutions when determining the injury.

47. As a strictly subsidiary matter, I would point out that according to the *TEC* and *Silver Seiko* judgments imports by Community producers at dumped prices do not contribute to the injury suffered by the Community industry provided that their volume remains relatively low.[36] Those cases concerned imports carried out to fill gaps in the range of products of the Community undertakings in question. However, I consider that other grounds of justification are not ruled out, in particular (as in this case) a trader's desire not to sell his own products at uneconomic prices but temporarily to supply his customers by way of low-priced imports. The essential criterion established by the case-law of the Court on this point seems to be the insignificant volume of such imports. The Council was not contradicted when it stated that the imports which were not taken into consideration accounted for 0.3% of the Community consumption of urea, 0.35% of Community production and 0.4% of sales by Community producers. The complaint is thus unconvincing and the third submission as a whole is therefore of no pertinence.

36 — Joined Cases 273/85 and 107/86, cited above, at paragraph 39; Joined Cases 260/85 and 106/86, cited above, at paragraph 47.

IV — Error of law and distortion of the facts

48. The fourth submission alleges an error of law and distortion of the facts. It is expressed as two complaints based on the refusal of the Community institutions to grant allowances to take account, first, of the difference in the levels of trade at which urea was sold in Saudi Arabia and the Community respectively and, secondly, of the quantity discounts allowed for high-volume sales.

49. On the first point the applicants argue that most sales of urea in Saudi Arabia are made directly to farmers. In the Community, however, the purchasers are trading companies, and an industrial concern which used urea as a raw material in the manufacture of glue. The request for an allowance under Article 2(10)(c) of the basic regulation was rejected.

50. Recital 20 of the contested regulation deals with this question:

'The producer/exporter in Saudi Arabia also requested an additional adjustment for differences in level of trade on the grounds that all sales on the domestic market were made to the end-users, i.e. individual farmers or agricultural companies, except for supplies to one customer who was a large industrial user of urea and who was, in principle, entitled to an additional discount, whereas more than 70% of shipments to the Community were allegedly for industrial use to customers processing urea into other types of fertilizers.

This request was not granted because it was considered that it was not proven in a satisfactory way that there was a difference in the level of trade since the bulk of the sales, both on the domestic market and on the export side, was made to end-users. Furthermore, it was admitted by the producer/exporter that the customer concerned in Saudi Arabia had not benefited from such discount during the period under investigation.'

51. For its part, the Council contends that there are no differences in level of trade between the sales in Saudi Arabia, made mainly to farmers, and those in the Community to industrial concerns using the urea as a raw material, inasmuch as the urea is not resold as such on the market and may be said to disappear from commercial channels. Accordingly, the Council argues that even the industrial purchasers in the Community must be regarded as end-users.

52. The applicants submit that a major Community producer of urea stated in its reply to the Commission's questionnaire that it made no sales to end-users, while mentioning as one of its customers a company which the Community institutions had regarded as an end-user. However, before ruling on the substantive issue the Court will need to consider the applicant's submission regarding formal legality.

53. Those facts as a whole form the necessary basis for *inter alia* the submission alleging a denial of the right to a fair hearing. As part of the first submission the applicants plead what may be termed a 'substitution of grounds'. Pursuant to Article 2(10)(c) of the basic regulation, which provides that differences in the level of trade may not qualify for adjustment except 'in so far as no account has been taken of them otherwise', the Commission in its letter of 13 August 1987[37] rejected the request for an adjustment on the ground that 'this request appears to be a repetition of the argument discussed above concerning differences in prices resulting from differences in quantities'. As was observed above the only reason given in this regard in the contested regulation is the lack of evidence, no reference being made to the fact that the adjustment in question had been taken into account in another context. I propose to consider the point later, together with the other complaints based on the denial of the right to a fair hearing.

37 — Application, Annex 9.

54. The second criticism relates, as we have seen, to the Commission's refusal to grant an allowance for quantity discounts. According to the applicants certain sales in Saudi Arabia did not exceed 0.43 tonnes whereas sales to the Community market were always in consignments of several thousand tonnes.

55. Recital 18 of the contested regulation contains some reference to that request:

'The producer/exporter in Saudi Arabia requested that an allowance be granted pursuant to Article 2(10)(b)(i) of Regulation (EEC) No 2176/84 in order to take account of the differences in the quantities sold on the domestic market and for exports to the Community. To this end it was suggested that the quantity discount, which was granted on the domestic market for sales of 5 000 tonnes or more, should be applied to all domestic sales in order to make them comparable with the quantities exported.

This request was not granted because no convincing evidence was supplied that all the criteria set out in Article 2(10)(b)(i) or (ii) of Regulation (EEC) No 2176/84 were met. The Council points out that account had already been taken of differences in quantities when determining normal value on the basis of the weighted average of all prices actually paid and when making adjustments for the differences in the conditions and terms of sale.'

56. In its defence the Council records that the applicants, in their reply to the questionnaire, stated that '9.14% of all the sales in the Saudi Arabian market during the investigation period benefited from quantity discounts' — a figure far below the 20% level required by Article 2(10)(b)(i) of the basic regulation.

57. In their reply the applicants note that the original questionnaire refers to '9.1.4%' and not '9.14%', on account of a typographical error.[38] They do not, however, conclude that the exact figure is 91.4% but confine themselves to asserting that sales subject to quantity discounts exceeded 20%, without supplying the precise figure.

58. However, in connection with that complaint the application also refers to the denial of the right to a fair hearing. The applicants maintain that during the investigation the Commission never cited lack of evidence, and had withheld the allowance requested solely because it had already been taken into account in the determination of the normal value, through the use both of the reduced prices for large quantities and of the usual prices for low-volume sales. The problem of lack of evidence was raised for the first time in the preamble to the contested regulation.

59. Consideration of recital 18 prompts some further explanation. Whilst the applicants strove during the investigation to

38 — Annex L to the reply, p. 11.

demonstrate that the refusal to grant an allowance for quantity discounts on the ground that an adjustment had already been made in the determination of the normal value was mistaken in point of law — citing in particular the most widely accepted legal textbook[39] — recital 18 of the contested regulation, although mainly based on the lack of evidence, includes a reference to the fact that 'account had already been taken of differences in quantities when determining normal value on the basis of the weighted average of all prices actually paid'. My view is that, regardless of whether the 'substitution of grounds' is absolute or whether there ultimately appears an *essential reason for the rejection* which had not been discussed during the administrative proceeding, the problems are those associated with the right to a fair hearing.

60. I shall not at this stage adopt a position on whether there were errors of law or whether the facts stated were distorted. It is first necessary to consider the refusals to grant allowances in terms of a denial of the right to a fair hearing, since together with the other three complaints they form the basis of the first submission.

V — Denial of the right to a fair hearing

61. According to the first of those three complaints, the applicants, who charged appreciably higher prices than the other suppliers of urea for export to the Community, were adversely affected by the change in the method of calculating the anti-dumping duty, of which they had received no prior warning. As was pointed out above, Regulation No 3339/87 replaced the provisional duty determined on the basis of the difference between the threshold price and the export price with a definitive duty set at 40% of the export price.

62. According to the applicants the denial of the right to a fair hearing arises from the fact that they were first informed of that substitution on the publication of Regulation No 3339/87. In dealing with the point the Council has produced a letter dated 8 September 1987 from the Commission to Mr Van Bael, counsel for the applicants, which the applicants in their reply claim never to have received. The Council also attached to its rejoinder an account of a meeting held in Brussels on 5 October 1987 with Mr Abdullah S. Nojaidi, President of the Saudi Basic Industries Corporation Marketing Limited, and Mr Van Bael (amongst others). Paragraph 8 of the account contains a summary of the Commission's position, including the following explanation: 'This solution would at least guarantee Sabic of selling a substantial amount to the EEC, whereas a duty of 40% may eliminate Saudi Arabia from the EEC market' and '*ad valorem* duty (40%) is significantly lower than dumping margin (55%)'. In their reply the applicants claim that their representatives who attended the meeting on 5 October 1987 cannot recall any reference to the adoption of an *ad valorem* duty of 40%. They further note that the alleged communication at that interview of the change in the method of calculating the duty was too late having regard to the period laid down by Article 7(4)(c)(iii) of the basic regulation.

39 — Beseler and Williams, 'Anti-dumping and Anti-Subsidy Law', *The European Communities*, 1986, reference 4.5.3., pp. 98 to 100.

63. The second head of complaint relates to the failure to reply to the applicants' questions regarding the determination of the threshold of injury. The question was mainly one of determining the production costs of the Community producer chosen by the Commission for establishing the threshold.

64. The applicants criticize the Commission for the inadequacy of the information supplied on this point, particularly as regards the comparison between Saudi Arabian prices and those of Italian producers, the way in which the Commission took account of the decline in production costs in the Community, the period referred to for that assessment, and lastly the adjustments required by the higher production costs entailed by a lower use of capacity due to the loss of export markets.

65. Here, the Council refers back to paragraph 8 of the letter of the Commission dated 8 September 1987, which reads 'more detailed information with regard to the calculation of price undercutting is at your disposal, if you so wish'.

66. It should be observed that the statement relates only to the question of undercutting — that is to say, the comparison between Saudi Arabian prices and those of the Italian producers. That was a matter on which the Commission's letter of 13 August 1987 had already given some information.[40]

40 — See Annex 9 to the application, at I, 4, (c): 'It is not correct that prices of the Saudi Arabian product did not undercut those of Italian producers. During the investigation period the prices of the main Italian producers were undercut by those charged for the Saudi Arabian product by up to 28%.'

67. However, the letter of 8 September 1987 contains further explanation regarding the determination of the threshold of the injury. Paragraph 2 states: 'It is considered that in so far as Article 13(3) of Regulation No 2176/84 puts a limit on the amount of the duty (i. e. it should not be higher than what [is] adequate to remove the injury), it refers to the injury suffered during the period under investigation and not to the situation at the moment when the size of the duty is being examined. For this reason the level of the minimum price determined in recital 42 of Regulation No 1289/87 was calculated on the basis of the cost of production of a representative Community producer during the investigation period and not on the basis of the cost of production at the moment of the imposition of the provisional duty.' Paragraph 8 also includes the remark that 'As far as the costs of production of a representative Community producer are concerned . . . , no further information can be disclosed due to the confidentiality of such data. However, it is underlined that account was taken of the effects of possible losses of export markets', and the passage: 'Average production costs were established with regard to the period 1 July 1985 to 30 September 1986. Such amounts reflect higher levels at the beginning and lower levels at the end of the period. Such a method is considered to be fair and reasonable.'

68. The letter of 8 September 1987 therefore contains information as to the period taken into consideration for determining the production costs of the Community producer, the effects on those costs of losing a share of the export market and the account taken of the decline in those costs during the investigation period. Nevertheless, the question whether the letter can be taken into consideration will have to be examined.

69. However, the applicants also criticize the lack of precise information about the choice of the Community producer — not even the Member State in which that producer is established was given — and the amount of its production costs. As may also be seen in paragraph 8 of the letter of 8 September 1987, the Commission pleads in reply the confidentiality of such information.

70. Lastly, the third complaint relates to the figure used by the Commission in granting an allowance for warehousing, which is lower than the figure proposed by the applicants. In its defence the Council relies on the letter of 8 September 1987 in which the Commission offers to make available to the applicants the figures concerning the allowance for warehousing; that offer was not taken up. Paragraph 6 of the letter of 8 September 1987 does indeed include the remark 'the figures relating to the adjustment granted for warehousing are at your disposal, if you so wish'.

71. In view of all those complaints the Court needs to determine the extent of the right to a fair hearing enjoyed by persons involved in the administrative procedure regarding dumping. As was emphasized at the beginning of this Opinion, the question has yet to be the subject of the many extensive explanations which the Court has given in matters of competition.

72. In his Opinion on the earliest ball-bearing cases, Mr Advocate General Warner undertook a study of the question which attracted much attention: [41]

'I agree of course that, in general, no one has a right to be heard during the process of preparation of legislation such as he has in the process of preparation of an administrative decision affecting him individually and directly. But, just as it seems to me that an instrument such as Regulation No 1778/77 [42] is to some extent a hybrid, so also it seems to me that an anti-dumping investigation may also be, for present purposes, a hybrid. In so far as it may lead to a finding that a particular exporter has been guilty of dumping and, on the basis of that finding, result in the imposition of an anti-dumping duty on his products *nominatim*, it has enough of the characteristics of a procedure preparatory to a decision of individual and direct concern to him.' [43]

73. For my part I would add that, from the viewpoint of an undertaking, the loss of the Community market as a result of the imposition of a high anti-dumping duty — as in this case — has financial consequences which are comparable to those which follow the imposition of a fine for an infringement of Articles 85 or 86 of the Treaty of Rome.

74. Naturally, the judgments of the Court on the right to a fair hearing in competition matters cannot be transposed in their entirety to the context of dumping. That was also the view taken by the President of

41 — Beseler and Williams, op. cit., 8-5-7, p. 195; Cunnane and Stanbrook, *Dumping and Subsidies, The Law and Procedures Governing the Imposition of Anti-Dumping and Countervailing Duties in the European Community*, 1983, p. 82.

42 — The regulation imposing the anti-dumping duty

43 — [1979] ECR 1262

the Court, Mr Ole Due, in an article on 'observance of the right to a fair hearing under the administrative law of the Community'.[44] He wrote:

'The differences may be explained, at least in part, by the particular nature of this field: the measures are adopted in the form of legislative provisions; the investigation is not necessarily directed at specified undertakings but may equally take issue with the conduct of governments of non-member countries . . . ; every request for the confidential treatment of the information supplied must be observed. Lastly, the Community provisions must comply with the obligations of the Communities under the GATT, which rests on the principle of reciprocity, and there may be justification for aligning even the procedural rules on those of the other members of that organization'.[45]

75. Nevertheless, a principle as *general* as the one defined by the Court in its judgment in *Hoffman-La Roche* v *Commission*,[46] namely that the Commission may not base its decision on facts, circumstances or documents on which the party concerned has been unable to make its views known, would seem to apply to dumping proceedings as well.[47]

76. In the *Timex Corporation*[48] judgment the Court showed the importance it attached to the rights of persons affected by an anti-dumping investigation, in particular with regard to the confidentiality of certain information. I shall return to this point.

77. Article 6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, generally known as the Second Anti-Dumping Code, sets out a number of rights enjoyed by interested parties during the administrative procedure. Article 6(2) provides that: 'The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 3 below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.' Under Article 6(7): 'Throughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests.'

78. The basic regulation sought to embody the rights recognized in the Second Anti-Dumping Code. Under Article 7(4)(a): 'The complainant and the importers and exporters known to be concerned, as well as the representatives of the exporting country, may inspect all information made available to the Commission by any party to an investigation as distinct from internal documents

44 — 'Le respect des droits de la défense dans le driot administratif commenantaire' *Cahiers de droit européen*, 1987, No 1-2, p. 383.

45 — Ibid., p. 387, note 7.

46 — Judgment of 13 February 1979 in Case 85/76 [1979] ECR 461, at paragraph 14.

47 — The same opinion is expressed in Hans-Christoph von Heydebrand und der Lasa 'Confidential Information in Antidumping Proceedings before United States Courts and the European Court', *European Law Review*, Volume II 1986, p. 331.

48 — Judgment of 20 March 1985 in Case 264/82 [1985] ECR 849.

prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation. To this end, they shall address a written request to the Commission indicating the information required.'

79. According to Article 7(4)(b): 'Exporters and importers of the product subject to investigation and, in the case of subsidization, the representatives of the country of origin, may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties or the definitive collection of amounts secured by way of a provisional duty.'

80. Article 7(4)(c) further provides:

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

(aa) be addressed to the Commission in writing,

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

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

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

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

81. As was noted above, the Council has produced the report of a meeting held at the Commission on 5 October 1987[49] and has set out in its rejoinder[50] extracts of an internal mission report prepared by Commission officials following their verification visit to Saudi Arabia, together with an internal note which appears to be a report of a meeting held in Brussels on 22 May 1987.

49 — Rejoinder, Annex 1

50 — Paragraph 83.

82. Those documents refer to the information which was not brought to the attention of the applicants on any other occasion, such as the imposition of a definitive *ad valorem* duty and the lack of sufficient evidence to grant the requests for allowances. Are they, however, to be regarded as evidence to be taken into account in judicial proceedings? In my opinion the reply must be in the negative. Such *purely internal* Commission documents, prepared by its officials, are not submitted either to the persons affected by the investigation or to their legal counsel, who have no means of having the content rectified. Those documents, whose *unilateral character* is absolute, cannot be viewed as having any probative force. No extensive academic research is needed in order to find that, under the legal systems of all the Member States, such documents are not treated as proof.

83. Admittedly, the basic regulation allows the Commission to give the requisite information 'orally . . . as considered appropriate by the Commission'. In my view that definitely does not mean that the Community institutions are exonerated from compiling valid evidence of how they have answered the requests from the undertakings concerned. A court of law cannot rely on assertions that the right to a fair hearing has been observed unless the party making those assertions submits tangible evidence in support.

84. The information given orally by the Commission during a meeting does not prevent it from submitting an account, if one has been drafted, for the comments of those who were present. That is not an insuperable requirement. The phrase 'as considered appropriate by the Commission' in Article 7 seems, indeed, to suggest that the written alternative should be preferred for information relating to factors of decisive importance for the rest of the proceeding. Furthermore, proof of compliance with the period laid down in Article 7(4)(c)(iii) necessarily means drafting a document in the form either of *minutes* submitted for the approval of the participants or of a *letter duly addressed* to the persons concerned, to which they can then respond.

85. In my view, therefore, the documents referred to above [51] should be eliminated from the present discussion.

86. The Council has also produced the letter of 8 September 1987 [52] which, as was noted above, the applicants claim never to have received. That letter, addressed to Messrs Van Bael & Bellis in Brussels, bears the same address as the previous letters. However, whereas those earlier letters include in the heading the word 'Telefax', followed by the telefax number of the applicants' counsel, [53] no such reference appears on the letter of 8 September 1987. The Court has already been confronted with similar difficulties. In *Belfiore* the Court held:

'However it is necessary to point out that the Commission despatched the letter of 12 February 1979 without taking the precaution of having it registered or arranging to have it accompanied by a form for acknowledgement of receipt, even though it had taken both those steps when it sent previous messages to the applicant. In these circumstances and taking into account

51 — See above, paragraph 81.

52 — Defence, Annex II.

53 — See the letter of 13 August 1987, Annex 9 to the application, and the letter of 3 June 1987, Annex 6 to the application.

the fact that the onus of proving notification and the date thereof lies on the Commission, it must be declared that the latter has placed itself in a position in which it cannot adduce conclusive evidence on this point and that, in the case of notification of such an important decision as compulsory resignation, the applicant is entitled to the benefit of the *slight doubt* as to the date when the period prescribed for bringing the action began to run'.[54]

87. In the *Michel* case, in which the European Parliament alleged that an application seeking to annul the decision contained in an ordinary letter was out of time, the Court held that:

'The addressee of an unregistered letter is not required to show the reasons for any delay in its delivery'.[55]

88. The Court has already found that the production of an unregistered letter cannot, *unless it is established that it has been received by the addressee*, 'take the place of proof'.[56] I therefore propose that the Court should take no account of the Commission's letter of 8 September 1987.

89. The conclusion to be drawn is therefore that the reason for the refusal to grant allowances for quantity discounts and the difference in level of trade, based essentially on the inadequacy of the evidence supplied by the applicants, was not known to those applicants until the publication of the contested regulation, without their having had a full opportunity during the investigation to defend their interests on this point.

90. The communication — or disclosure — of the information on the basis of which the Commission was considering the imposition of an anti-dumping duty took place for the first time during a meeting held at the Commission on 22 May 1987, and later by letters dated 27 May and 3 June 1987.

91. In a letter addressed to the Commission on 17 June 1987[57] — within the permitted period (as the Commission conceded in its rejoinder) inasmuch as the Commission had, by way of exception, agreed in the correspondence dated 3 June 1987[58] to extend the period[59] until 17 June 1987 — it was stated:

'The high dumping margin is the result of one factor. Urea is delivered in Saudi Arabia primarily directly to farmers with the producers assuming a number of the costs which would otherwise be incurred by distributors. In the EEC, however, most of Samad Urea was sold to technical users which processed the product into another product before selling it to the enduser. Despite very large differences in conditions and terms of sale, quantities sold, and the

54 — Judgment of 5 June 1980 in Case 108/79 [1980] ECR 1769, at paragraph 7, emphasis supplied.

55 — Judgment of 26 November 1981 in Case 195/80 [1981] ECR 2861, at paragraph 11

56 — Judgment of 11 May 1989 in Joined Cases 193 and 194/87 *Maurissen* v *Court of Auditors* [1989] ECR 1045, at paragraph 47

57 — Annex 8 to the application.

58 — Annex 6 to the application.

59 — Since the publication of the regulation imposing a provisional duty had taken place on 9 May 1987, any written request for information was in principle, pursuant to Article 7(4) (c) (i) (cc) of the basic regulation, inadmissible after midnight on 9 June 1987, 'extensions' are allowed under Article 7 (4) (c) (iii) of the basic regulation

level of trade, *no allowance* has yet been made by the Commission to the normal value side of the equation for such differences.'

The rest of the letter sets out the request for an allowance.

92. It is not denied that the question of allowances affected the defence of the applicants' interests, or that it appears among the considerations on the basis of which the Commission recommended the imposition of definitive duties. Accordingly, the conclusion must be that the applicants were not in a position to defend their interests effectively.

93. The Council contends that, even if the allowances requested had been granted, the amount of the duty would not have altered as a result. No doubt it wishes the Court to apply its judgment in *Distillers*,[60] in which it refused to examine allegations by the applicant of procedural irregularities since the decision of the Commission would, in any case, have been identical. In my view, that judgment merely applied the traditional principle that only infringements of *essential* procedural requirements are liable to lead to the annulment of an act. However, as we have seen, the Council's contention is challenged by the applicants, who claim in the abovementioned letter of 17 June 1987 that *the high level of the dumping margin is due to the absence of an allowance.*[61]

60 — Judgment of 10 July 1980 in Case 30/78 [1980] ECR 2229.

61 — The new basic regulation, Council Regulation (EEC) No 2423/88 of 11 July 1988 (OJ 1988 L 209, p. 1) now includes an Article 2(10) (e) under which individual adjustments having an *ad valorem* effect of less than 0.5% of the price or value of the transaction affected are treated as insignificant and disregarded.

94. Consequently, the mere contention of the Council does not negate the essential nature of the irregularity committed. In so far as it relates to the refusals to grant the two allowances mentioned above, the first submission must therefore be upheld. Consequently, there is no point in considering the merits of the submission alleging the error of law and distortion of the facts.

95. The criticism based on the lack of information about the change in the method of calculating the definitive duty is perhaps a less sensitive matter. As was noted above, it is clear from the case-law of the Court[62] that the Community institutions enjoy a wide discretion in choosing the most suitable type of duty. Whereas it is essential for a trader to know how the normal value, the export prices, the threshold of injury and the allowances were calculated, and how the 'like product' was chosen, the choice between an *ad valorem* duty or a duty fixed by reference to a threshold price should not *in theory* affect the amount of the anti-dumping duty, which cannot be other than the dumping margin or the threshold of injury if a lesser duty will be adequate to remove that injury. Admittedly, the Court held in a recent judgment that:

'A variable duty is generally more favourable to the traders concerned, because it avoids any collection of anti-dumping duty provided that importation is carried out at prices above the minimum price fixed'.[63]

62 — Case C-189/88, cited above, at paragraph 25; Case C-305/86, cited above, at paragraph 58.

63 — Case C-305/86, cited above, at paragraph 60.

However, since the fixing of the *ad valorem* anti-dumping duty is in no way unforeseeable — it is indeed the commonest type of duty — it does not appear that the change in the method of calculating the duty could have affected the applicants adversely. That complaint in the first submission cannot therefore be upheld.

96. In connection with the right to a fair hearing, the applicants also refer to the amount of the allowance granted for warehousing. Despite the express requests for an explanation of the figure used, they claim that no information was supplied by the Commission.

97. In letter of 21 August 1987,[64] the applicants observed: 'The warehousing allowance granted is considerably lower than the market value and cost figures relating to the domestic warehousing. No explanation of the difference has been given'. That letter was in answer to the Commission's letter of 13 August 1987[65] stating that an allowance of SR 7.96 per tonne had been granted. The applicants' request for information, although made after 9 May 1987,[66] must nevertheless be taken into consideration because the Commission's letter of 13 August ends with the sentence: 'I would appreciate receiving your questions or comments, if any, on the above not later than 21 August 1987'. That sentence seems to indicate that the applicants, as under the Commission's letter of 3 June 1987, had been given a further extension of the period laid down by Article 7(4)(c)(i)(cc) of the basic regulation.

64 — Application, Annex 10, p 13
65 — Application, Annex 9
66 — See footnote 58

98. In its defence the Council relies on the Commission's letter of 8 September 1987. For the reasons set out above, however, that letter cannot be taken into account. The manner in which the Commission arrived at the figure stated above had nothing confidential about it, and it is difficult to see why the method of calculation was not disclosed. The conclusion to be drawn is that it has not been proved that the applicants received sufficient information in the matter to enable them to defend their interests. In this respect, this submission must therefore be accepted.

99. Lastly, the applicants maintain that their right to a fair hearing was not observed as regards the determination of the threshold of injury by reference to the production costs of the 'representative Community producer'. Since the Commission pleaded in reply the confidential nature of that information, the applicants were unable to ascertain either the Community undertaking chosen as 'representative' or the Member State in which that undertaking was established, or the production costs during the reference period. Accordingly, the Court is called upon to consider once again the problem of reconciling confidentiality with the right to a fair hearing.

100. The Second GATT Anti-Dumping Code deals with the protection of confidentiality in Article 6(3). Confidential information may not be disclosed without the specific permission of the party submitting it, subject to disclosure ordered by 'a narrowly drawn protective order'. However, parties may be requested to furnish a non-confidential summary of the information. If the information is not susceptible of summary, a statement of reasons must be provided.

101. Article 8 of the basic regulation repeats the same provisions, apart from those concerning the possibility of a 'protective order'.

102. The requirements set out in the case-law of the Court in this matter may be summarized as follows. In the *Timex Corporation* judgment the Court declared void a regulation imposing a definitive anti-dumping duty, on the ground that the obligation of confidentiality '[must], however, ... be interpreted in such a way that the rights [of the defence] ... are not deprived of their substance'.[67] The Court held that:

'the Commission ought to have made every effort, as far as compatible with the obligation not to disclose business secrets, to provide the applicant with information relevant to the defence of its interests, choosing, if necessary on its own initiative, the appropriate means of providing such information. Mere disclosure of the items referred to in the calculation of the normal value without any figures does not satisfy those imperative requirements'.[68]

103. It is true that, in the more recent judgment of *Brother* v *Council*, the Court held that:

'Brother's argument to the effect that it had no knowledge whatever of the manner in which the target prices were calculated cannot be accepted since the method of calculating target prices was communicated to the applicant, and the production costs of Community undertakings constitute confidential data which could not in any circumstances have been communicated to it.'[69]

In that case, however, the applicant was taking issue only with the use of the expedient of target prices — an expedient rightly chosen by the Commission for reconstructing prices within the Community as they should have been in the absence of dumping; it was not contesting the level of the production costs of Community undertakings or the denial of the right to a fair hearing.

104. On the other hand, if the criteria by which the Court was guided in its *Timex Corporation* judgment are followed, the conclusion will have to be that the refusal to disclose any information on the points mentioned above deprives the right to a fair hearing, as set out in Article 7(4) of the basic regulation, of virtually *all practical effect*. The applicants are thereby reduced to relying on the Commission's statements regarding the choice of the representative Community producer. Is the undertaking in question one of the least efficient in the Community, whose production costs are especially high? The applicants will remain in ignorance. Have the costs which determined the amount of the injury, and hence the anti-dumping duty, been calculated according to the appropriate method? The applicants will remain in ignorance. Has the Commission miscalculated this item, as the applicants maintained at the oral procedure? They will still remain in ignorance, and so will the Court.

105. Since the amount of the duty was fixed in the contested regulation by reference to the injury and not the dumping margin, the above information is *essential* to the defence of the interests of those concerned within the meaning of the Second Anti-Dumping Code.

67 — Case 264/82, cited above, at paragraph 29.

68 — Case 264/82, cited above, at paragraph 30.

69 — Judgment of 5 October 1988 in Case 250/85 [1988] ECR 5683, at paragraph 34.

106. In the *Timex Corporation* judgment the Court emphasized that denial of the right to a fair hearing was especially serious since 'the normal value was determined on the basis of the constructed value of the like product, ... so that Timex was entirely dependent for the defence of its interests on the factors on which the Commission based its calculation'.[70] The position of the applicants in the present case is exactly the same in this regard.

107. Most commentators on European and American anti-dumping law maintain that access to non-confidential information alone is of little relevance to the right to a fair hearing.[71] Some claim that the European procedure obliges legal counsel for the parties to engage in 'shooting in the dark'.[72]

108. The report on the anti-dumping policy of the European Community,[73] prepared by the Committee on External Economic Relations of the European Parliament, reflects the same anxieties. It states:

'The more opaque anti-dumping procedures appear, the more unfair they must seem to exporters and related parties. This is particularly true of the methods used to calculate dumping margins and levels of injury, which over the years have taken on a byzantine complexity. But domestic producers, too, can at times feel wronged, for example by the difficulty of monitoring price undertakings ....

In view of the lack of strict EC rules concerning professional secrecy, it would be inopportune to grant lawyers of interested parties access to confidential information provided by their opponents. However, the Commission and the Court should be invited to consider the feasibility of such rules, and hence of introducing in the Community measures similar to those that exist in the United States.'

109. A recent proceeding has shown that it might be of value to have sight of confidential documents in order to appraise the merits of some of the arguments put forward by the Community institutions. In his Opinion in Cases 121/86, 122/86 and 129/86, delivered on 11 July 1989, Mr Advocate General Tesauro sets out the following facts.[74] The Commission had adopted a regulation in 1982 imposing a provisional anti-dumping duty and asked the Council on 9 June 1983 to adopt a regulation imposing a definitive anti-dumping duty. Following the Council's refusal and after continuing the investi-

70 — Case 264/82, cited above, at paragraph 30

71 — See Horlick and Oliver, 'Trade Laws Regarding Imports. Recent Developments', p. 86, *Documents de la Conférence Annuelle (1989) Collège de l'Europe, Bruges;* Van Bael, 'Procedural Aspects of EEC Anti-Dumping Enforcement', p 5, *Documents de la Conference Annuelle (1989) Collège de l'Europe, Bruges;* Van Bael, 'EEC Anti-Dumping Law and Procedure Revisited', *Journal of World Trade,* Volume 24, No 2, p 5, April 1990, and Taylor and Vermulst, 'Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings under United States Law A framework for the European Communities', *The International Lawyer,* Volume 21, No 1, p 43.

72 — James A Taylor and Edwin A Vermulst, op. cit. p 45

73 — Session document No A3-0336/90 of 30 November 1990

74 — [1989] ECR 3934, 3942

gation in the summer of 1985, the Commission proposed that the proceeding be terminated, to which the Council agreed by Decision No 86/59/EEC of 6 March 1986. Mr Tesauro concludes in these terms:

'In the face of the objections raised by the executive, which considers those questionnaires to be confidential and as such not capable of being included in the files transmitted to the applicants, in the absence of any justification as to the lack of non-confidential summaries of those questionnaires and also in view of the fact that the Commission asserted that it had supplied the applicants during the course of two meetings held on 14 November and 22 December 1985 with all the necessary information, the Court requested the Commission to provide it with the questionnaires at issue.

The reply was frankly entirely unsatisfactory. The Commission in fact merely transmitted, without giving any explanation, copies of the non-confidential summaries of the questionnaires compiled by the Chinese exporters for the period of time between 1978 and the first quarter of 1983 and certain copies of communications sent by importers of North Korean magnesite containing certain data on imports of that product up to June 1985.

In other words, the data made available by the Commission on imports from China are none other than the data which were covered by the first part of the investigation and which form the basis for the proposal for definitive anti-dumping measures submitted in June 1983.'

110. In view of all those observations I should, of course, record how difficult it is to apply in practice the solution in the *Timex Corporation* judgment. However, a knowledge of the information in question is essential to enable the interested parties to the investigation to defend their interests, subject to the proviso contained in that judgment that 'mere disclosure of the items referred to in the calculation . . . without any figures does not satisfy' the imperative requirements of observance of the right to a fair hearing. Although it may in actual fact be difficult for the Commission, with its obligation to disclose to the applicant information which is relevant to the defence of its interests, to find 'the appropriate means of providing such information',[75] the Court has established that it is nevertheless obliged to set up suitable machinery for ensuring the full exercise of the right to a fair hearing. In particular, the conclusion must be drawn that the use of 'non-confidential summaries' has proved to be inadequate whenever the disclosure of figures is at issue.

111. Furthermore, the situation is not really satisfactory in terms of fundamental rights. If the European Commission of Human Rights declares inadmissible applications directed against national decisions enacted pursuant to a Community act,[76] the main reason is that, through its successive judgments, the Court has established the principle that it reviews the Community institutions' observance of fundamental

75 — Case 264/82, cited above, at paragraph 30.

76 — Application No 13258/87 *M. & Co.* v *Federal Republic of Germany:* Decision of 9 February 1990 concerning an order to enforce a judgment of this Court.

rights. It is therefore far from unimportant to avoid conspicuous discrepancies between the construction this Court puts on the right to a fair trial and the requirements already laid down by the European Court of Human Rights.

112. On this point there seems to be no doubt that the anti-dumping proceeding, although conducted by an administrative authority, must meet the needs of a 'fair hearing',[77] which implies that an 'equality of arms'must prevail between the parties.[78] Furthermore, observance of the principle of hearing arguments from both sides demands that the party or his representative have the opportunity of consulting and criticizing the case documents, and in particular the evidence on which the decision was based.[79] Accordingly, it does not appear that the procedure followed in this case met those requirements.

113. All the foregoing leads me to the conclusion that in this case the fundamental principle of the right to a fair hearing, as expounded in particular in the *Timex Corporation* judgment, has not been properly applied by the Commission. The Commission did not in this case make suitable arrangements for the disclosure to the applicants of the information needed for the defence of their interests. It therefore seems that this head of complaint must be upheld, and accordingly the contested regulation must, on this count too, be declared void.

114. I am of course aware of the difficulties inherent in having to reconcile the observance of the right to a fair hearing with the protection of the confidentiality of certain information. However, I would point out that, in other legal systems, solutions to those difficulties have apparently been found.

115. Under American law, since the Trade Agreements Act 1979 the two administrative authorities in charge of dumping investigations — the International Trade Administration ('ITA'), which determines the existence and extent of any dumping, and the International Trade Commission ('ITC'), which establishes the injury caused — have to compile a file containing a copy of all the information obtained by or submitted to those authorities during the administrative procedure. The file also includes the confidential information. That information may not be disclosed without the prior consent of the person who produced it. However, the Trade Agreements Act 1979 introduced into American law the system of the 'administrative protective order'. By virtue of such an order counsel for the interested party is allowed to have sight of the confidential documents subject to the proviso that he is thereafter obliged to respect their confidentiality, *even in dealings with his client.* The Court of International Trade issues an

77 — *Ringeisen* judgment of 16 July 1971, A Series, Vol. 13, p. 39, paragraph 95; *Konig* judgment of 28 June 1979, A Series, Vol. 27, pages 29 and 30, paragraphs 88 to 90.

78 — *Delcourt* judgment of 17 January 1970, A Series, Vol. 11, p. 15, paragraph 28; *Bonisch* judgment of 6 May 1985, A Series, Vol. 92, p. 15, paragraph 32.

79 — *Felbrugge* judgment of 29 May 1986, A Series, Vol. 99, p. 17, paragraph 44.; Decision of the Commission No 7317/75, *Lynas* v *Switzerland*, of 6 October 1977; Rep. 1977, p. 412 at p. 445, paragraph 5.

'administrative protective order' either in the course of the administrative procedure when the competent administrative authority refuses disclosure of the confidential information or when an application is made which challenges the decisions adopted by the ITA or the ITC. [80]

116. In granting or refusing the 'administrative protective order, the Court of International Trade has adopted a 'balancing test' [81] which, according to academic legal texts, combines the following factors:

— the 'age' of the information: recent information is regarded as more sensitive than older information, [82]

— the origin of the information: information submitted by bodies having no direct interest in the procedure is more sensitive, [83]

— the relevance of the documents with regard to the decision adopted, or to be adopted, by the administrative authority, [84]

80 — On access to confidential information and 'administrative protective orders', see Kaplan, Kuhbach and Lorentzen, 'Antidumping, Countervailing Duty and the National Security Provisions in the 1988 Trade Act', *George Washington Journal of International Law and Economics 1989*, pp. 628-631; Kassinger, 'Antidumping Duty Investigations', p. 68, in Johnston Law and Practice of United States Regulation of International Trade, Oceana, 1989, pp. 23-25; Koch, *Die Abwehr von Dumping: das Beispiel des Amerikanischen Rechts*, Heidelberg, 1989, p. 328; Horlick and DeBusk, 'Commerce Procedures Under Existing and Proposed Antidumping/Countervailing Duty Regulations', *The International Lawyer 1988*, pp. 110-112; Horlick, 'The United States Antidumping System' in Jackson and Vermulst, *Antidumping Law and Practice, A Comparative Study*, Harvester Wheatsheaf, 1989, pp. 111-113; Bello, 'Access to Business Confidential Information in Antidumping Proceedings', in Jackson and Vermulst, op. cit., pp. 349-353; Vermulst, *Antidumping Law and Practice in the US and the European Communities: A Comparative Analysis*, Elsevier, 1987, pp. 69-77; Taylor and Vermulst, op. cit., pp. 43-70; von Heydebrand & der Lasa, op. cit., p. 333; Schervier, 'Die Änderungen des Amerikanischen Antidumpings- und Ausgleichzollrechts durch den Trade and Tariff Act of 1984', *RIW*, 1985, p. 808; Ehrenhaft, 'A Practitioner's Response to the Anthony-Byrne Report: It ain't necessarily so', *Law and Pol'y in Int'l Bus.*, 1985, pp. 71-79; Anthony and Byrne, 'Safeguarding Confidential Information in ITC Injury Proceedings: Proposals to reduce the Risk of Disclosure', *Law and Pol'y in Int'l Bus.*, 1985, pp. 1-63; Riesenfeld, 'The Treatment of Confidential Information in Antidumping Cases: A Comment on the Celanese Case', *CMLRev.*, 1984, pp. 553-556; Bryan and Boursereau, 'Antidumping Law in the European Communities and the U.S.: A Comparative Analysis', *George Washington Journal of International Law and Economics 1985*, pp. 631-701; Garfinkel, 'Disclosure of Confidential Documents Under the Trade Agreements Act of 1979: A Corporate Nightmare', *Law and Pol'y in Int'l Bus.*, 1981, pp. 465-493; Assman, 'Decision Making under the EEC and the U.S. Antidumping Laws', *ZVglRWiss*, 1981, pp. 327-354; Ehrenhaft, 'What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act can, will, should mean for US Trade Policy', *Law and Pol'y in Int'l Bus.*, 1979, pp. 1361-1436; Lorenzen, 'Technical Analysis of the Antidumping Agreement and the Trade Agreements Act', *Law and Pol'y in Int'l Bus.*, 1979, p. 1430; Van Bael, 'EEC Antidumping Law and Procedure Revisited', *Journal of World Trade Law 1990*, p. 18.

81 — A typical formulation of this may be found in that court's judgment in *Roquette Frères* v *United States* (554 F. Supp. 1246, 1248, 4 ITRD (BNA) 1388 (Court of International Trade 1982): 'This Statute [paragraph 516 A (b) (2) (B) of the Tariff Act of 1930, as amended] gives the court wide latitude in determining whether or not to release confidential documents to parties involved in an antidumping proceeding. In making its determination, the court must consider (1) the needs of the litigants for data used by the Government in order to adequately respond to the antidumping finding, (2) the need of the Government in obtaining confidential information from businesses in future proceedings, and (3) the needs of the producers of sorbitol to protect from disclosure information which, in the hands of a competitor, might injure their respective positions in the industry'.

82 — For example: *Japan Exlan Co.* v *United States* (1 Court of International Trade 286, 15-23 Cust. B & Dec. 102, 3 I.T.R.D. (BNA) 1008 (1981) in which disclosure was authorized because it was 'based on the fact that none of the information contained therein is more recent than September 1979 with most of the information adduced dating back to 1978 or earlier, ... any sensitivity previously possessed by this data has become de minimis'.

83 — James A. Taylor and Edwin A. Vermulst, op. cit., infer this point from the interpretation by analogy of the judgment in *Roquette Frères* v *United States*, in which the Court of International Trade refused to grant disclosure of information submitted by American producers who were not applicants in the administrative procedure.

84 — *American Spring Wise Corporation* v *United States* (566 F Supp. 1538, 4 I.T.R.D. (BNA) 2210 (Court of International Trade (1983)) in which the court refused to allow the disclosure of information which was not 'directly relevant to the administrative determinations'.

— the reasons given in the application,

— the specificity of the information requested: this factor is based on the theory that the most accurate or specific information is most easily traced to its source,

— observance of equitable principles, [85]

— the status of counsel for the applicant.

The last point has been the subject of much discussion in academic legal texts and American case-law. Until 1983 the Court of International Trade had refused disclosure to 'in-house counsels' or 'corporate counsels' on the ground that it did not wish to place them 'under the unnatural and unremitting strain of having to exercise constant self-censorship in their normal working relations'. [86] That line of decisions was terminated by a judgment of the Court of Appeals of the Federal Circuit, establishing that granting disclosure was a matter to be examined on a 'counsel by counsel basis'. [87] The Court of Appeals proceeded largely on the basis that both 'in-house counsels' and 'retained counsels' 'are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsels provide the same services and are subject to the same types of pressures as retained counsels. The problem and importance of avoiding inadvertent disclosure is the same for both. Inadvertence, like the thief in the night, is no respecter of its victims'.

117. Can such a system be transposed to Community law? As noted above, academic legal texts [88] seem broadly favourable, and the European Parliament hopes that this avenue will be explored. The American experience has been declared satisfactory. [89] Canada also uses a similar system. [90] As the President, Mr Due, stated: 'there may be justification in aligning even the procedural rules on those of the other partners' in GATT. [91]

118. Are the legal difficulties insuperable? Advocates, solicitors and barristers are required to observe the rules of professional ethics in all the Member States, no matter

85 — *Nakajima All Co.* v *United States* (3 Court of International Trade 69, 3 I.T.R.D. (BNA) 1974 (1982)), in which the court ordered disclosure to Counsel for Nakajima on the ground that Counsel for the defendants had also had access to the information in question.

86 — Atlantic Sugar I, 85 Cust. Ct. 128, 2 I.T.R.D. (BNA) 1546 (1980).

87 — US Steel III, 730 F. 2d at 1465; on this point, see Mc Intyre, 'Can In-House Counsel be trusted with Access to a Competitor's Confidential Information?: U.S. Steel Corp. v United States', 58 *St John's Law Review*, 890 (1984).

88 — For example, Hans-Christoph von Heydebranch und der Lasa, op. cit.; James A. Taylor and Edwin A. Vermulst, op. cit., p. 69.

89 — For example, James A. Taylor and Edwin A. Vermulst, op. cit., p. 44.

90 — James A. Taylor and Ewin A. Vermulst, op. cit., p. 68

91 — Op. cit., p. 383; however, the Court has consistently held that 'the attitude of one of its trading partners, even a major partner, does not suffice to oblige the Community to follow the same course' (judgment of 5 October 1988 in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731, at paragraph 15, and judgment of 14 March 1990 in Joined Cases C-133/87 and C-150/87 *Nashua* v *Commission and Council* [1990] ECR I-719, at paragraph 30).

whether those rules are imposed by the legislature or by the profession itself. A breach of confidentiality is, in principle, punished under the domestic legal order of every Member State. Furthermore, the rules of civil liability should enable undertakings injured by an unlawful disclosure of their confidential information to take action against the counsel or lawyer who committed the breach. It is difficult to see what arguments could support the view that, even given the same guarantees, European lawyers are not in a position to perform the same function as officers of the court as their American counterparts. Moreover, any improper conduct could be punished by denying the guilty party further access, for a period to be determined, to the confidential data on file in an anti-dumping proceeding. Such a penalty would be particularly effective since there are not many legal firms that act in dumping cases. It could apparently be included in the basic Council regulation if the decision were taken to introduce into Community law machinery similar to the 'administrative protective order'. In that event it would be appropriate to involve in the establishment of the system the professional lawyers' organizations operating at a European level — by way of a protocol if need be.

119. Certain commentators, incidentally, maintain that the introduction of such a system should reduce significantly the work load of the Commission.[92] Other authors[93] also claim that Community law as it stands does not prevent the Court from issuing 'protective orders', and refer to the judgment in *AM & S Europe Limited* v *Commission*[94] in which the Court considered *in camera* the documents lodged at its request by the applicant and held them to be confidential. That opinion may be valid where an action before the Court seeks the annulment of an act; on the other hand, as Community law now stands there may be doubt whether the Court could be asked during the administrative procedure to consider a refusal by the Commission to release certain confidential information.

120. However that may be, it is important to determine precisely how the two imperative requirements of the protection of confidentiality and the observance of the right to a fair hearing may be reconciled in this regard.

121. In the light of the observations set out above, I propose that

92 — James A. Taylor and Edwin A. Vermulst, op. cit., p. 69, note 126.

93 — Hans-Christoph von Heydebrand und der Lasa, op. cit., who bases himself on Article 21 of the Rules of Procedure.

94 — Judgment of 18 May 1982 in Case 155/79 [1982] ECR 1575.

— Article 1 of Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia[95] be declared void in so far as it concerns Al-Jubail Fertilizer Company and Saudi Arabian Fertilizer Company;

— the Council be ordered to pay the costs, with the exception of those incurred by the intervener, which must be borne by the latter.

95 — OJ 1987 L 317, p. 1.