economic situations, it is not thereby excluded from review by the Court.

As regards such a discretion, the Court's review relates to compliance with the procedural rules, the question of whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers, which implies, as regards the choice of reference country, that it must be verified whether the institutions have neglected to take account of essential factors for the purpose of establishing the appropriate nature of the country chosen and whether the information contained in the documents in the case has been considered with all the care required for the view to be taken that the normal value has been determined in an appropriate and not unreasonable manner.

2. It cannot be concluded that the normal value of products from a non-market economy country has been determined by reference to the price in a market-economy third country in 'an appropriate and not unreasonable manner' within the meaning of Article 2(5)(a) of the basic anti-dumping regulation, No 2423/88, when, on the one hand, various factors already known to the Commission relating to the volume and methods of production, to conditions of access to raw materials and to the prices on the domestic market were such as to raise doubts as to the appropriateness of the third country chosen as a reference country and when, on the other hand, the institutions have not made a serious or sufficient attempt to determine whether the third country suggested by one of the parties to the proceedings could be regarded as an appropriate reference country. For that reason it must be considered that Regulation No 725/89 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports is invalid.

REPORT FOR THE HEARING
in Case C-16/90 *

I — Facts and procedure

1. On 21 November 1988 and 8 and 14 February 1989 Detlef Nölle, trading under the name of 'Eugen Nölle' (hereinafter referred to as 'Nölle') applied to the Hauptzollamt Bremen-Freihafen, for entry for free circulation of three consignments of cleaning and paint brushes originating in the People's Republic of China and falling under sub-heading 9603 4010 of the Combined Nomenclature. The Hauptzollamt therefore demanded, pursuant to

* Language of the case: German.

Commission Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the Peoples Republic of China (Official Journal 1988 L 272, p. 16), a provisional anti-dumping duty for which Nölle provided a security under Article 1(4) of the said regulation in the form of a directly enforceable bank guarantee in the sum of DM 31 000, DM 17 000 and DM 4 400 respectively, a total of DM 52 400 for the three consignments.

By three decisions of 14 April 1989, the Hauptzollamt requested the plaintiff to pay for the three consignments imported, DM 29 937.04, DM 16 972.57 and DM 4 307.79 respectively, a total of DM 51 217.40 by way of anti-dumping duties. Those decisions were based on Article 1 of Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports (Official Journal 1989 L 79, p. 24) under which a definitive anti-dumping duty of 69% of the net price per brush, free-at-Community-frontier, not cleared through customs, was to be imposed on the goods imported at that time by Nölle.

2. On 3 May 1989 Nölle lodged an objection in which it claimed that the decisions were illegal inasmuch as Regulation No 725/89 was in breach of higher-ranking Community law in several respects. On 28 June 1989 the Hauptzollamt dismissed that objection, claiming to be only an executive authority whose duty was to implement Regulation No 725/89 and therefore not in a position to examine the validity of such a regulation.

On 2 August 1989 Nölle brought an action before the Finanzgericht Bremen in which it repeated its claim for cancellation of the three decisions determining the definitive anti-dumping duties.

3. The Second Chamber of the Finanzgericht Bremen, taking the view that the action raised the problem of determining the validity of the Community provision in question, decided, by order of 12 December 1989, to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling in pursuance of Article 177 of the EEC Treaty:

'Is Council Regulation (EEC) No 725/89 of 20 March 1989 invalid?'

4. The order for reference was lodged at the Court Registry on 22 January 1990.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged:

— on 29 March 1990 by the Commission of the European Communities, represented by Eric White, a member of the Commission's Legal Service, assisted by Reinhard Wagner, a German Judge

placed at the disposal of the Commission within the framework of the scheme for an exchange of national officials;

— on 12 April 1990 by the Council of the European Communities, represented by Erik Stein, Legal Adviser in the Council's Legal Service;

— on 24 April 1990 by Detlef Nölle, trading as 'Eugen Nölle', the plaintiff in the main proceedings, represented by Deringer, Tessin, Herrmann & Sedemund, Rechtsanwälte, Cologne.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and to assign the case to the Fifth Chamber.

II — Summary of the written observations submitted to the Court

5. *Nölle* claims that Regulation No 725/89 is invalid and therefore void because it infringes higher-ranking rules of Community law, namely Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1988 L 209, p. 1) and Article 190 of the EEC Treaty. It is illegal for three reasons, it is claimed.

In the first place the plaintiff claims that the normal value used for calculating the dumping margin was wrongly determined since Sri Lanka ought not to have been chosen as the reference country. Under Article 2(5) of Regulation No 2423/88, in the case of imports from non-market economy countries, normal value is to be determined 'in an appropriate and not unreasonable manner' on the basis either of (a) the price at which the like product of a market economy third country is sold; or (b) the constructed value of the like product in a market economy third country; or (c) the price actually payable in the Community for the like product.

Nölle claims that the Commission has hitherto based its practice regarding the choice of a reference country under paragraph 2(5)(a) on the existence in that country of a like product, a similar volume of production, prices resulting from the rules of the market economy, similar production methods and conditions of access to raw materials comparable to those of the exporting country concerned (cf. Council Regulation (EEC) No 407/80 (Official Journal 1980 L 48, p. 1; Commission Decision 80/410/EEC of 10 April 1980, Official Journal 1980 L 97, p. 1); Commission Decision 82/398/EEC of 14 June 1982, Official Journal 1982 L 172, p. 47).

According to the plaintiff, Sri Lanka ought not to have been chosen as a reference country because it does not satisfy any of

these conditions. Thus, it does not manufacture like products, since China produces round, flat and radiator brushes, whereas Sri Lanka produces only flat brushes (as well as others not affected by the anti-dumping duty imposed). Production volumes are not comparable, as Sri Lanka has only two producers, one of whom manufactures practically none of the products in question, whereas in China there are at least 150 small and medium-sized businesses whose production volume is at least 200 times that of Sri Lanka. In addition, the Sri Lankan industry has to import the pig bristle, the wood for the handles and the ferrules, whilst China has almost 85% of the world market in pig bristle.

Finally, the domestic price is not the result of the rules of a market economy since there is no natural competition because the two producers share roughly 90% of the domestic market and the only manufacturer of the product concerned is a subsidiary of a Community producer who played a decisive part in the anti-dumping proceeding instigated by the European producers. Under the first indent of Article 4(5) of Regulation No 2423/88 the injury caused must be determined without taking into account producers related to exporters or importers. That rule suggests that information coming from producers in a third country who are 'related' to complainants should also be left out of account.

The combination of these factors results in a price level very much higher than would have been the result if another reference country had been chosen, such as that suggested by the importers — Taiwan — which was rejected by the Commission because the physical characteristics and the production costs of the products were different and the producers in Taiwan who were approached refused to cooperate (recitals 16 and 17 to Regulation No 725/89).

Thus the determination of the normal value resulted in an error in the calculation of the dumping margin. That margin, which is more than 90%, would have been much less if the Commission had chosen a Member State of the Community as the reference country, even if that State showed a level of production costs much higher than that for China.

In the second place the plaintiff claims that it cannot be stated that there was any injury to the Community industry. The brushes manufactured in the Community, particularly in the Federal Republic of Germany, are of better quality than those imported from China and consequently a difference in price could only be established by reference to prices for the lowest quality, which cannot however be regarded as comparable. The volume of imports, far from going up, has diminished, the trend of German brush production since 1981 has been rising and imports of Chinese brushes have not affected employment in the industry, where redundancies have been the result of progress in automation and rationalization.

Moreover the Commission was not entitled, for the purpose of determining the injury, to take into account Member States such as

France, Italy and Ireland, since no investigations were made there and France and Italy import only a negligible volume of Chinese brushes. In addition, the Commission was not entitled to use information obtained from its inquiries from the German producers. Under the first indent of Article 4(5) of Regulation No 2423/88, previously cited, the determination of injury must be effected without taking into account producers related to exporters or importers. In fact the four firms concerned import Chinese brushes themselves and one of them, Schabert, has even formed an association, supported by Rothlaender, the biggest importer of pig bristle for brushes in the Federal Republic of Germany, for the production of brushes in China. It must be noted that two-thirds of the imports of Chinese brushes are effected by the German producers and it therefore seems hard to maintain, as the Council does (recital 30 to Regulation No 725/89) that they made these imports as a legitimate self-defence measure against unfair competition and that the brushes were resold at a modest profit. If it was possible to sell more than two-thirds of the imports at a profit, one must wonder how the remainder could have caused such serious injury to the Community producers.

Thirdly the plaintiff claims that the Commission was wrong to find that there was a Community interest within the meaning of Article 12 of Regulation No 2423/88. It states that the proceeding was initiated at the instigation of the European industrialists to safeguard a proscribed agreement intended to drive independent importers from the market. It maintains that the independent importers were informed that such an agreement had been concluded between the German producers and the Chinese exporters, under which the independent exporters could no longer be directly supplied as deliveries were reserved for the Community producers — through the medium of the bristle importers, Rothlaender and Berg. It cannot be in the Community interest to help the European brush industry to 'sweep competitors from the market' contrary to Community competition law by means of an anti-dumping duty.

Finally the fourth complaint is to the effect that Regulation No 725/89 infringes the requirement, laid down by Article 190 of the EEC Treaty, to state the reasons on which it is based. The recitals to the regulation are not an answer, or not a sufficient answer, to the main objections already raised by the plaintiff, during the anti-dumping proceeding, to the imposition of an anti-dumping duty.

6. The *Commission* contends that the Community institutions have a discretion in appraising complex economic situations (judgment in Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923), including the choice of reference country. That choice was not, in the Commission's view, vitiated by any error of appraisal. The Sri Lankan brushes are in fact like products since they are essentially made from animal hairs mounted on wooden handles of more or less the same thickness, with a ferrule and number and weight of bristles more or less

similar to the Chinese brushes. It is irrelevant, the Commission thinks, that only flat brushes are produced and sold. It must not be forgotten that 80% of brushes exported from China are flat brushes and that round and radiator brushes fall under the same sub-heading in the Combined Nomenclature.

Moreover, production methods are similar in the two countries, with labour-intensive manufacture by hand and with low wages. The fact that the volume of production in the People's Republic of China is greater is irrelevant, as the decisive criterion is the production costs of individual firms, which are always small or medium-sized businesses. As regards the supposed advantage of access to raw materials, the Commission's answer is that that can be satisfactorily quantified only in a non-market economy country and could, in any case, be offset by other competitive advantages existing in a market economy country. Moreover adjustments were made, the Commission states, for products imported for the production of brushes (recital 20 to the contested regulation) and 25% of the adjusted prices was deducted to take account of quality differences.

Finally, the fact that there are only two producers in Sri Lanka and that one of them is the subsidiary of a Community firm does not imply the existence of a price agreement or that there was no sufficient competition.

In addition the choice of Sri Lanka is justified by the fact that the United States made the same choice to justify the imposition of an anti-dumping duty of 127.07% on brushes from China.

As regards the complaint relating to injury, the Commission claims that the Community institutions have a discretion to decide whether or not certain producers must be excluded from the production concerned (judgment in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraphs 43 and 44). The exercise of such a discretion may be seen, it claims, in recital 30 to the contested regulation. Moreover the Commission maintains that even if the Community products are better finished it cannot be concluded that they are not like products. In any event, the quality difference was taken into account by the application of a 20% correction factor to the level of undercutting and, as may be seen from recital 23 to the regulation, by the fact that the Chinese products were essentially compared to low or average quality brushes.

The Commission states that, contrary to the applicant's statement, imports from China rose from 28 140 000 brushes in 1982 to 45 580 000 brushes in 1987 and to 30 538 000 brushes for the first half of 1988 and that in this respect it is irrelevant whether or not imports expressed in terms of dollars, for example, increased. At the same time business declined for Community producers, causing redundancies, which cannot be explained by rationalization

measures in a manufacturing sector which is still labour-intensive.

Finally the Commission emphasizes that, to calculate the duty intended to offset the injury it did not base its decision on the average level of undercutting but on a lower level to take account of quality differences. It thinks that this particularly favourable calculation might have given the Community industry some reason to complain about the low level of the anti-dumping duty imposed.

As regards the third argument, it claims that the anti-dumping duty does not lead to restrictions of competition in the Community but merely corrects the advantages which unfair competition gave to the dumped imports. Moreover, it was unaware that the German or European brush industry had succeeded in encouraging the Chinese exporters to restrict their exports to the Community or to supply only certain Community purchasers. Further, in the case of an *ad valorem* duty such an agreement would be pointless.

Finally, as regards the fourth argument, the Commission takes the view that Regulation No 725/89 does not infringe the requirement of Article 190 of the EEC Treaty for a statement of the reasons on which it is based, because, as the Court has consistently held, the reasoning of the Community authority concerned must be sufficiently clear and unequivocal to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to enable the Court to exercise its supervisory jurisdiction (judgment in Case 240/84 *Toyo* v *Council* [1987] ECR 1809) and in this respect it is sufficient to set out the principal issues of law and of fact on which a legal measure is based and which are necessary in order that the reasoning may be understood (judgment in Case 24/62 *Germany* v *Commission* [1963] ECR 63). In this case those requirements were fully satisfied by the Council regulation, which sets out all the points raised by the plaintiff.

7. The *Council* concurs with the observations submitted by the Commission and adds further details. Thus it claims, first, that for every case of dumping the criteria appropriate to the specific situation of the proceedings in question should be adopted. In deciding upon these criteria the Council is called upon to appraise complex economic situations and, according to the Court's case-law, the institutions have a margin of discretion for that purpose (judgment in Case 258/84 [1987] ECR 1923, already cited).

As regards the plaintiff's statement that the institutions did not take account of the fact that the value in Deutschmarks of imports into the Federal Republic of Germany had fallen, the Council maintains that an increase in volume of the imports combined with a reduction in value represents an even more serious injury to the industry since the unit value of the brushes fell sharply.

As to the plaintiff's statement, put forward in its application to the national court, that the imposition of anti-dumping duties was

contrary to the Agreement on Trade and Economic Cooperation between the Community and China (Official Journal 1985 L 250) the Council contends that, whilst providing for the promotion and intensification of trade between the EEC and China, the same article states that this must take place within the framework of the respective laws and rules, which no doubt includes the anti-dumping rules.

Finally, as regards the statement of reasons, the Council claims that a regulation containing 36 paragraphs summarizing the essentials of the procedure and the arguments of the legislature complies with the criteria laid down by the Court in its consistent case-law, on the last occasion in the judgment in Case 156/87 [1990] ECR 781, already cited.

G. C. Rodríguez Iglesias
Judge-Rapporteur.