

Northwestern Journal of International Law & Business

Volume 8

Issue 2 *Fall*

Fall 1987

EEC Antidumping Law and Trade Policy after Ballbearings II: Discretionary Decisions Masquerading as Legal Process

James K. Lockett

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [Administrative Law Commons](#)

Recommended Citation

James K. Lockett, EEC Antidumping Law and Trade Policy after Ballbearings II: Discretionary Decisions Masquerading as Legal Process, 8 Nw. J. Int'l L. & Bus. 365 (1987-1988)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

ARTICLE

EEC Antidumping Law and Trade Policy After *Ballbearings II*: Discretionary Decisions Masquerading as Legal Process?

*James K. Lockett**

CONTENTS

I. INTRODUCTION	366
II. EEC ANTIDUMPING LAW IN TRANSITION	368
A. Initial Changes	368
B. Development of "Second Generation" Issues	374
III. THE <i>BALLBEARINGS II</i> CASES	378
A. Administrative Procedures Since <i>Ballbearings I</i>	378
B. Procedural Matters Decided in <i>Ballbearings II</i>	380
1. <i>Interim Measures</i>	380
2. <i>Appeals of Definitive Regulations Against Both the Council and Commission</i>	381

* B.A. University of Washington, 1977, J.D. Gonzaga University, 1980, LL.M. University of London, 1981, Oxford University, 1983. The author practices law in Brussels, Belgium, and will be affiliated with the firm of Clifford Chance beginning May, 1988. He would like to express his thanks to Mr. Frank L. Fine for his helpful comments on an earlier draft of this article.

3. <i>Admissibility of Claim to Annul Regulation in its Entirety</i>	381
4. <i>Refusal to Accept Price Undertakings or Take Account of Unilateral Price Increases</i>	382
5. <i>Adequacy of the Statement of Reasons for Assessing Duty Rate</i>	384
6. <i>Absence of Company's Name From a Complaint</i>	385
C. <i>Substantive Matters Decided in Ballbearings II</i>	385
1. <i>The Use of Different Methodologies To Determine Normal Values and Export Prices</i>	385
a. Mixed use of weighted and transaction-by-transaction methods	386
b. Inadequate statement of reasons for choosing the new method of calculation	389
c. Breach of the principles of legitimate expectation, legal certainty, and sound administration	389
d. Comparison of non-comparable products	390
e. Computation of normal values and export prices on a non-comparable basis	391
2. <i>Symmetry of Normal Value and Export Price for a Fair Comparison</i>	393
IV. THE IMPACT OF <i>BALLBEARINGS II</i> ON EEC LAW AND TRADE POLICY	399
V. CONCLUSION	402
VI. AFTERWORD	403

I. INTRODUCTION

Trade laws, and especially antidumping laws, are having an ever-greater impact on international trade throughout the world.¹ The effect on trade in the European Economic Community ("EEC" or "Community") is a prime example of this trend.² Controversy and allegations of

¹ Dumping can be generally defined as the selling of a product on a foreign market at a price below that charged on the domestic market. Sandler, *Primer on United States Trade Remedies*, 19 INT'L LAW. 763 (1985). See also Cunningham, *The Current State of U.S. Import Relief Laws—Increased Importance and Increased Complexity*, in INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE 1-1, 1-2 to 1-5 (J. Jackson, R. Cunningham & C. Fontheim eds. 1985)[hereinafter INTERNATIONAL TRADE POLICY]. For a thought-provoking analysis on the current proliferation of calls for trade protection and a proposed framework for analyzing the arguments for "fair trade," see Nicolaides, *How Fair is Fair Trade?*, 21 J. WORLD TRADE L. 147 (1987).

² See J. BESELER & A. WILLIAMS, *ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES v* (1986).

unfairly protectionist policies often accompany the heightened impact, both in the EEC³ and elsewhere.⁴ Also accompanying the trend is the increasing use of trade laws—correctly or incorrectly—as instruments with which trade policy is set and implemented.⁵ In the EEC, antidumping law has thus tended to function more as a policy tool and less as a technical instrument.⁶

This Article examines whether EEC antidumping law is maturing into a rational, fair, and cohesive set of rules and procedures while in the midst of this shift to a policy orientation. In setting the framework for this analysis, this Article first examines recent changes in EEC an-

³ An example of these controversies has been the heated debate over the extension of European Economic Community ("EEC") antidumping duties to goods produced in the EEC by certain foreign-owned companies. See, e.g., *Trade Dispute Looms Over EEC Move on Components*, Fin. Times, Feb. 4, 1987, at 4 (Eur. ed.); *EEC Set to Raise the Stakes Against Tokyo*, Fin. Times, Feb. 4, 1987, at 4 (Eur. ed.); *EEC Trade Policy: The FTA Criticises the Plan to Revise the EEC Anti-Dumping Regulation*, Europe No. 4501, Mar. 4, 1987, at 10; Van Bael, *Japanese Investment in the EC: Trojan Horse or Hostage?*, INT'L FIN. L. REV., June 1987, at 10.

⁴ See *US Criticised for Interpretation of Trade Laws*, Fin. Times, July 15, 1987, at 5, col. 1 (Eur. ed.); *The Members Are Cheating and GATT's Watchdog Is Toothless*, Int'l Herald Trib., Apr. 1, 1987.

⁵ See Howell & Wolff, *The Role of Trade Law in the Making of Trade Policy*, in INTERNATIONAL TRADE POLICY, *supra* note 1, at 3-1. In the opinion of Howell & Wolff, trade laws in the United States assume an even greater role than merely being instruments of trade policy objectives. "One is forced to conclude that to a degree unmatched in other nations, trade law is not merely an important aspect of U.S. trade policy—it actually *is* trade policy." *Id.* at 3-21.

⁶ One of the first overt examples of EEC antidumping law being used as a trade policy tool was the 1985 decision to impose antidumping duties on hydraulic excavators from Japan, in which the EEC Council ("Council") overrode the EEC Commission's ("Commission") recommendation and imposed tougher measures "in the light of the present trade relations with Japan . . ." Council Regulation 1877/85, 28 O.J. EUR. COMM. (No. L 176) 1, 4 (1985). While noting that the Commission's approach in the past had been "largely technical," one report on this case had the following comment:

The European Community for the first time has introduced an overtly political and anti-Japanese element into its handling of antidumping cases. This emerged in its handling of the imposition of definitive anti-dumping duties on Japanese hydraulic excavators. Duties have been imposed—despite the readiness of the Commission to accept Japanese undertaking [sic] to raise prices—for two reasons. First, ministers doubted whether the Commission would be able to monitor the trade effectively. Second, they wanted the matter seen "in light of the present commercial relations with Japan."

Consideration of the state of trade relations with a supplying country introduces a diplomatic element into what has hitherto been a largely technical process.

Community Imposes Duties on Japanese Excavators, Fin. Times, July 9, 1985, at 6, col. 1 (Eur. ed.); c.f. Vinyl Acetate Monomer from Canada, Commission Regulation 512/84, 27 O.J. EUR. COMM. (No. L 58) 17, 19 (1984)(refusing an undertaking from Canadian exporter of vinyl acetate monomer because of no similar possibility under Canadian law); Pentaerythritol from Canada, Council Regulation 96/85, 28 O.J. EUR. COMM. (No. L 13) 1, 3 (1985)(though no offer of an undertaking had been made by a Canadian pentaerythritol exporter, the Council stated that the absence of provisions in Canadian law for undertakings must be accounted for in determining whether a proposed undertaking by a Canadian exporter would be accepted by the EEC. The comments by the Council were later removed by a "corrigendum" to the regulation. 28 O.J. EUR. COMM. (No. L 20) 46 (1985)).

tidumping law, briefly reviewing earlier European Court of Justice ("Court") decisions,⁷ and summarizing legal issues currently being discussed.⁸ In this analysis, the important role of judicial review will be shown. This Article closes by addressing the effect of the Court's decisions and the extent to which they have contributed to or impeded the process of applying the EEC's fair trade rules.⁹ This Article concludes that the most recent cases—known as the *Ballbearings II Cases*—have set back the rationalization of EEC antidumping law, reinforcing the tendencies of the Commission and Council of the European Communities ("Commission" and "Council," respectively) to use their discretionary powers to pursue policy aims beyond the true scope of EEC antidumping laws.

II. EEC ANTIDUMPING LAW IN TRANSITION

A. Initial Changes

The changes in EEC antidumping law since 1979 have been quite profound. While the EEC antidumping procedures are decidedly flexible and discretionary when compared to those of other legal systems, particularly the United States,¹⁰ the EEC antidumping rules are still considerably clearer and more transparent now than they were before the late 1970s.¹¹ Since then, the Court has played an important role in the process of reforming and transforming EEC antidumping proceedings. This process was given its initial boost by the 1979 decisions of the Court in the first set of *Japanese Ballbearings Cases* ("*Ballbearings I*").¹² These were the Court's first decisions relating to the antidumping law. Notably, the opinion of Advocate General J. P. Warner was highly critical of

⁷ See *infra* notes 10-44 and accompanying text.

⁸ See *infra* notes 47-77.

⁹ See *infra* notes 78-246.

¹⁰ A panel discussion during the 1983 Fordham Corporate Law Institute on Antitrust and Trade Policies of the European Economic Community commented on this point several times. See Panel Discussion, *Antidumping and Countervailing Duties*, 1983 FORDHAM CORP. L. INST. 132 ("the EEC administration of its laws is much looser and less formal," comment by A. Paul Victor); *id.* at 136 ("officials in the EEC system on trade and subsidies have a greater area of discretion," comment by J. Jackson).

¹¹ For a review of the earlier period, see generally C. STANBROOK, *DUMPING—A MANUAL ON THE EEC ANTI-DUMPING LAW AND PROCEDURE* (1980); Didier, *EEC Antidumping Rules and Practices*, 17 COMMON MKT. L. REV. 349 (1980); Van Bael, *Ten Years of EEC Anti-Dumping Enforcement*, 13 J. WORLD TRADE L. 398 (1979).

¹² The "*Japanese Ballbearings Cases*" is the commonly-known name for five decisions of the European Court of Justice ("Court") concerning antidumping:

the lack of procedural safeguards in antidumping cases.¹³ In *Ballbearings I*, the Commission had refused to inform the exporters (petitioners) of any details relating to their defense, including: 1) the alleged dumping margins and their method of calculation; 2) the fact that constructed values had been used instead of domestic prices; or 3) how injury had been determined.¹⁴ As a result of this judicial criticism, the existing EEC antidumping regulation¹⁵ was amended to provide for improved rights for defendants in antidumping proceedings.¹⁶ Thus, *Ballbearings I* had a significant impact on the development of EEC antidumping law by limiting some of the previously unfettered discretion exercised by the Commission.

Surprisingly, no judicial decision ruled upon a substantive aspect of EEC antidumping law until May 7, 1987, when the *Ballbearings II* opinions were delivered.¹⁷ Despite the fact that there were several hundred administrative proceedings by the Commission and Council before this case, there were relatively few appeals to the Court (the only appellate court in the EEC legal system¹⁸). Those appeals were all decided on

1) NTN Toyo Bearing Co. v. Council, 1979 E. Comm. Ct. J. Rep. 1185, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8574 (1979);

2) Import Standard Office ("ISO") v. Council, 1979 E. Comm. Ct. J. Rep. 1277, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8575 (1979);

3) Nippon Seiko K.K. v. Council, 1979 E. Comm. Ct. J. Rep. 1303, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8576 (1979);

4) Koyo Seiko Co. v. Council, 1979 E. Comm. Ct. J. Rep. 1337, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8577 (1979);

5) Nachi Fujikoshi Corp. v. Council, 1979 E. Comm. Ct. J. Rep. 1363, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8578 (1979).

The opinion of Advocate General J.P. Warner, covering all five cases, was delivered on February 14, 1979. See 1979 E. Comm. Ct. J. Rep. 1185, 1212, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8574, at 8345 (1979). Unless reference to an individual case or opinion is made, the five Court opinions and the Advocate General's opinion will be referred to collectively as *Ballbearings I*. For a brief background and summary of the cases, see Note, *European Court: Dumping of Japanese Bearings*, 13 J. WORLD TRADE L. 361 (1979).

¹³ *Ballbearings I*, 1979 E. Comm. Ct. J. Rep. 1185, 1212, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8574, at 8329, 8445-93 (1979) (Opinion of the Advocate Gen.).

¹⁴ *Id.* at 1253-66, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) at 8377-87.

¹⁵ Council Regulation 459/68, 11 O.J. EUR. COMM. (No. L 93) 1 (1968).

¹⁶ Council Regulation 1681/79, 21 O.J. EUR. COMM. (No. L 196) 1 (1979). For a discussion of this amendment, see De Smedt, *The EEC Anti-dumping Policy: New Developments*, 14 INT'L LAW. 223 (1980); see also H. LESGUILLONS, LE RÉGIMÉ COMMUNAUTAIRE DE PROTECTION CONTRE LE DUMPING ET LES SUBVENTIONS 17-18 (1983).

¹⁷ As in the earlier *Ballbearings I* cases, *Ballbearings II* is the common name for five antidumping cases appealed to the Court after an affirmative dumping decision by the Council. Four of the five appeals were by the same Japanese companies party to *Ballbearings I*. See *infra* note 78.

¹⁸ A proposal has been made by the Court to establish a junior appeals tribunal, to be known as the Court of First Instance. This tribunal would take the initial responsibility for cases involving competition, antidumping, steel quotas, and EEC staff matters. The new court's powers would be limited to deciding points of "complex fact" rather than legal points, which would remain under the Court's jurisdiction. Appeals to the Court would still be possible. See *European Court Seeks to Ease*

procedural grounds, and provided some minimal procedural safeguards.¹⁹

In addition to the major impact of *Ballbearings I*, which led to a revision of the EEC antidumping regulation then in force,²⁰ the other major factor for change was the completion of the Tokyo Round of the General Agreement on Tariffs and Trade ("GATT").²¹ The Tokyo

Its Load, Fin. Times, Nov. 25, 1987, at 2 (Eur. ed.). For an analysis of the new court's effect, see Lang, *The Impact of the New EEC Court of First Instance in Antitrust and Trade Law Cases 1987* FORDHAM CORP. L. INST. — (forthcoming, B. Hawk ed. 1988).

¹⁹ It is not the purpose of this Article to review extensively all of these prior Court decisions. Excluding procedural orders and interim measures, between the *Ballbearings I* decision and *Ballbearings II* on May 7, 1987, there were six more final judgments of the Court on antidumping matters:

1) *Alusuisse Italia Spa. v. Council*, 1982 E. Comm. Ct. J. Rep. 3463, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8869 (1982)(a judgment dismissing the application as inadmissible on grounds that an unrelated importer had no right to appeal against a generally applicable regulation);

2) *Allied Corp. v. Comm'n ("Allied I")*, 1984 E. Comm. Ct. J. Rep. 1005, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,083 (1984)(appeals against a regulation imposing provisional antidumping duties. The decision upheld the right of appeal for producers and exporters able to establish that they were identified or affected by measures imposing antidumping duties, thus showing that the measures are of direct and individual concern. A final judgment dismissed the applications of exporters as unfounded since the Commission had the right to impose provisional duties based on information at its disposal upon the withdrawal of exporters' undertakings);

3) *Timex Corp. v. Council*, 1985 E. Comm. Ct. J. Rep. 849, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,143 (1985)(the Court held that the Commission had breached essential procedural requirements by failing to provide information to complainant sufficient for it to ascertain whether the Commission had established the facts correctly; the Court annulled the regulation for the Commission's infringement of the procedural requirements);

4) *Allied Corp. v. Council ("Allied II")*, 4 Common Mkt. Rep. (CCH) ¶ 14,200 (1985)(appeals against the definitive antidumping regulation; the Court found that the regulation required the Council to assess duties at an amount less than dumping margin if those duties were adequate to remove injury; the Court held that the Council was obliged to decide the amount of duty necessary to remove injury and because there was nothing on the record indicating the Council had done so, the Court annulled the duty);

5) *Gerlach & Co. BV v. Minister for Economic Affairs*, 1985 E. Comm. Ct. J. Rep. — (a reference from the Dutch courts for a preliminary ruling under Article 41 of the European Coal and Steel Community ("ECSC") Treaty; rulings relate to the authority of the Commission and to the prolonged use of obligatory conversion rates for calculation of antidumping duties on certain iron and steel products)(not yet reported);

6) *Continentale Produkten Gesellschaft Ehrhardt-Renken GmbH & Co. v. Comm'n*, 1987 E. Comm. Ct. J. Rep. — (application concerning refund procedures and powers of the Commission; dismissed by Court)(not yet reported).

Two antidumping cases were terminated before final judgment:

1) *Celanese Chemical Corp. v. Council*, 1982 E. Comm. Ct. J. Rep. 1183 (an order ensuring confidential treatment of business secrets in Court proceedings);

2) *V/O Raznoimport v. Comm'n*, 1983 E. Comm. Ct. J. Rep. 2573 (an order dismissing application for interim measures);

For a brief discussion of the most important of the antidumping cases and related background materials, see *infra* notes 29-43 and accompanying text.

²⁰ See *supra* notes 14-16 and accompanying text.

²¹ General Agreement on Tariffs and Trade ("GATT"), Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. See generally Jackson, Louis & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267 (1982).

Round brought about several changes in the GATT, one of which was the GATT Antidumping Code.²²

To accommodate the changes of the Antidumping Code, the Community approved the Tokyo Round agreements.²³ On December 20, 1979, it adopted the new antidumping and countervailing legislation as Council Regulation 3017/79 ("Antidumping Regulation").²⁴ This regulation entered into force on January 1, 1980, and repealed the previous regulation.²⁵

The purpose of the Antidumping Regulation was four-fold: 1) to incorporate the changes agreed upon in the GATT Antidumping Code and in particular, the more specific rules used to determine causation of injury; 2) to continue to implement the procedural changes necessary to meet the criticisms made in *Ballbearings I*; 3) to elaborate on and strengthen the criteria on export subsidies (as distinct from dumping); and 4) to consolidate the legislation into a single instrument, the prior regulation having already been amended three times.²⁶ Marking a major step forward under the Antidumping Regulation, the Commission and Council slowly began to make their procedures more apparent.²⁷ By 1982-83 the regulations and decisions were somewhat less cryptic, allowing an outside party to understand some of what had transpired in the particular cases.²⁸

The Court had a continuing role to play in these procedural improvements. The first appeal after *Ballbearings I* came in 1981 in *Ce-*

²² Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650. For a brief review of the negotiations and the effect of the new agreement, see J. BESELER & A. WILLIAMS, *supra* note 2, at 13-18 (noting changes, inter alia, in the injury assessment standards, price undertaking rules, and retroactive application of duties).

²³ Council Decision of Dec. 10, 1979, 23 O.J. EUR. COMM. (No. L 71) 1 (1980).

²⁴ Council Regulation 3017/79, 22 O.J. EUR. COMM. (No. L 339) 1 (1979)[hereinafter Antidumping Regulation]. At the same time, the Commission enacted Commission Recommendation 3018/79/ECSC, 22 O.J. EUR. COMM. (No. L 339) 15 (1979), which governs antidumping matters for coal, iron, and steel products in the Community, falling under a separate legal regime. See J. BESELER & A. WILLIAMS, *supra* note 2, at 24-29, 31. For purposes of this Article, and since the general EEC antidumping rules and the specific ECSC rules are nearly identical, reference will be made only to the EEC rules.

²⁵ Antidumping Regulation, *supra* note 24, arts. 17, 18.

²⁶ Pitt & Moncreiffe, *The Anti-Dumping and Anti-Subsidy Rules and Practices of the European Economic Community*, 10 INT'L BUS. LAW. 333 (1982); see also J. BESELER & A. WILLIAMS, *supra* note 2, at 26-27; Didier, *EEC Anti-dumping Rules and Practices*, 17 COMMON MKT. L. REV. 349 (1980). Article 14(1) of the Antidumping Regulation was amended in 1982 to provide that review proceedings could not be held at the exporter's request until one year after the termination of a proceeding. Council Regulation 1580/82, 25 O.J. EUR. COMM. (No. L 178) 9 (1982).

²⁷ Van Bael, *A Practitioner's Guide to Due Process in EEC Antitrust and Antidumping Proceedings*, 18 INT'L LAW. 841, 858-61 (1984).

²⁸ *Id.* at 861.

lanese Chemical Corp. v. EEC Council.²⁹ There the Court affirmed that appellants could be assured of a degree of confidentiality for certain business secrets that were divulged to support the appeal.³⁰

The next appeal, *Alusuisse Italia Spa. v. EEC Council*,³¹ was not handled as equitably. In dismissing this case, the Court barred from litigation an independent importer not directly involved in the administrative proceedings by use of an unduly rigid admissibility standard.³² That standard—a need for the party to be expressly named in a regulation—was shown to be impossibly formalistic in the next appeal, *EEC Seed Crushers' and Oil Processors' Federation v. Commission ("FEDIOL")*,³³ which involved a countervailing duty proceeding. Although the complainants had not been named in the regulation at issue, the Court held that a right to judicial review as to whether the Commission had disregarded their procedural rights existed.³⁴ Some five months later, *Allied Corp. v. EEC Council ("Allied I")*³⁵ removed the question of an exporter's right to appeal when affected by measures; at the same time it affirmed some of the Commission's discretionary powers concerning the imposition of provisional duties.³⁶

An important step in providing procedural safeguards for all parties involved was taken by the Court in its 1985 judgment in *Timex Corp. v. EEC Council*.³⁷ The Court again upheld a complainant's right of appeal. In *Timex* the Commission had refused to provide the complainant with certain basic details concerning the dumping calculations. The complainant was thus unable to ascertain whether or not the Commission was using the correct facts. The Court held that in failing to disclose the

²⁹ 1982 E. Comm. Ct. J. Rep. 1183.

³⁰ *Id.* For further discussion of this issue, see Riesenfeld, *The Treatment of Confidential Information in Antidumping Cases: A Comment on the Celanese Case*, 21 COMMON MKT. L. REV. 553 (1984).

³¹ 1982 E. Comm. Ct. J. Rep. 3463, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8869 (1982).

³² See Van Bael, *supra* note 27, at 865.

³³ *EEC Seed Crushers' and Oil Processors' Federation ("FEDIOL") v. Comm'n*, 1983 E. Comm. Ct. J. Rep. 2913, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,013 (1983).

³⁴ For further background on the role of complainants, see Kuyper, *Some Reflections on the Legal Position of the Private Complainant in Various Procedures Relating to Commercial Policy*, 1983 LEGAL ISSUES EUR. INTEGRATION 115.

³⁵ 1984 E. Comm. Ct. J. Rep. 1005, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,083.

³⁶ For a useful survey of the admissibility standards used by the Court in the light of the judgments in *Alusuisse*, *FEDIOL*, and *Allied I*, see Bellis, *Judicial Review of EEC Anti-dumping and Anti-subsidy Determinations After "Fediol": The Emergence of a New Admissibility Test*, 21 COMMON MKT. L. REV. 539 (1984).

³⁷ 1985 E. Comm. Ct. J. Rep. 849, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,143.

facts, essential procedural requirements were breached. The Court annulled the regulation and required the antidumping duty to be maintained until the Commission and Council adopted the measures needed to comply with the judgment.³⁸

The important principle that emerged from *Timex* was the Commission's duty (heretofore largely unperformed) to give all interested parties sufficient information on the key dumping and injury issues in question, so that the parties could ascertain whether or not the Commission made accurate factual determinations.³⁹ Although the Commission still has some improvements to make in this area, greater disclosure in most areas of EEC antidumping practice now exists.⁴⁰

The last important Court decision before *Ballbearings II* reversed the rationalization of EEC antidumping law was the 1985 decision in *Allied Corp. v. EEC Council* ("*Allied II*"),⁴¹ which was a second appeal in this antidumping case.⁴² In a sense, this decision was an extension of the principle from *Timex* that Community institutions are required to make findings on the record so that the parties (and the Court) may review them, though this principle was not expressed by the Court. Here, the Council's failure to indicate on the record whether it had made a determination as to the level of duty necessary to remove injury was held to be illegal, and the Court annulled the regulation.⁴³

Through these cases the Court played an important role in making EEC antidumping law more easily understood and procedurally fair.

³⁸ *Id.* at 870-71, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 15,784-85. One of the most interesting parts of the Court's judgment was its order allowing the regulation to continue for the interim period. On this point, and for a general review of the case, see Note, *Antidumping—Redefinition of Confidentiality and Right of Judicial Review—Institution of a New Form of Relief: Timex Corporation v. Council and Commission of the European Communities*, 16 GA. J. INT'L & COMP. L. 179 (1986).

³⁹ In this author's experience, since the *Timex* decision there is greater disclosure of information by the Commission if requested by the parties. Although disclosure of the duty calculations using the so-called "target price" method remains inadequate, the Commission defends its lack of disclosure on grounds of confidentiality. The Commission has also been requiring parties to submit more comprehensive non-confidential summaries of their submissions. Though there is still room for improvement, these are quite helpful developments. For a proposed means to develop these trends further, see Taylor & Vermulst, *Disclosure of Confidential Information in Antidumping and Countervailing Duty Proceedings Under United States Law: A Framework for the European Communities*, 21 INT'L LAW. 43 (1987).

⁴⁰ See *id.* Greater disclosure concerning injury and assessment of duties would aid considerably in verifying the accuracy of the Commission's findings.

⁴¹ 4 Common Mkt. Rep. ¶ 14,200 (1985).

⁴² See *supra* notes 35-36 and accompanying text.

⁴³ *Allied II*, 4 Common Mkt. Rep. (CCH) at 16,222. For further analysis of the decision, see Pevtchin, *Allied II: Limits on the Extent of Injury Under the EEC Anti-dumping Rules*, 1985 FORDHAM CORP. L. INST. 605.

Resolution of these "first generation" issues through application of foundational administrative law principles have been essential limitations on the otherwise unbridled discretion of the Community institutions.⁴⁴ These procedural improvements have allowed parties (and in particular defendants) to apply principles from previous cases in detailed analyses of the substantive issues of dumping, injury, and related matters. Some of these recent issues are discussed below.

B. Development of "Second Generation" Issues

During 1984 and 1985, several pivotal changes began in EEC antidumping law. As previously mentioned, several Court judgments firmly established the right of appeal for exporters, complainants, and certain importers.⁴⁵ Another important development which began in 1984 was a change in the Commission's methodology for computing dumping. This change of methodology was first manifested in the antidumping regulation delivered by the Council concerning ballbearings from Japan and Singapore.⁴⁶ The Court appeal of this case, known as *Ballbearings II*, is the main focus of the remainder of this Article.

Within days of the Council's decision in *Ballbearings II*, the Antidumping Regulation was amended. To support its policy aims and to consolidate the intended amendments into one version,⁴⁷ the Council enacted Council Regulation 2176/84⁴⁸ ("Amended Regulation"). The Amended Regulation took effect on August 1, 1984,⁴⁹ and approximately forty changes were made to the earlier Antidumping Regulation.⁵⁰ The amendments were intended to be a comprehensive updating of EEC trade law policy and practice.⁵¹ While certain minor substantive changes

⁴⁴ For comments on this evolution, see Panel Discussion, *Antidumping Rules in the EEC: The Second Generation of Issues*, 1985 FORDHAM CORP. L. INST. 695, 699.

⁴⁵ See *supra* notes 29-36 and accompanying text. A useful summary of the right of judicial review in the EEC may be found in Vermulst, *Dumping in the United States and the European Community: A Comparative Analysis*, 1984 LEGAL ISSUES EUR. INTEGRATION 103, 133-47. For a fuller background on judicial review generally, see J. USHER, EUROPEAN COURT PRACTICE (1983); see also Lang, *Judicial Review of Trade Safeguard Measures in the European Community*, 1985 FORDHAM CORP. L. INST. 641; J. BESELER & A. WILLIAMS, *supra* note 2, at 241-59; I. VAN BAELE & J. BELLIS, INTERNATIONAL TRADE LAW AND PRACTICE OF THE EUROPEAN COMMUNITY 4-10, 127-28 (1985).

⁴⁶ Council Regulation 2089/84, 27 O.J. EUR. COMM. (No. L 193) 1 (1984).

⁴⁷ J. BESELER & A. WILLIAMS, *supra* note 2, at 28-29.

⁴⁸ 27 O.J. EUR. COMM. (No. L 201) 1 (1984)[hereinafter Amended Regulation].

⁴⁹ *Id.* art. 19. The earlier Antidumping Regulation was repealed. *Id.* art. 18.

⁵⁰ See De Smedt, *European Community: A New Anti-dumping Regulation*, WORLDLAW, Nov.-Dec. 1984, at 43 [hereinafter *New Regulation*].

⁵¹ See De Smedt, *EEC Law: Anti-Dumping*, 12 INT'L BUS. LAW. 471 (Dec. 1984)[hereinafter *Anti-Dumping*]. Two key officials of the Commission involved with antidumping matters summarized the changes as follows:

were effected by the Amended Regulation, particularly in the definition of constructed value and in the comparison between normal value and export price,⁵² the primary thrust of the changes were again procedural.⁵³ Changes were implemented with regard to undertakings,⁵⁴ introduction of a "sunset" clause for duties,⁵⁵ and other procedural points.⁵⁶ In general, the procedural changes have indeed proven to be useful in the development of a clearer and better regulated trade practice.⁵⁷

By 1985, observers generally agreed that EEC antidumping law had reached the "second generation"⁵⁸ (although, in this author's view, the change came some five to ten years later than it did in comparable trading partners). Rather than arguing over fundamental procedural rights, the discussion shifted to: 1) initiation and complaint procedures;⁵⁹ 2) the

Some of the amendments are designed to clarify the Commission's practice in this area. These relate to the definition of the costs to be taken into account for the determination of constructed value and sales below cost; the treatment of related parties; the allowances to be granted for differences in conditions and terms of sale and, in particular, those relating to the level of trade and to import charges and indirect taxes; the period of investigations; the calculation of the amount of a subsidy and the rules relating to the treatment of confidential information. Other changes are of a technical character. These include amendments to bring the terminology into line with current customs legislation and common rules for imports from state trading countries. Finally, the opportunity has been taken to streamline the procedures and to make them more effective. Amendments to this effect are those concerning consultation with the Member States; the stipulation of time limits for the acceptance of price undertakings; the procedures to be followed in case of violation or withdrawal of price undertakings; the rules for the refund of duties on particular shipments and, finally, the introduction of a "sunset" provision, under which anti-dumping and countervailing measures automatically lapse after a period of five years, unless it has been shown that there is a need for their continued existence.

J. BESELER & A. WILLIAMS, *supra* note 2, at 28-29 (footnotes omitted).

⁵² De Smedt, *New Regulation*, *supra* note 50 (noting the revised definition of constructed value as being cost of production plus a reasonable profit margin, and noting changes in the Article 10 adjustments).

⁵³ See De Smedt, *Anti-Dumping*, *supra* note 51.

⁵⁴ See *id.* (noting an expedited process and time limits for offering undertakings).

⁵⁵ *Id.* (generally five years duration).

⁵⁶ For example, consultations, confidentiality, and termination of proceedings. See *id.*

⁵⁷ For a recent survey of procedures in EEC practice, see van Lennep & van Barlingen, *Procedural Aspects of EEC Anti-Dumping*, 28 SWISS REV. INT'L COMPETITION L. 57 (1986). Certainly one benefit of the greater clarity of the proceedings, and particularly the details published in the regulations, has been that the practice of the EEC can finally be comprehensively analyzed. The first such study came out in 1984. Davey, *An Analysis of European Communities Legislation and Practice Relating to Antidumping and Countervailing Duties*, 1983 FORDHAM CORP. L. INST. 39. Several other useful studies have since been published. See J. BESELER & A. WILLIAMS, *supra* note 2; I. VAN BAELE & J. BELLIS, *supra* note 45; E. VERMULST, *ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES* (1987).

⁵⁸ See Panel Discussion, *supra* note 44; Bourgeois, *EC Antidumping Enforcement—Selected Second Generation Issues*, 1985 FORDHAM CORP. L. INST. 563.

⁵⁹ Bourgeois, *supra* note 58, at 590-94.

scope, and evasion, of duties;⁶⁰ 3) refunds of duties paid;⁶¹ 4) review and expiration of antidumping duties;⁶² and 5) matters relating more to the mechanics of the proceedings than the basic procedural fairness.⁶³

Based upon the increased disclosure of the regulations and increased experience with these complex issues, discussions on the substantive level are now possible.⁶⁴ For example, the concept of "Community interest" as a test in assessing duties has been discussed,⁶⁵ although its application remains rather unclear.⁶⁶ The overall issue of injury has also been discussed to a much greater extent than before.⁶⁷ It remains to be seen, however, whether the Commission will seriously examine the complicated injury issues with which it has been confronted.⁶⁸ In several recent cases the defendants have asserted that the Commission has failed to analyze the alleged injury fully, and these issues have been appealed to the Court.⁶⁹

⁶⁰ *Id.* at 595-600. Concerning evasion or circumvention of antidumping duties, the Community has now amended the Amended Regulation to allow the imposition of antidumping duties on certain EEC assembled products, 1) where the assembly is handled by a party related or associated to an exporter found to have been dumping, 2) where such operation began or increased after the initiation of such antidumping proceeding, and 3) where the value of the parts from that exporter's country exceed 60% of the total value of the parts used in the assembled product. See Council Regulation 1761/87 of June 22, 1987 (amending Council Regulation 2176/84), 30 O.J. EUR. COMM. (No. L 167) 9 (1987).

⁶¹ See *Bourgeois*, *supra* note 58, at 600-01; Panel Discussion, *supra* note 44, at 699-700. In October 1986, the Commission laid down guidelines concerning refunds of duties. See *Commission Notice Concerning the Reimbursement of Anti-Dumping Duties*, 29 O.J. EUR. COMM. (No. C 266) 2 (1986).

⁶² See *Bourgeois*, *supra* note 58, at 601.

⁶³ *Id.* at 584-90.

⁶⁴ See, e.g., *Pevtchin*, *supra* note 43, at 615 (discussion on the extent of injury).

⁶⁵ See, e.g., *Bourgeois*, *supra* note 58, at 588-90; Stanbrook, *The Impact of Community Interest and Injury Determination on Antidumping Measures in the EEC*, 1985 FORDHAM CORP. L. INST. 623; *Pevtchin*, *supra* note 43. In *Allied II*, 4 Common Mkt. Rep. (CCH) ¶ 14,200, the Advocate General suggested that the Community institutions should take a far more flexible attitude towards the application of the antidumping rules. He was critical of the Commission's handling of price undercutting, arguing that measures should be applied only when actual price discrimination is practiced. Advocate General van Themaat argued that the Commission should not have compared export prices with artificially constructed EEC market prices. Finally, in his view, the amount of duties should not exceed the level required by the Community interest, *id.* sec. 4.3, a theory which in essence would combine the injury and Community interest tests. The Court, however, did not adopt the Advocate General's views completely, ruling solely on the issue of the institution's failure to meet the requirements of Article 13(3) of the regulation.

⁶⁶ See *Allied II*, 4 Common Mkt. Rep. (CCH) ¶ 14,200.

⁶⁷ See, e.g., *Pevtchin*, *supra* note 43; Stanbrook, *supra* note 65; Panel Discussion, *supra* note 44, at 697-98, 701.

⁶⁸ A major contributing factor in this respect, inter alia, is the fact that the Commission's antidumping services are understaffed significantly. See Panel Discussion, *supra* note 44, at 698.

⁶⁹ See *Electronic Typewriters from Japan*, Council Regulation 1698/85, 28 O.J. EUR. COMM. (No. L 163) 1 (1985)(two of the three Community producers were themselves significant importers

Since 1984-85, much discussion and dispute has centered upon the dumping determinations made by the Commission.⁷⁰ Where producers sell in their domestic market and the EEC markets through subsidiaries, the method of setting and comparing normal values and export prices has also been altered by the Commission, and continues to be a subject of sharp disagreement.⁷¹ The Commission has also developed a "single entity" theory, whereby a normal value (either domestic price or constructed value) is determined at the distribution level of the subsidiary company (that is, the subsidiary's prices or their equivalent). This has been adopted even though there is no authority in the Antidumping Regulation to use the sales companies' prices.⁷² To reconstruct the export price, the Commission deducts from the EEC subsidiary's resale price all "costs incurred between importation and resale" and a "reasonable profit" (normally more than the actual amounts).⁷³ Thus, for the export price an ex-factory price is used for comparison. For the normal value, however, only certain "direct" selling expenses of the parent or domestic subsidiary are deducted, leaving all of the "indirect" selling and other expenses related to distribution to be included in normal value.⁷⁴ The Commission calls this an "ex-factory" price.⁷⁵ Although it has been demonstrated that this methodology skews the results of dumping calculations very significantly,⁷⁶ the Commission and Council persist in using

of Japanese typewriters, and the remaining producer showed several indications of improving its position despite certain problems of its own making; these decisions are currently on appeal to the Court. *See infra* note 224)[hereinafter *Electronic Typewriters*]; Photocopiers from Japan, Council Regulation 535/87, 30 O.J. EUR. COMM. (No. L 54) 12 (1987)(an important issue in this case was the definition of "Community industry," since by the end of the case all of the EEC producers except one had links with Japanese companies, and the remaining EEC producer was the United Kingdom subsidiary of a United States company buying part of its products from a related Japanese company; these decisions are currently on appeal to the Court. *See infra* note 225)[hereinafter *Japanese Photocopiers*].

⁷⁰ Aside from the court appeals, discussions at certain public forums have also focused on these subjects. *Compare* *Bourgeois*, *supra* note 58, at 564 (in support of the Commission's positions) with Panel Discussion, *supra* note 44, at 700-01 (criticizing some of the Commission's positions).

⁷¹ The Court discussed some of these issues in *Ballbearings II*. *See infra* notes 188-223 and accompanying text. The disagreement has resulted in a number of appeals to the Court. *See infra* notes 224-25.

⁷² *See, e.g.*, *Electronic Typewriters*, *supra* note 69 (where the Commission first elaborated on its new theory). Interpretations of Article 2(3) and (7) of the Amended Regulation, *supra* note 48, are in dispute in this appeal to the Court.

⁷³ Except for the deductions being excessive in their amounts, this method is sanctioned under Article 2(8)(b) of the Amended Regulation, *supra* note 48.

⁷⁴ *Electronic Typewriters*, *supra* note 69; *Japanese Photocopiers*, *supra* note 69.

⁷⁵ *Id.*

⁷⁶ A graphic illustration of the application of this new methodology was made in a conference in Brussels early in 1987. The example given started with a resale price in the home market of 500, and a higher resale price by the related EEC importer of 560. The normal value was calculated by

this method. The extent to which this method has now been sanctioned by the Court in *Ballbearings II* will be addressed below.⁷⁷

III. THE *BALLBEARINGS II* CASES

The *Ballbearings II* cases are landmark decisions.⁷⁸ Five decisions of the Court on five applications for annulment made by the Japanese companies were handed down on May 7, 1987. These cases were the first judgments of the Court on substantive aspects of EEC antidumping law.⁷⁹ Numerous procedural and substantive arguments were raised by the applicants in support of their applications. The Court, however, ruled against the applicants on every point. Before discussing the decisions in depth, some background information is needed.

A. Administrative Procedures Since *Ballbearings I*

It will be recalled that in the 1979 decisions in *Ballbearings I*, the Court ruled in favor of the applicants and annulled the regulation impos-

deducting "direct" selling costs in the home market (salesmen's salaries, commissions, credit, warranty, packing, insurance and freight), which reduced the 500 to a normal value of 434. Starting with an EEC resale price of 560, all direct and indirect costs of the EEC subsidiary were deducted, plus a 5% "reasonable profit," and duties and export costs. The resulting constructed export price, which began at 560, was 311.

On the basis of this example, it was seen that, even though the EEC related importer had a resale price 12% higher than the home market price of its parent (only 5.5% of which was export costs and duty), the companies would nonetheless be found dumping at the rate of 16.71%. In order not to be found dumping, the EEC importer would have to sell at a price which is 57% higher than the parent's selling price in the home market. This result occurs even though the selling costs in each market are almost identical in percentage terms. The dramatic difference arises solely from the Commission's methodology. See R. Griffith, *How a Dumping Calculation is Done* (remarks at the Conference on EEC Anti-Dumping Law and Practice, Jan. 29, 1987, Brussels, Belgium).

⁷⁷ See *infra* notes 188-223 and accompanying text.

⁷⁸ The *Ballbearings II* cases consist of five appeals from Council dumping decisions: NTN Toyo Bearing Co. v. Council, 1987 E. Comm. Ct. J. Rep. —; Nachi Fujikoshi Corp. v. Council, 1987 E. Comm. Ct. J. Rep. —; Koyo Seiko Co. v. Council, 1987 E. Comm. Ct. J. Rep. —; Nippon Seiko K.K. ("NSK") v. Council, 1987 E. Comm. Ct. J. Rep. —; Minebea Co. v. Council, 1987 E. Comm. Ct. J. Rep. —. The decisions are not yet reported.

An official English translation, Judgment of the Court, is available for each case from the Court (except for *Nachi Fujikoshi*, for which only a French text is available). An official translation of Advocate General Mancini's opinion, Opinion of the Advocate General ("Op. Advocate Gen."), which covers all five cases in *Ballbearings II*, is also available from the Court. Citations to the separate decisions are to paragraph numbers ("¶") used by the Court in its translations (paragraphs in the Opinion of the Advocate General are not numbered; the Court's page numbering is used). For convenience, the facts of *Ballbearings II* will be referenced to the Opinion of the Advocate General and not to the separate decisions of each case. The *NSK* decision is used in this Article for the legal issues arising in all five *Ballbearings II* cases. Where legal issues unique to a particular case are discussed, the individual decision is referenced.

⁷⁹ For a discussion of the earlier cases, see *supra* notes 12, 19.

ing antidumping duties on those companies.⁸⁰ A month or so after those judgments, the Federation of European Bearing Manufacturers Association submitted a new complaint alleging fresh dumping practices by the Japanese.⁸¹ Following an investigation, the Commission and the Japanese companies agreed to settle the investigation by an agreement on prices.⁸² These price agreements (known as "undertakings" in EEC practice) were embodied in the Commission decision of June 4, 1981.⁸³ The agreements, however, were only temporary.

In March 1983, the European ballbearing industry provided information to support allegations that additional dumping and injury were occurring despite the price agreements.⁸⁴ In light of the expanding market in miniature ballbearings, the allegations in the complaint, and the Commission's own experiences in monitoring these price agreements, the Commission decided that there was adequate evidence to justify a review of the situation.⁸⁵ Thus, in July 1983 the Commission announced initiation of an antidumping proceeding concerning imports of certain ballbearings originating in Japan and Singapore.⁸⁶ After the preliminary investigation the Commission made a provisional decision,⁸⁷ revoking its 1981 acceptance of the price undertakings, and imposing provisional antidumping duties on imports of those products.⁸⁸ After this provisional

⁸⁰ See *supra* notes 12-19 and accompanying text.

⁸¹ *Ballbearings II*, Op. Advocate Gen. at 10.

⁸² *Id.*

⁸³ Commission Decision 81/406/EEC, 24 O.J. EUR. COMM. (No. L 152) 44 (1981).

⁸⁴ *Ballbearings II*, Op. Advocate Gen. at 10.

⁸⁵ *Id.*

⁸⁶ One of the original Japanese companies, Koyo Seiko, had a factory in Singapore, as did the newcomer to the antidumping appeals process, Minebea. The notice of initiation was published in 26 O.J. EUR. COMM. (No. C 188) 8 (1983). The Commission later clarified that it was initiating a review proceeding. 26 O.J. EUR. COMM. (No. C 310) 3 (1983).

⁸⁷ 27 O.J. EUR. COMM. (No. L 79) 8 (1984)(corrigendum published in 27 O.J. EUR. COMM. (No. L 86) 31 (1984)).

⁸⁸ *Ballbearings II*, Op. Advocate Gen. at 11. The provisional duties ranged from 4.36% to 18.45%. *Id.* Except for the normal values of Minebea in Singapore (for which constructed values were made), normal values were established using a range of representative bearing types on the domestic market. For the export prices, all exporters except Nachi Fujikoshi sold in the EEC through subsidiaries. In those cases, the export price was constructed on the basis of the prices from the subsidiaries to independent buyers, adjusted to deduct all overheads of the subsidiaries, a profit margin of 6%, and other costs between importation and resale. *Id.* at 11-12. Regarding injury, the provisional regulation found that the market shares of Japan and Singapore had increased from 17.5% to 27.9% between 1979 and 1983. The prices of the imported bearings were found lower than the amount necessary for the EEC industry to cover its costs and earn a reasonable profit. *Id.* at 12 (citing ¶¶ 23 and 24 of the Preamble to the provisional regulation, Commission Regulation 744/84 of Mar. 19, 1984). Accordingly, due to the damage to the industry, and particularly the financial losses and unemployment, it was felt necessary to fix the level of duties at the level of the dumping margins. *Id.*

regulation was published, further meetings were held and letters sent, the results of which were fresh offers of undertakings by the exporters. The Commission and Council declined to accept those offers.⁸⁹

Past experience had shown that undertakings in the ballbearings sector were not a satisfactory solution to dumping, being controversial and difficult for the Commission to monitor.⁹⁰ Therefore, following a proposal from the Commission, the Council confirmed the Commission's findings and imposed definitive antidumping duties in Council Regulation 2089/84 of July 19, 1984⁹¹ ("Contested Regulation"). The duties ranged from 4.03% to 14.71%.⁹²

In October and November 1984, the Japanese companies filed separate applications to annul the Contested Regulation. The applications were filed under the second paragraph of Article 173 of the Treaty Establishing the EEC,⁹³ the usual procedure for such cases. In all five cases, both the Commission and the European complainants were granted leave to intervene in support of the Council.⁹⁴

B. Procedural Matters Decided in *Ballbearings II*

1. Interim Measures

In *Nippon Seiko K.K. v. Council* ("NSK") and *NTN Toyo Bearing Co. v. Council*, the applicants lodged applications for the adoption of interim measures (a type of relief similar to an injunction in United States law) pursuant to Article 83 of the Court's Rules of Procedure.⁹⁵ They requested the Court to order suspension of the collection of the contested duties pending final judgment in the main cases. The President of the Court, however, dismissed both applications in decisions that make it very difficult for applicants to obtain interim relief in future cases. These orders established a balancing test for the granting of interim relief in antidumping cases. Since the Community institutions had found injury to the Community industry, the new balancing test requires that the interests of the industry be considered. Since an interim measure cannot prejudice the accuracy of the institutions' findings, however, the assump-

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 27 O.J. EUR. COMM. (No. L 193) 1 (1984)[hereinafter Contested Regulation].

⁹² *Ballbearings II*, Op. Advocate Gen. at 5.

⁹³ *Id.* at 1. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, art. 173 (entered into force Jan. 1, 1958) [hereinafter EEC Treaty].

⁹⁴ *Ballbearings II*, Op. Advocate Gen. at 13. For citations to the five cases, see *supra* note 78.

⁹⁵ In *NSK* the application was filed on December 5, 1984. In *NTN Toyo* the application was filed on November 9, 1984. See Order of the President of the Court, 1984 E. Comm. Ct. J. Rep. 4093, noted in 27 O.J. EUR. COMM. (No. C 31) 3 (1985); 27 O.J. EUR. COMM. (No. C 32) 8 (1985)).

tion of the test weighs in favor of the EEC industry. This makes it very difficult for interim relief to be granted.⁹⁶ This new test is excessive,⁹⁷ and it is hoped that it will be revised,⁹⁸ although it has already been applied again.⁹⁹

2. *Appeals of Definitive Regulations Against Both the Council and Commission*

In two of the *Ballbearings II* cases¹⁰⁰ applicants instituted proceedings against both the Council and Commission.¹⁰¹ The regulation in question, though proposed by the Commission, was passed by the Council. The Commission lodged an objection to admissibility of the action against it under Article 91 of the Rules of Procedure on the ground that the Contested Regulation was a Council action.¹⁰² By this reasoning, the actions against the Commission were declared inadmissible.¹⁰³ Subsequent cases have applied this principle in addressing annulment of Council antidumping regulations.¹⁰⁴

3. *Admissibility of Claim to Annul Regulation in its Entirety*

Four of the appeals in *Ballbearings II* requested that the Court annul the Contested Regulation in its entirety.¹⁰⁵ The Council objected,

⁹⁶ See Order of the President of the Court, 1984 E. Comm. Ct. J. Rep. 4093.

⁹⁷ The procedure for granting interim relief normally requires the applicant to prove irreparable harm, establish a prima facie case on the merits of the application, and demonstrate urgency for the relief. Also, the measures must not prejudice the substance of the case. See generally Borchardt, *The Award of Interim Measures by the European Court of Justice*, 22 COMMON MKT. L. REV. 203 (1985). In addition to proof of the urgency of the matter, a prima facie case, and serious and irreparable harm, the Court also required an analysis of the effect of the proposed measures on the EEC and EEC industry. Order of the President of the Court, noted in 27 O.J. EUR. COMM. (No. C 32) 8 (1985). The Court said suspension of payment of the duties, even though covered by the lodging of security, would not take the Community's interests into account and would frustrate the measures enacted. *Id.* It is submitted that this test is paramount to saying that interim measures are inapplicable to appeals of antidumping regulations.

⁹⁸ See *supra* note 97.

⁹⁹ For an example of the subsequent use of this test, see *Silver Seiko Ltd. v. Council*, 1985 E. Comm. Ct. J. Rep.— (not yet reported), noted in 28 O.J. EUR. COMM. (No. C 327) 3 (1985), where the balancing test led the Court to dismiss the application for interim measures (and those of four other applicants in related cases) on the ground that the EEC institutions and industry alleged such measures could cause appreciable damage to the industry, and those interests weighed against the damage and urgency shown by the applicant. 28 O.J. EUR. COMM. (No. C 327) at 7-8. This is one of the issues on appeal in *Electronic Typewriters*. See *infra* note 224 and accompanying text.

¹⁰⁰ *Koyo Seiko*, 1987 E. Comm. Ct. J. Rep. —; *Minebea*, 1987 E. Comm. Ct. J. Rep. —.

¹⁰¹ *Ballbearings II*, Op. Advocate Gen. at 13.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *Tokyo Juki Indust. Co. v. Council*, noted in 29 O.J. EUR. COMM. (No. C 308) 4 (1986).

¹⁰⁵ *Koyo Seiko, Nachi, NSK, and NTN Toyo*. See *Ballbearings II*, Op. Advocate Gen. at 13.

maintaining that the applications were admissible only to the extent that each challenged the portion of the Contested Regulation affecting each particular applicant.¹⁰⁶ The Advocate General believed the Council's objection was unfounded,¹⁰⁷ stating that the Council was confusing the interest of the applicants in bringing the action with the consequences of annulment.¹⁰⁸ Citing *Import Standard Office v. Council*¹⁰⁹ and *Timex*,¹¹⁰ as well as the applicant's reliance on *FEDIOL*,¹¹¹ the Advocate General believed that all the applicants had a specific interest in having the Contested Regulation annulled, and that the consequences of the annulment were a matter for the Court to decide in its final judgment.¹¹²

The Court, however, did not agree with the Advocate General or the applicants. Citing *Allied II*,¹¹³ the Court affirmed that the appeals were allowable to those exporters able to establish that they were identified in the measures adopted by the Commission or the Council, or were concerned by the preliminary investigations.¹¹⁴ The Court held, however, that the Contested Regulation as a whole was not applicable to each company, and that a company was "individually concerned only by those provisions of the Contested Regulation which impose[d] on it a specific anti-dumping duty and determine[d] the amount thereof, and not by those provisions which impose[d] anti-dumping duties on other undertakings."¹¹⁵ Therefore, the Court upheld the objection of admissibility, and rejected the claims for wholesale annulment.¹¹⁶

4. *Refusal to Accept Price Undertakings or Take Account of Unilateral Price Increases*

The Japanese companies also argued in their applications that the Commission and Council had unlawfully failed to consider the price undertakings offered by the parties or the fact that some of the companies

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 14.

¹⁰⁸ *Id.*

¹⁰⁹ 1979 E. Comm. Ct. J. Rep. 1277, [1978-1979 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8575 (1979).

¹¹⁰ 1985 E. Comm. Ct. J. Rep. 849, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,143.

¹¹¹ 1983 E. Comm. Ct. J. Rep. 2913, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,013.

¹¹² *Ballbearings II*, Op. Advocate Gen. at 14.

¹¹³ 4 Common Mkt. Rep. (CCH) ¶ 14,200.

¹¹⁴ *NSK*, Judgment of the Court ¶ 6 (*Ballbearings II*). For ease of reference, most citations on common issues hereinafter will be to *NSK*, since the other judgments substantially follow *NSK* on the main issues.

¹¹⁵ *Id.*

¹¹⁶ *NSK*, Judgment of the Court ¶ 7 (*Ballbearings II*).

had increased their prices during and after the investigation period. The Advocate General and the Court concluded that the refusal to accept the price undertakings (offered after the provisional duties were imposed by Regulation 744/84) was not unlawful.¹¹⁷ Citing *FEDIOL*,¹¹⁸ the Advocate General concluded that, due to the very wide discretion of the Commission to select the most appropriate measures for a given situation, it was for the Commission alone to decide whether an undertaking would adequately safeguard the Community interests.¹¹⁹ After examining the provisions of the Antidumping Regulation,¹²⁰ the Court concluded that there was no provision requiring the EEC institutions to accept price undertakings offered to them; Article 10 was held to have clearly granted discretion as to acceptance of undertakings.¹²¹

As for the institutions' failure to take account of price increases, the Advocate General and the Court again found that no error had been made. The Advocate General found nothing in the Antidumping Regulation that required exporters' price increases to be taken into account after the investigation period.¹²² The Court agreed, adding that it was essential for the investigation period to be of a "specified and limited duration," so that investigations may be completed in a reasonable

¹¹⁷ *Ballbearings II*, Op. Advocate Gen. at 25.

¹¹⁸ 1983 E. Comm. Ct. J. Rep. 2913, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,013.

¹¹⁹ *Ballbearings II*, Op. Advocate Gen. at 25.

¹²⁰ The Antidumping Regulation, *supra* note 24, was still in force when the Contested Regulation, *supra* note 91, was ordered. Article 10(1) and (2) of the Antidumping Regulation provides as follows:

1. Where, during the course of a proceeding, undertakings are offered which the Commission after consultation considers acceptable, anti-dumping/anti-subsidy proceedings may be terminated without the imposition of provisional or definitive duties. Such termination shall be decided in conformity with the procedure laid down in Article 9(1) and information shall be given and notice published in accordance with Article 9(2). Such termination does not preclude the definitive collection of amounts secured by way of provisional duties pursuant to Article 12(2).

2. The undertakings referred to under paragraph 1 are those under which: (a) the subsidy is eliminated or limited, or other measures concerning its injurious effects taken, by the government of the country of origin or export; or (b) prices are revised or exports cease to the extent that the Commission is satisfied that either the dumping margin or the amount of the subsidy, or the injurious effects thereof, are eliminated. In case of subsidization the consent of the country of origin or export shall be obtained.

¹²¹ *NSK*, Judgment of the Court ¶ 51 (*Ballbearings II*). Despite the institutions' discretion in accepting undertakings, this has been their preferred means of resolving cases, although recently their use has decreased somewhat. The Commission had described its policy as follows: "the Community is impartial in its stance on the acceptance of price undertakings as an alternative to the imposition of duties. Indeed, it is often found that undertakings prove to be more flexible than duties as a means of eliminating the injury caused by dumping or subsidization." *First Annual Report on the Community's Anti-Dumping and Anti-Subsidy Activities*, BULL. EUR. COMMUNITY 9-1983, point 2.2.2 (1983). See also I. VAN BAEL & J. BELLIS, *supra* note 45, at 98-99.

¹²² *Ballbearings II*, Op. Advocate Gen. at 26.

time.¹²³

5. *Adequacy of the Statement of Reasons for Assessing Duty Rate*

Relying upon *Allied II*,¹²⁴ several applicants argued that the EEC institutions had failed to provide an adequate statement of reasons for the level of duties assessed. In the Contested Regulation the Council had applied duties at the level of the dumping margin definitively established by the Commission. The Contested Regulation expressly referred to the injury findings of the provisional ruling, Regulation 744/84, where the Commission found material injury and concluded that the provisional duty should correspond to the dumping margin. It also noted that, since this earlier regulation was issued, the applicants had not submitted any fresh evidence concerning injury to the Community industry.

The Court in *NSK* found that the Council's express reference to the Commission's earlier findings was, in these circumstances, an adequate statement of reasons.¹²⁵ Since there was a statement that the Council confirmed the earlier findings on injury and that no new evidence had been presented, the Court felt that it could be "*implied* that the definitive duty would, like the provisional duty, be fixed at a rate corresponding to the dumping margin."¹²⁶ Accordingly, the Court found that the Contested Regulation had given an adequate statement of reasons relating to the extent of injury and the level of duty required to remove it.¹²⁷

The *NSK* ruling by the Court must be seen as a significant limitation on its ruling in *Allied II*.¹²⁸ *Allied II* required the Council to make express findings, but in *NSK* the Court stated that such findings may be "*implied*." The Contested Regulation in *Ballbearings II* contained no more than a pro forma reference to the Commission's basic findings, and it contained nothing expressly indicating that the Council itself had decided the amount of duty necessary.¹²⁹ This is an unfortunate step backward by the Court. In such matters as the setting of levels of duties—the differences of which can amount to millions of dollars in some cases—

¹²³ *NSK*, Judgment of the Court ¶ 52 (*Ballbearings II*). The Court also noted that price increases may be possible grounds for a review proceeding pursuant to Article 14 of the Antidumping Regulation, *supra* note 24, or refunds under Article 15, but the initial procedures should not be influenced or delayed by such increases. *NSK*, Judgment of the Court ¶ 53 (*Ballbearings II*).

¹²⁴ *Allied II*, 4 Common Mkt. Rep. (CCH) ¶ 14,200.

¹²⁵ *NSK*, Judgment of the Court ¶ 56 (*Ballbearings II*).

¹²⁶ *Id.* ¶ 57 (emphasis added).

¹²⁷ *Id.* ¶ 59.

¹²⁸ See *Allied II*, 4 Common Mkt. Rep. (CCH) ¶ 14,200; see also notes *supra* 18, 41-45 and accompanying text.

¹²⁹ The Contested Regulation, *supra* note 91, was enacted before the judgment in *Allied II*, so the Council did not take it into account when drafting its regulations.

one would expect that due process and substantial justice would require more of the Community institutions by way of explanation, and judicial review of their actions. It can only be hoped that this ruling is a slight aberration of the earlier trend towards reasonable procedural rights and responsibilities.

6. *Absence of Company's Name from a Complaint*

In *Ballbearings II*, one of the appellants, Koyo Seiko, contended that the procedure against it was unwarranted since, although it had participated in the administrative proceedings, it was not mentioned further in the case apart from its name's appearance on the cover of the complaint.¹³⁰ The Court noted, however, that the procedure at issue was a review of the undertakings authorized under Article 14 of the Antidumping Regulation. Since the Commission may itself take the initiative under Article 14, the Court found that Koyo Seiko's absence from the body of the complaint did not constitute an obstacle to the opening of this procedure against it.¹³¹

C. Substantive Matters Decided in *Ballbearings II*

In the judgments of the Court, several important substantive issues were also discussed. The principle issues can be generally categorized into two types: first, the use of different methodologies to determine normal values and export prices; and second, the failure to make adequate adjustments to the normal values and the export prices. The Court's analysis of these issues was not as clearcut as the categories indicate, but such divisions are helpful in understanding the Court's rulings.

1. *The Use of Different Methodologies to Determine Normal Values and Export Prices*

The five different applications under *Ballbearings II* sprouted several procedural and substantive arguments in the first general category of issues. The principal argument was that the applicants' dumping margins were calculated incorrectly through the use of an unprecedented new methodology. The arguments were: 1) use of a new method combining weighted averages to determine normal values while using the transaction-by-transaction method to determine export prices was unlawful and

¹³⁰ *Koyo Seiko*, Judgment of the Court ¶ 9 (*Ballbearings II*).

¹³¹ *Id.* The Contested Regulation had a very unusual procedural history. See *supra* notes 84-94 and accompanying text. While the Court's analysis of this issue was not entirely satisfactory, the conclusion was correct in the overall context of the Antidumping Regulation, *supra* note 24, and EEC practice.

inequitable; 2) the statement of reasons for choosing this new method was inadequate; 3) the new method was adopted in breach of the principles of legal certainty, legitimate expectations, and sound administration; 4) prices of different products were compared though not actually comparable; and 5) normal values and export prices were not computed on a comparable basis.¹³² Each of these arguments is discussed below.

a. Mixed use of weighted and transaction-by-transaction methods

In the Contested Regulation normal values were calculated for certain representative models on the basis of a weighted average of the prices paid on the domestic market;¹³³ export prices were computed on an individual, transaction-by-transaction basis.¹³⁴ After calculating these individual export prices and making the necessary deductions to bring them to ex-factory prices, any export prices that were above their comparable normal value (i.e., where dumping was not indicated) were then reduced artificially to the level of their normal value. The dumping margin was then determined by comparing the weighted average normal values and the individual export prices, including those reduced artificially.¹³⁵

In many respects, the applicants' principal complaint concerned the artificial reduction of those export prices which were above normal value. In all of the applicants' prior dealings with the Commission, weighted averages had been used for both normal value and export price. They asserted that the new method was incorrect because it excluded the large number of export sales made at non-dumping prices.¹³⁶ This method tends to show a dumping margin even where the average export prices are not different from domestic market prices. The eventual antidumping duties are thus higher, and are then applied unfairly to dumped and non-dumped sales alike. According to the applicants, the new method was not only inequitable but also unlawful.¹³⁷ The applicants argued that the relevant portion of the Antidumping Regulation allowed a choice between methods, but not combinations of methods.¹³⁸ The Community institutions denied that the Antidumping Regulation contained

¹³² See *Ballbearings II*, Op. Advocate Gen. at 17-18; *NSK*, Judgment of the Court ¶ 9 (*Ballbearings II*).

¹³³ *NSK*, Judgment of the Court ¶ 12 (*Ballbearings II*) (referring to ¶ 11 of the Preamble to the Contested Regulation, *supra* note 91).

¹³⁴ *Id.* (referring to ¶ 16 of the Preamble to the Contested Regulation, *supra* note 91).

¹³⁵ *Id.*

¹³⁶ *Ballbearings II*, Op. Advocate Gen. at 19.

¹³⁷ *NSK*, Judgment of the Court ¶ 13 (*Ballbearings II*).

¹³⁸ *Id.*

any prohibition on combining the methods listed.¹³⁹

The Advocate General echoed the EEC institutions' arguments.¹⁴⁰ Despite the disjunctive sense of the applicable provision—"the dumping margin may be established on a transaction-by-transaction basis *or* by reference to the most frequently occurring, representative or weighted average prices"¹⁴¹—the Advocate General saw simply a listing of possible methods, having neither an order of precedence nor criteria for preferring one to another.¹⁴² Further, he saw nothing inequitable about leaving the full value of export prices above normal value out of the computation.¹⁴³ Based upon his own hypothetical example, the Advocate General assumed that "to offset against one another prices in excess of the normal value and prices below the normal value would mathematically cancel out any dumping margin"¹⁴⁴ Flowing from this faulty stream of logic, the Advocate General then concluded that Article 4(2), concerning the injury analysis of the volume and prices of dumped imports, required that dumping margins "take into account *only* the volume of imports made at dumping prices"¹⁴⁵ In the end, his view was that the Commission's practice was more favorable to exporters than the Antidumping Regulation seemed to have required.

Like the Advocate General, the Court failed to tackle the issue of

¹³⁹ *Id.* Article 2(13)(b) of the Antidumping Regulation provided that, "[w]here prices vary, the dumping margin may be established on a transaction-by-transaction basis *or* by reference to the most frequently occurring, representative *or* weighted average prices." Antidumping Regulation, *supra* note 24 (emphasis added). The applicants felt the disjunctive sense of the provision supported their position.

¹⁴⁰ *Ballbearings II*, Op. Advocate Gen. at 19 (referring to the institutions and citing Article 2(13)(c) of the Antidumping Regulation, *supra* note 24, which provided that "[w]here dumping margins vary, weighted averages may be established").

¹⁴¹ *Id.* (emphasis added).

¹⁴² *Id.* at 8. His conclusion was correct that there are no preferences stated, but missed the point of the applicants' arguments: that the Antidumping Regulation did not permit mixing of methods. The Antidumping Regulation listed methods, but the word "*or*" indicated that a choice among the methods was required, though it did not instruct the EEC institutions as to how or in what order the choice should be made. See *supra* note 139.

¹⁴³ *Ballbearings II*, Op. Advocate Gen. at 21.

¹⁴⁴ *Id.* Obviously this assumption is not true in many cases, as is demonstrated by the fact that numerous dumping margins have been established by using those same methods.

¹⁴⁵ *Id.* (emphasis added). If this conclusion were true, then weighted averages could never lawfully be used. However, the Antidumping Regulation, *supra* note 24, provides them as alternatives, showing that the Advocate General's views are not consistent with the text of the Antidumping Regulation. In his excellent survey of EEC practice, Davey criticizes the Commission's method of ignoring instances where the export price exceeds the normal value: "The fairness of this practice is not immediately obvious. If an exporter's prices on the average exceed normal value, how can it be argued that Community industry is hurt? . . . There may be some latitude to argue that no injury has been incurred if significant negative dumping margins are in fact present." Davey, *supra* note 57, at 67-68.

statutory construction raised by the applicants. Rather, the Court stated that "the choice between the different methods of calculation specified in Article 2(13)(b) of [the Antidumping Regulation] requires an appraisal of complex economic situations."¹⁴⁶ Based on the holding of *Remia v. Commission*,¹⁴⁷ cited by the Advocate General, the Court concluded in *NSK*¹⁴⁸ that it must "[l]imit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, 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."¹⁴⁹ The Court found that the applicants' arguments were tantamount to alleging a manifest error of appraisal in choosing a method which does not take full account of export prices above normal value.¹⁵⁰ The Court then rejected these arguments, finding that the artificial reduction of export prices meant that the transaction-by-transaction method did not exclude them from the calculation and that the Commission had the freedom to choose the method it deemed most appropriate.¹⁵¹ The Court repeated the Advocate General's theory that the injury suffered by the Community industry, arising from "certain manoeuvres in which dumping is disguised by charging different prices,"¹⁵² could only be handled by using the transaction-by-transaction method.¹⁵³ The Court therefore found that the Commission had not committed any manifest errors in its appraisal of the choice of methods, and the applicants' submission on this point was rejected.¹⁵⁴

It is unfortunate that the Court has chosen, when faced with "complex economic situations," to retreat to such a limited scope of general judicial review. Given the fact that the Court is currently the only avenue of review of the Commission's and Council's decision, a higher standard and level of review is necessary. In these cases, the Commission acts as police officer, investigator, and judge, having broad discretionary powers. In order to follow the practices of its other GATT partners, a

¹⁴⁶ *NSK*, Judgment of the Court ¶ 21 (*Ballbearings II*).

¹⁴⁷ [1987] 1 Common Mkt. L.R. 1 (1985).

¹⁴⁸ *NSK*, Judgment of the Court ¶ 21 (*Ballbearings II*).

¹⁴⁹ *Id.* It should be seen here that the Court also is avoiding or neglecting the important issue of statutory construction raised by the applicants. See *supra* notes 139, 142.

¹⁵⁰ *NSK*, Judgment of the Court ¶ 22 (*Ballbearings II*). The Court does not address the alleged manifest error of law. See *supra* note 149.

¹⁵¹ *NSK*, Judgment of the Court ¶ 23 (*Ballbearings II*).

¹⁵² *Id.* ¶ 25. The allegation of "disguised" dumping was not raised by the Commission or Council, so it is unclear why the Court attributed such motives or actions to the applicants.

¹⁵³ *Id.* ¶ 26. For comments on these arguments, see *supra* notes 142, 144-45.

¹⁵⁴ *NSK*, Judgment of the Court ¶ 26 (*Ballbearings II*). An unofficial expression of the Commission's views on these general issues can be found in J. BESELER & A. WILLIAMS, *supra* note 2, at 112-15.

reasonable judicial (or even administrative) review of the record would seem to be a minimal requirement.

b. Inadequate statement of reasons for choosing the
new method of calculation

Article 190 of the EEC Treaty¹⁵⁵ requires a statement of reasons that discloses in a clear and unequivocal fashion the reasoning followed by an EEC institution, a principle which the Court had affirmed in *Nicolet Instrument v. Hauptzollamt Frankfurt-am-Main*.¹⁵⁶ This statement of reasons is required so concerned parties are aware of the reasons for such measures (and can thus defend their rights) and so the Court can exercise its supervisory function.¹⁵⁷

Several applicants argued that the reasons set out in paragraph 18 of the Contested Regulation¹⁵⁸ were inadequate, since it was not explained why the Commission had changed from the weighted average basis used previously to the new methods.¹⁵⁹ The Court found the statement therein to be adequate, however, stating that it was clear that the change of method was made in order to eliminate injury which allegedly had subsisted under the previous method of calculation, allowing dumping to be offset by "negative" dumping.¹⁶⁰ For this reason, the Court rejected the applicants' arguments.¹⁶¹

c. Breach of the principles of legitimate expectation,
legal certainty, and sound administration

Several applicants claimed that the adoption of the new method, which mixed the use of weighted averages for normal value with the transaction-by-transaction method for export price, violated the principles of legal certainty and legitimate expectation, and breached the rules

¹⁵⁵ EEC Treaty, *supra* note 93.

¹⁵⁶ 1986 E. Comm. Ct. J. Rep. — (not yet reported), *cited in* *NSK*, Judgment of the Court ¶ 28 (*Ballbearings II*). *NSK* cited for the same proposition the decision in *Groupeement des Fabricants de Papiers Peints de Belgique v. Comm'n*, 1975 E. Comm. Ct. J. Rep. 1491, but the Court did not refer to it in its decision.

¹⁵⁷ *Nicolet*, 1986 E. Comm. Ct. J. Rep. at —, *cf. Timex*, 1985 E. Comm. Ct. J. Rep. 849 (regulation annulled due to Commission's failure to disclose sufficient information to complainants); *Allied II*, 4 Common Mkt. Rep. (CCH) ¶ 14,200 (regulation annulled due to absence in the record of information as to whether the Council had met its duty to assess the necessary level of duties).

¹⁵⁸ See 27 O.J. EUR. COMM. (No. L 193) 1, 3 (1984).

¹⁵⁹ See, e.g., *NSK*, Judgment of the Court ¶ 29 (*Ballbearings II*).

¹⁶⁰ *Id.* This is a curious conclusion, since the Contested Regulation does not mention injury in ¶ 18. However, it does give a fairly reasonable explanation of the reasons, so the Court's conclusion is probably not incorrect; only its reasoning is suspect.

¹⁶¹ *Id.* ¶ 30.

of sound administration.¹⁶² Those principles and rules would have required that adequate advance notice be given so that the parties could modify their trading practices to comply with the new requirements of the Community.¹⁶³ The Court disagreed. First, it recalled that *Ballbearings II* was a review proceeding under Article 14 of the Antidumping Regulation, which provided that such undertakings may be amended, repealed, or annulled.¹⁶⁴ Thus, the Court decided that the principle of legal certainty did not prevent the re-examination of the earlier measures.¹⁶⁵

Secondly, as to the principle of legitimate expectation, the Court recalled that Article 2(13)(b) of the Antidumping Regulation gave the EEC institutions the option to choose their methods.¹⁶⁶ Citing *Faust v. Commission*,¹⁶⁷ the Court stated that, "where the institutions enjoy a margin of discretion in the choice of means necessary to achieve their policies, traders cannot claim to have a legitimate expectation that the means originally chosen will be maintained, since these may be altered by the institutions in the exercise of their powers."¹⁶⁸

Thirdly, the Court stated that "the rules of sound administration cannot prevent the institutions from using the powers conferred upon them by the regulations in force."¹⁶⁹ Having decided against the applicants on these three points, the Court rejected the applicants' submissions.¹⁷⁰

d. Comparison of non-comparable products

A point advanced only by the applicants in *Minebea Co. v. EEC*¹⁷¹ concerned differences in physical characteristics of a model between the

¹⁶² See, e.g., *NSK*, Judgment of the Court ¶ 29 (*Ballbearings II*).

¹⁶³ *Id.* The Court in *NSK*, for example, had argued that legitimate expectations may be created without any express promise or assurance having been given by the Commission, citing *CNTA*, 1975 E. Comm. Ct. J. Rep. 533, 549. The applicants argued further that due to existing price undertakings, they had a legitimate expectation that the Commission would continue to apply the same methods until those undertakings were withdrawn, citing *Rumi v. Comm'n*, 1982 E. Comm. Ct. J. Rep. 487, ¶ 11. The Court did not refer to the cited cases in its judgment.

¹⁶⁴ *NSK*, Judgment of the Court ¶ 32 (*Ballbearings II*).

¹⁶⁵ *Id.* ¶ 31.

¹⁶⁶ *Id.* ¶ 33. For the text of the provision, see *supra* note 139.

¹⁶⁷ 1982 E. Comm. Ct. J. Rep. 3745, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8878 (1982).

¹⁶⁸ *NSK*, Judgment of the Court ¶ 34 (*Ballbearings II*).

¹⁶⁹ *Id.* ¶ 35.

¹⁷⁰ *Id.* In this respect, the Court concurred with the Advocate General's views, which also relied on *Faust*. See *Ballbearings II*, Op. Advocate Gen. at 16-17.

¹⁷¹ Judgment of the Court ¶ 30 (*Ballbearings II*).

domestic and export markets.¹⁷² In *Minebea*, there were some technical differences between the models, the extent of which was not agreed upon by Minebea and the Commission. Minebea claimed that the two types of bearings were not comparable, thus violating the principle of Article 2(9) and (10) of the Antidumping Regulation, and distorting the comparison.¹⁷³ The details of this factual dispute were unclear.¹⁷⁴ However, under Article 2(10) the burden of claiming an allowance for any differences is upon the party making the claim, and since no proof from Minebea had been forthcoming, Minebea's submission was rejected.¹⁷⁵

e. Computation of normal values and export prices on a non-comparable basis

In *NSK*, the applicant argued that there was a connection between Article 2(13) and Article 2(9) of the Antidumping Regulation. Its theory was that the choice of methods under Article 2(13) must be consistent with the principle of Article 2(9), requiring a fair comparison.¹⁷⁶ Because different methods were used for computing the normal value and the export price, in the applicant's view those methods were inconsistent with Article 2(9).

The Article 2(9) argument is an extremely important issue in EEC antidumping law. As is noted further below, it seems that neither the Advocate General nor the judges of the Court fully appreciated its complexities. Unfortunately, the presentation of these arguments to the Court in the parties' written pleadings also was unclear.¹⁷⁷ The resulting judgment on this issue is somewhat confusing, but nonetheless is also discussed below.¹⁷⁸

The Court noted, in response to the applicants' submissions under

¹⁷² Where physical differences exist between the product sold in the domestic market and in the EEC, an adjustment to account for differences in price comparability may be given. Antidumping Regulation, *supra* note 24, art. 2(9)-(10)(a).

¹⁷³ See *supra* note 172.

¹⁷⁴ *Ballbearings II*, Op. Advocate Gen. at 24. It is unclear whether Minebea claimed that the bearings were not comparable at all, or whether they could have been made comparable by adjustments but that those adjustments had not been made or were insufficient. If its point was the former, it appears that Minebea conceded at least some aspect of the technical issue at its oral hearing. See *id.* If it was the latter point, it seems that the Council had made certain adjustments but no further proof had been submitted by Minebea. *Minebea*, Judgment of the Court ¶ 30 (*Ballbearings II*).

¹⁷⁵ *Minebea*, Judgment of the Court ¶¶ 33-34 (*Ballbearings II*).

¹⁷⁶ *NSK*, Judgment of the Court ¶ 13 (*Ballbearings II*).

¹⁷⁷ This is generally admitted by the parties involved. Indeed, at the oral arguments for these cases the Court was frankly encouraged to read the pleadings submitted in a later series of cases, *Electronic Typewriters*, *infra* note 224, where the treatment of the issues was said to be much more thorough, systematic, and well presented by both sides.

¹⁷⁸ See *infra* notes 188-223 and accompanying text.

Article 2(9), that the provisions for determining normal value are set forth in the Antidumping Regulation, Article 2, paragraphs 3 to 7, and the provisions for determining export price are in Article 2(8). Each of those provisions separately specifies several different methods for calculating the two items.¹⁷⁹ The Court found that the provisions of Article 2(13)(b) and (c) of the Antidumping Regulation confirmed the fact that these various methods of calculation of normal value and export price are independent, since the provisions “merely state the various possibilities for calculating the dumping margin without imposing any requirement that the methods chosen for calculating the normal value and the export price should be similar or identical.”¹⁸⁰

Secondly, the Court examined Article 2(9) itself,¹⁸¹ and made two points concerning it. First, Article 2(9) was found to be intended to define the adjustments to be made to normal value and export price as determined by Article 2, paragraphs 3 to 7 and paragraph 8, respectively.¹⁸² Second, the Court found those adjustments related exclusively to several differences in the domestic and export markets: 1) physical characteristics; 2) quantities of the products; 3) the conditions and terms of sale; and 4) the level of trade.¹⁸³ Accordingly, the Court concluded “that Article 2(9) of the regulation [did] not require the normal value and the export price to be calculated according to the same method.”¹⁸⁴

In its rejection of the applicants' submission,¹⁸⁵ the Court seems to have concluded that there is nothing in the Antidumping Regulation which requires that the same method be used to compute normal value and export price. Within the parameters of the arguments presented by the applicants, the Court may have been technically correct, but missed the real point. The provisions of Article 2(9) and (10) do require that the export price and normal value be on a “comparable basis” in order for there to be a “fair comparison.”¹⁸⁶ It is granted that Article 2(9) and (10) do not discuss the calculation methods for normal value and export price. If the methods used to calculate normal value and export price,

¹⁷⁹ *NSK*, Judgment of the Court ¶ 14 (*Ballbearings II*).

¹⁸⁰ *Id.* ¶ 15. For the text of Article 2(13)(b-c), see *supra* notes 139-140.

¹⁸¹ For the purposes of a fair comparison, the export price and the normal value shall be on a comparable basis as regards physical characteristics of the product, quantities, and conditions and terms of sale. They shall normally be compared at the same level of trade, preferably at the ex-factory level, and as nearly as possible at the same time.

Antidumping Regulation, *supra* note 24, Article 2(9).

¹⁸² *NSK*, Judgment of the Court ¶ 17 (*Ballbearings II*).

¹⁸³ *Id.*

¹⁸⁴ *Id.* ¶ 18.

¹⁸⁵ *Id.* ¶ 19.

¹⁸⁶ See *supra* note 181.

however, result in their not being on a “comparable basis” (and the specified allowances are still inadequate to put them on a comparable basis), then those methods do not lead to a “fair comparison” and are inconsistent with the Antidumping Regulation and GATT.¹⁸⁷

2. *Symmetry of Normal Value and Export Price for a Fair Comparison*

This controversial issue concerned the failure of the Commission to make necessary adjustments to put normal value and export sales price on a comparable basis in order to allow a fair comparison. This concept—sometimes called “symmetry”—is well-known to trade law specialists in the United States.¹⁸⁸ It involves the problem of making appropriate allowances in normal value and export price where there are sales through subsidiary companies. There has been a great deal of debate in the United States on this subject, including such important court cases as *Consumer Products Division, SCM Corp. v. Silver Reed America*¹⁸⁹ (“SCM IP”), *Silver Reed America v. United States*,¹⁹⁰ and *Smith-Corona Group, Consumer Products Division v. United States*¹⁹¹ (“SCM I”), and a long history of hearings, amendments to the laws and regulations, and varied interpretations of the rules, the general result of which has been to recognize and uphold the need for these adjustments to ensure a fair and equitable comparison.¹⁹²

In the judicial and expert analyses of the United States legislation (which is based on the same GATT provisions as the EEC regulation) there has been a clear overview of the purposes of the legislation: “One of the goals of the statute is to guarantee that the administering authority

¹⁸⁷ For further discussions on these issues, see *infra* notes 188-92, 200-04, 213-15 and accompanying text.

¹⁸⁸ In the United States, the discussion has centered on the “ESP offset” and the circumstances of sales adjustments. See, e.g., Victor & Ehrgood, *Circumstances of Sales Adjustments in Anti-Dumping Investigations: A Reevaluation*, INTERNATIONAL TRADE POLICY, *supra* note 1, at 7-1; Holmer & Bello, *Import Law and Policy Series: Fair “Apples to Apples” Comparisons in Dumping Cases*, 19 INT’L LAW. 927 (1985); 1984 *Trade Law Survey*, 15 GA. J. INT’L & COMP. L. 473, 564-66 (1985).

¹⁸⁹ *Consumer Products Division, SCM Corp. v. Silver Reed America, Inc.* (“SCM II”), 753 F.2d 1033, 1039-40 (Fed. Cir. 1985) (upholding the ESP offset “cap” as being a reasonable limitation in light of the agency’s expert evaluation of the need for fair comparison).

¹⁹⁰ 581 F. Supp. 1290, 1294 (Ct. Int’l Trade 1984) (confirming the fundamental statutory objective of achieving a fair comparison of “apples with apples”), *rev’d on other grounds*, *SCM II*, 753 F.2d 1033.

¹⁹¹ *Smith Corona Group, Consumer Products Div., SCM Corp. v. United States* (“SCM I”), 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 104 S.Ct. 1274 (1984) (upholding the ESP offset system of deducting indirect home market selling expenses).

¹⁹² The administrative regulation involved is 19 C.F.R. § 353.15(c). For a brief review of the history of the provision and the ESP offset, see *supra* note 188.

makes the fair value [normal value] comparison on a fair basis—comparing apples with apples.”¹⁹³ In wording that evokes the same arguments made by the applicants in *Ballbearings II* in favor of an adjustment to offset the imbalanced methodologies, the United States Court of Appeals for the Federal Circuit saw the need for the offset as an expression of the requirement of a fair comparison. The Court in *SCM I* explained:

Were it not for the exporter's sales price offset, comparisons based on purchase price would be fair, yet comparisons based on exporter's sales price would be skewed in favor of a higher dumping margin. *We do not believe that the statute requires the Secretary to compare both apples and oranges with only apples. Rather, it expressly requires a fair comparison.* The offset is an attempt to achieve such a comparison.¹⁹⁴

Unfortunately, as will be seen below, the EEC Court and institutions have not had the same clarity of overview, nor the same desire to see fairness accomplished, as have the United States commentators and courts.

In the EEC, there is a much shorter history. Indeed, until the Commission began its aggressive series of new interpretations of the Antidumping Regulation—which commenced with the *Ballbearings II* cases—this issue really had not fully arisen in EEC practice.¹⁹⁵ When the Contested Regulation was enacted by the Council in mid-1984, this was the first occasion in which the Commission and Council applied the new methodology.

In the Contested Regulation, most of the applicants' export prices were determined on the basis of the sales prices of their EEC subsidiaries,¹⁹⁶ a method that is provided for in Article 2(8) of the Antidumping Regulation. From the subsidiaries' resale prices, all of the direct and indirect selling and overhead costs and a "reasonable profit" were deducted. Thus, after deductions for such items as freight, insurance, duties and like expenses, the export prices were on an ex-factory basis.¹⁹⁷

For normal values, a much different methodology was followed. Prices in the domestic market to the first independent customer were used. Where the companies had domestic selling subsidiaries, however,

¹⁹³ *SCM I*, 713 F.2d at 1578.

¹⁹⁴ *Id.* (emphasis added). The analogy of apples and oranges refers to the need for the normal or fair value and the export price to have the same essential character—i.e., to be truly and fairly comparable.

¹⁹⁵ For a brief introduction to these issues, see *supra* notes 70-76 and accompanying text.

¹⁹⁶ The Contested Regulation does not mention the method used, see 27 O.J. EUR. COMM. (No. L 193) 1 (1984), but it is clear that the calculation was done in this way. See, e.g., *NSK*, Judgment of the Court ¶ 38 (*Ballbearings II*).

¹⁹⁷ *Ballbearings II*, Op. Advocate Gen. at 22-23.

the price used was that of the domestic subsidiary.¹⁹⁸ As the applicants in most cases sold in Japan through distribution companies that were not operating from a factory, those sales prices were not ex-factory prices, and differences existed between those prices and the export prices. Thus, while all expenses of the European subsidiaries had been deducted, only some of the corresponding costs incurred on the domestic market were deducted from the normal values.¹⁹⁹

The applicants claimed that the disparity in treatment created an artificially high normal value which, when coupled with the more substantial deductions for export price, led to an artificially high dumping margin. In their view, this was unjustified since sales in both markets had been at the same level of distribution, but the methodologies used made the two values uncomparable.²⁰⁰ The applicants argued that Article 2(9) of the Antidumping Regulation requires that the export price and normal value be handled on a symmetrical basis so that two prices beginning on the same level of distribution are treated on a "comparable basis."²⁰¹

In his opinion in *Ballbearings II*, Advocate General Mancini rejected those arguments entirely. He stated flatly: "That argument may have its attractions but it is untenable because the system disregards in principle and excludes in practice the symmetry relied upon by [the applicants]."²⁰² The Advocate General noted that the deductions of export sales expenses were mandated by Article 2(8)(b), whereas the deductions on the normal value side desired by the applicants could be done only for purposes of comparison of the two sides.²⁰³

In the Advocate General's view, such deductions on the normal value side were "*prohibited*—and this is the point—by the provision in Article 2(10)(c) governing 'comparative' allowances."²⁰⁴ Since his view

¹⁹⁸ The use of the subsidiaries' resale price was not challenged in *Ballbearings II*. The legality of this method under Article 2(3) and (7) of the Antidumping Regulation, *supra* note 24, has been challenged in subsequent appeals against the regulations in the *Electronic Typewriters* and *Japanese Photocopiers* appeals. See *infra* notes 224-25 and accompanying text.

¹⁹⁹ *NSK*, Judgment of the Court ¶ 38 (*Ballbearings II*).

²⁰⁰ *Id.* ¶ 37.

²⁰¹ *Id.* This is broadly the same argument as the United States court in *SCM I* found so persuasive. See *supra* notes 196-97 and accompanying text.

²⁰² *Ballbearings II*, Op. Advocate Gen. at 23. His conclusions are strikingly different from those expressed in *SCM I*, 713 F.2d 1568. See *supra* notes 191, 193-94 and accompanying text.

²⁰³ *Ballbearings II*, Op. Advocate Gen. at 23.

²⁰⁴ *Id.* (emphasis added). This provision provides:

If the export price and the normal value are not on a comparable basis in respect of the factors mentioned in paragraph 9, due allowance shall be made in each case, on its merits, for differences affecting price comparability. Where an interested party claims such an allowance, it must prove that its claim is justified.

The following guidelines shall apply in determining these allowances:

(incorrect, as shown below) gave such allowances *only* for expenses bearing a direct relationship to the sales,²⁰⁵ he concluded that the allowances "cannot possibly include the costs incurred by the subsidiaries . . . in marketing the product on the domestic market."²⁰⁶ To the Advocate General, it did not matter whether the marketing on the domestic market was done by a sales department of the producer or by a related sales company; the costs were both a part of the company's overhead and thus were not deductible.²⁰⁷ In addition, the Advocate General argued that sales expenses had to be taken into account in computing constructed values under the Antidumping Regulation, and that it would "be unreasonable if the legislature allowed those expenses to be deducted immediately thereafter by making comparative allowances."²⁰⁸

As a final point, the Advocate General addressed specific cost adjustments requested by NSK. While those costs (communications, technical assistance, and freight) were in principle deductible, he felt NSK had not submitted adequate proof for the costs as required by the Antidumping Regulation.²⁰⁹

...
(c) differences in conditions and terms of sale: allowances shall be limited, *in general*, to those differences which bear a *direct relationship* to the sales under consideration and include, for example, differences in duties and indirect taxation, credit terms, guarantees, warranties, technical assistance, servicing, commissions or salaries paid to salesmen, packing, transport, insurance, handling, loading and ancillary costs; allowances *generally* will not be made for differences in overheads and general expenses, including research and development costs, or advertising; the amount of these allowances shall normally be determined by the cost of such differences to the seller, though consideration may also be given to their effect on the value of the product;

Antidumping Regulation, *supra* note 24, art. 2(10)(c)(emphasis added).

²⁰⁵ Note that the Antidumping Regulation, *supra* note 24, does not say "only," but rather "generally." See *supra* note 204. However, the Advocate General's error was not completely understood by the Court. See *infra* notes 214, 222-23 and accompanying text.

²⁰⁶ *Ballbearings II*, Op. Advocate Gen. at 23.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 24. Actually, the legislature has provided for selling expenses to be deducted immediately after computing constructed values. Here, the Advocate General (perhaps understandably) reflects his lack of experience with EEC antidumping practice. In that practice, the Commission computes constructed values by including an amount of general, administrative, and sales expenses. This is the normal value. However, where warranted, the Commission then makes deductions for direct selling expenses (or other relevant adjustments) as provided under the Antidumping Regulation, *supra* note 24, art. 2(10)(c). Thus, from the practical side, the Antidumping Regulation's mention of selling expenses as an element in constructed values is not relevant to his argument. The Advocate General was mistaken because selling expenses are deducted when constructed values are adjusted under Article 2(9) and (10).

Theoretically, the Advocate General's argument here is inconsistent with his earlier argument, where he had distinguished between the methods for computing normal value and export price under Article 2(3)-(8) and the adjustments under Article 2(9) and (10). See *supra* notes 200-01 and accompanying text. His argument here, however, fails to distinguish the difference between the selling expenses in Article 2(3) and the adjustments under Article 2(9) and (10).

²⁰⁹ *Ballbearings II*, Op. Advocate Gen. at 24.

The Advocate General made several key errors in his opinion. First, he erroneously read Article 2(10)(c) to allow *only* direct costs, whereas the Article 2(10) “guidelines” speak only of general limitations.²¹⁰ Second, his argument against symmetry (which distinguishes between the methods for setting normal value and export price as compared to the Article 2(9) adjustments for comparison) was inconsistent with his argument against granting adjustments for domestic sales expenses, in which he failed to account for those methodological distinctions.²¹¹ Third, he incorrectly concluded that the granting of allowances to take account of cost differences like those requested by the applicants would be tantamount to reducing both sides to the cost of production plus overhead, thus removing the possibility of finding a dumping margin.²¹² This argument incorrectly concludes that dumping is a form of price discrimination, and also disregards the fact that other GATT partners (such as the United States) have granted such adjustments in like situations and still found dumping margins.²¹³ Thus, the Advocate General’s opinion cannot be regarded as a correct legal analysis of the issues at hand. The Court’s analysis, though reaching the same basic final conclusions as the Advocate General, used an analysis which did not torture logic or the Regulation nearly as much.²¹⁴ Still, since the pleadings of the parties were not entirely satisfactory,²¹⁵ and since the Advocate General’s opinion was not particularly well reasoned, it is not altogether surprising that the Court’s opinion is less than satisfactory.

As its starting point, the Court noted that Article 2(8)(b) requires that all of the expenses of an EEC sales subsidiary should be deducted to arrive at an ex-factory price.²¹⁶ Where the export price and normal value are not comparable as set forth in Article 2(9), allowance ought to be made, stressed the Court, drawing particular attention to differences in conditions and terms of sale under Article 2(10)(c).²¹⁷

The Court further distinguished between the allowances made to

²¹⁰ See *supra* notes 204-05. This error is also found in the general analysis of his opinion. See *Ballbearings II*, Op. Advocate Gen. at 6-8.

²¹¹ What the Advocate General said would be “unreasonable” for the legislature to do is actually the standard practice. See *supra* note 208 and accompanying text.

²¹² *Ballbearings II*, Op. Advocate Gen. at 7.

²¹³ See *supra* notes 188-94 and accompanying text.

²¹⁴ For example, whereas the Advocate General deleted the words “in general” from his quotation of Article 2(10)(c) of the Antidumping Regulation, thereby contradicting his previous interpretation of “only” direct expenses being deductible in the comparison, the Court quoted the full text and recognized the implications of those words. Compare *Ballbearings II*, Op. Advocate Gen. at 7, with *NSK*, Judgment of the Court ¶ 41 (*Ballbearings II*).

²¹⁵ See *supra* notes 177-78 and accompanying text.

²¹⁶ *NSK*, Judgment of the Court ¶ 39 (*Ballbearings II*).

²¹⁷ *Id.* ¶ 41.

construct export price and the allowances made under Article 2(10)(c). The 2(10)(c) allowances are intended to rectify export prices or normal values already calculated.²¹⁸ In addition, the 2(10)(c) adjustments must be claimed and justified, whereas the export price allowances under Article 2(8) are automatic.²¹⁹ To claim an Article 2(10) adjustment, the Court found that:

[a] party making such a claim must prove that its claim is justified, that is to say that the difference on which it relies concerns one of the factors listed by Article 2(9), that the difference affects price comparability and lastly, if, as in this case, it is a question particularly of differences in conditions and terms of sale, that those differences bear a direct relationship to the sales under consideration.²²⁰

The Court held that none of the three applicants which had raised this issue had succeeded in showing that its claim for adjustments had satisfied these conditions.²²¹ The expression of the Court's conclusion was stated most clearly in the *NSK* decision:

As regards the allowances in respect of the cost of telephone communications, customer services and technical services, *NSK* has not established that those differences bore a direct relationship to the sales under consideration. Although it is true that Article 2(10)(c) provides that allowances shall only "in general" be limited to differences which bear a direct relationship to sales, *NSK* has not established the existence of any special circumstance capable of justifying an exception to that general rule.²²²

As can be seen from these decisions, *Ballbearings II* has established two principles with which to interpret the provisions of Article 2(10)(c) concerning adjustments in conditions and terms of sale:

- 1) As a general rule, allowances shall only be made for differences bearing a direct relation to sales. Allowances will generally not be made for general expenses.
- 2) If a party is able to establish the existence of special circumstances

²¹⁸ *Id.* ¶ 44.

²¹⁹ *Id.* ¶ 45.

²²⁰ *Id.*

²²¹ *Id.* ¶ 49 (*Ballbearings II*); *Minebea*, Judgment of the Court ¶ 46 (*Ballbearings II*); *Nachi*, Judgment of the Court ¶ 36 (*Ballbearings II*).

²²² *NSK*, Judgment of the Court ¶ 47. In *Minebea*, the Court concluded:

Indeed it is clear from *Minebea*'s own assertions that the expenses which it claims should have been deducted from the normal value are general expenses. Article 2(10) provides that allowances will "generally" not be made in respect of such expenses, and the applicant has not established the existence of any special circumstance capable of justifying an exception to that general rule.

Minebea, Judgment of the Court ¶ 45 (*Ballbearings II*). In *Nachi*, the Court reached a similar conclusion: "En effet, celles-ci [i.e., Article 2(10)(c)] excluent en général les ajustements pour des différences dans les frais administratifs et *Nachi* n'a prouvé l'existence d'aucune circonstance particulière de nature à justifier une dérogation à la règle ainsi posée." *Nachi*, Judgment of the Court ¶ 35 (*Ballbearings II*).

capable of justifying an exception to the general rule, allowances for differences in costs which do not bear a direct relationship to sales may also be made.

Unfortunately, since the Court found that none of the parties had established such "special circumstances," there is no guidance whatsoever as to what may constitute proof of the existence of such circumstances, or what those circumstances might be. Moreover, the Court has not given any guidance as to the types of overhead and general expenses that may be allowed, nor whether there are any limitations as to the amounts allowed. This is an unfortunate situation which the Court could have avoided by clarifying these points.

The likely result is that it will be left to the Commission and Council to determine the answers (if any) to the above questions. At the risk of being cynical, based on previous practice one can easily imagine that the EEC institutions will construe the exception quite strictly. Since the institutions will then be analyzing "complex economic situations" when they interpret the exception, the *Remia* case could imply that the Court will limit its review to questions of procedure and manifest errors of fact.²²³ If this were to take place, the entire interpretation of EEC substantive antidumping law would be left to the virtually unfettered discretion of the Commission. This is an unnecessary and unwarranted possibility.

This part of the *Ballbearings II* judgment seems to be a case of "bad facts make bad law." Clearly the applicants did not present detailed requests for adjustments, nor did they give evidence of "special circumstances." As is discussed below, there are later appeals where the facts and issues are much more clearly presented. It can only be hoped that the Court will be prepared to revise its thinking on this issue of fair comparison.

²²³ See *supra* notes 147-50 and accompanying text. The Court appears to be backing further away from realistic judicial review in this portion of its reasoning, and the institutions are in fact seeking such an interpretation of *Remia* and *Ballbearings II*. In the oral arguments for *Electronic Typewriters*, *infra* note 224 (in which the author represented one of the applicants), the Queen's Counsel representing the Council urged the Court to extend its deference in "complex economic situations" not only to the "special circumstances" exception, but more generally to all appraisals of fact. He argued that antidumping investigations are inherently appraisals of complex economic situations, and that the Court should therefore limit its review of the institutions' discretionary decisions accordingly. In his view, all questions of methodologies, allowances, cost allocations, etc., should be left to the Commission's discretion and should not be reviewed unless the results are "manifestly unreasonable." This is an extraordinary and unjustified assertion of authority.

IV. THE IMPACT OF *BALLBEARINGS II* ON EEC LAW AND TRADE POLICY

Ballbearings II is clearly a major victory for the Commission and Council. In virtually every single procedural and substantive point, the Court either has ruled in favor of the institutions or has declined to rule, leaving those subjects to the institutions' discretion. On the critical subject of symmetry and the requirement of a fair comparison under Article 2(9), the Court has given little guidance. Whether it will give any guidance on this issue in the *Electronic Typewriter* cases²²⁴ or the *Japanese Photocopier* cases²²⁵ is an open question, particularly in light of *Ballbearings II*. For the moment, it is up to the Commission and Council to take the next moves in this respect.

The Commission and Council have yet to follow the lead of their United States counterparts on these issues. Recognizing the critical importance of this subject in the administration of the United States antidumping laws, and realizing that substantial fairness required that action be taken, the United States legislature and the appropriate administrative authorities have taken steps to deal with this problem of cost comparison and administrative discretion through implementation of policy directives coupled with the application of the laws and policies at the administrative level.²²⁶

Therein lies a major difference between United States and EEC practice in this area: while the United States practice has recognized the comparison problem, attempted to reach a fair policy result, and has im-

²²⁴ Oral arguments in *Electronic Typewriters* were held on September 22-23, 1987, with a judgment expected in 1988. The individual cases are: *Brother Indus., Ltd. v. Council*, 28 O.J. EUR. COMM. (No. C 235) 4 (1985); *Tokyo Elec. Co. v. Council*, 28 O.J. EUR. COMM. (No. C 242) 5 (1985); *Silver Seiko Ltd. v. Council*, 28 O.J. EUR. COMM. (No. C 260) 4 (1985); *Canon, Inc. v. Council*, 28 O.J. EUR. COMM. (No. C 266) 9 (1985); *Sharp Corp. v. Council*, 28 O.J. EUR. COMM. (No. C 307) 5 (1985).

²²⁵ These actions, known collectively as *Japanese Photocopiers*, were filed mostly in June 1987, but no judgment would be expected for several years. Many of the same issues presented in *Electronic Typewriters* would be dealt with in these appeals: *Canon, Inc. v. Council*; *Mita Indus. Co. v. Council*; *Ricoh Co. v. Council*; *Matsushita Elec. Trading Co. v. Council*; *Konishiroku Photo Indus. Co. v. Council*; *Sanyo Elec. Co. v. Council*; *Minolta Camera Co. v. Council*; *Sharp Corp. v. Council*. The petitions and main contentions of the applicants are reported at 30 O.J. EUR. COMM. (No. C 225) 3-10 (1987).

²²⁶ The United States Court of Appeals recognized this need when it stated in *SCM I*:

Although the statute expressly requires a direct relationship between the differences in circumstances of sale and adjustment to foreign market value, we cannot conclude that the administering authority acted either beyond its authority or unreasonably in promulgating the offset. The offset does permit negation of one specific statutory adjustment of exporter's sales price, but does so to achieve a broader statutory purpose otherwise frustrated because of the alternative statutory methods of computing United States price.

SCM I, 713 F.2d at 1579. For background on these actions, see *supra* note 188.

plemented those policies through the application of its laws, the EEC reaction has been virtually the opposite. The EEC authorities are aware that the symmetry issue is critically important, but they have declined to deal with it openly.²²⁷ The Community institutions know that the absence of symmetry in dumping calculations has prejudiced exporters substantially and unfairly, yet they have gone even further by inventing theories which exacerbate its effects.²²⁸ Rather than taking steps to reach a fair resolution of this problem, they hide behind the regulation and claim that it forces them to act in this way.²²⁹ At the bottom of it all is one conclusion which is perhaps as equally important as the others: in the United States, there is meaningful substantive judicial review of the implementation of antidumping policies and laws; in the EEC, at least based upon present indications, there is none.²³⁰

In *Ballbearings II*, the Court has chosen not to rule upon certain "complex economic situations"—which in antidumping law could mean virtually all substantive matters—but has left those matters to the discretion of the Commission and Council.²³¹ Based upon the Court's previous procedural judgments, and if the deference of *Ballbearings II* is extended to other cases, it would seem that the Commission and Council would have unbridled discretion in substantive matters, provided they give an explanation of what they are doing (and even that proviso appears to have been limited by *Ballbearings II*).²³² In such circumstances, whenever the institutions wanted to "find" high dumping margins, they might simply make arbitrary and unreasonable interpretations of facts and invoke the proper regulations. If seen as "complex economic situations," such manifestly unjust and improper actions could be neither defended against nor appealed.

EEC antidumping law has reached a worrisome stage. Previously, observers bemoaned the role of the Commission as police officer, prose-

²²⁷ For example, they still maintain that the EEC adjustment rules are neutral. See J. BESELER & A. WILLIAMS, *supra* note 2, at 95-96.

²²⁸ For example, the new "5% rule" and the "single entity" theory which increased dumping margins significantly are at issue in the Electronic Typewriters rulings, *supra* note 69. These rulings are now on appeal. See *supra* note 224.

²²⁹ See *supra* note 228; see also J. BESELER & A. WILLIAMS, *supra* note 2, at 92-93.

²³⁰ See *supra* notes 147-49 and accompanying text.

²³¹ By its references to *Remia*, [1987] 1 Common Mkt. L.R. 1, and *Faust*, 1982 E. Comm. Ct. J. Rep. 3745, [1981-1983 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8878, as well as the implied limitations placed on *Allied II*, 4 Common Mkt. Rep. (CCH) ¶ 14,200, the Commission and Council have been given substantial freedom in the area of trade law and policy.

²³² See *supra* note 231. Unfortunately, it seems that the attitude of certain EEC officials is that they may do as they like now in antidumping proceedings, since such proceedings always involve "complex economic situations." Such attitudes are the regrettable consequence of the Court's seeming refusal to face these issues.

cutor, and judge. The Court has now added to those three roles that of interpreter of "complex economic situations."²³³ Such a grant of discretion is gratuitous and unnecessary, and one can only expect the Commission to expand its use of the antidumping rules as a policy tool. Certainly, it must avoid gross errors of fact and must give a plausible explanation of what it is doing,²³⁴ but beyond those minimal limits the Commission would be allowed to use the discretionary tools given it by the legal system to accomplish policy objectives in the ways it sees fit. The earlier procedural improvements insisted upon by the Court merely give the system the appearance of due process and substantial justice.²³⁵ The Court's ruling in favor of the institutions on all of the issues presented in *Ballbearings*, and its failure to grapple seriously with these questions of statutory interpretation, do not bode well for the future.

V. CONCLUSION

The "judicialization" of trade laws which has transformed them from arbitrary and somewhat mysterious proceedings into a semblance of due process and legal order has been a trend noted by various observers and commentators.²³⁶ As has been illustrated here, in the EEC there has been a trend towards greater disclosure and clarification of the guidelines.²³⁷ Judicial review played an important role in bringing EEC antidumping law out of its earlier "dark ages."²³⁸ In the area of procedural reforms, judicial review played a useful part, and may have contributed to a measure of "judicialization" in EEC trade law.²³⁹

Ballbearings II has stunted—if not stopped—that process of transformation in the EEC. Indeed, too much "judicialization" is seen by the

²³³ See *supra* note 223 and accompanying text.

²³⁴ See *supra* notes 147-49 and accompanying text (discussing *Remia*, [1987] 1 Common Mkt. L. R. 1, and that case's review standard).

²³⁵ See *supra* note 231.

²³⁶ The term "judicialization" is derived from an article by Ehrenhaft, *The "Judicialization" of Trade Law*, 56 NOTRE DAME L. REV. 595 (1981). In the view of Taylor & Vermulst, *supra* note 39, at 75, trade law has become increasingly "judicialized" since 1980. *Id.* at 69.

²³⁷ See *supra* notes 10-11 and accompanying text.

²³⁸ See *supra* notes 12-16 and accompanying text.

²³⁹ See Bourgeois, *supra* note 58, at 584-87. Bourgeois feels that EEC antidumping cases are progressively becoming more "adjudicative-like processes," a trend to which he ascribes four factors:

A first factor is the way in which the procedure itself is organized in line with the requirements of the 1979 GATT Antidumping Code, which is itself indebted to U.S. models. A second factor is the presence of trade lawyers [sic], who have a natural tendency to change their clients into litigants. A third factor is the change of heart of the Court of Justice that has opened the door to judicial review. A fourth factor is the growing proportion of cases leading to the imposition of anti-dumping duties rather than price undertakings. Such cases are more contentious and the corresponding decisions need to be drafted more rigorously.

Id. at 586.

EEC authorities as something to be avoided.²⁴⁰ To them, it is "of crucial importance to preserve a degree of flexibility in the application of an antidumping law."²⁴¹ *Ballbearings II* has certainly delivered that flexibility to them. Indeed, in this author's view, excessive discretion has been left in the hands of the EEC institutions. The rule of law, with its attendant safeguards, has been limited severely.²⁴²

Through *Ballbearings II* and its predecessors, the EEC judicial review system has created an appearance of propriety while at the same time allowing the EEC institutions to create an arbitrary system useful as a policy tool.²⁴³ The procedural reforms demanded by earlier Court decisions have given this system an aura of credibility. Yet this system, with its facade of credibility, can be and is being used by the Commission and Council in an arbitrary and biased manner to pursue the whims of protectionist policies.²⁴⁴ In *Ballbearings II* we have seen the failure of the European Court of Justice to act as an effective balance and restraining force for the rule of law.

Antidumping laws are supposed to be addressed against an "unfair" trade practice, and supportive of fair and liberalized trade.²⁴⁵ However, the EEC's fair trade laws, and particularly the antidumping rules, are being used in arbitrary and deceptive ways. One author has asked the question: How fair is fair trade?²⁴⁶ At the moment, the answer in the EEC is that fairness and justice are sorely lacking. Both the Commission

²⁴⁰ *Id.* at 586-87.

²⁴¹ *Id.* at 587.

²⁴² The primacy of the rule of law, whereby the government institutions are to be neutral enforcers and arbiters of the laws, seems to be sorely lacking in EEC antidumping law. This absence is a significant contrast to the United States approach:

One of the most pervasive aspects of U.S. trade policy is the emphasis which is given to the rule of law. The government has approached trade issues by seeking to lay down rules of conduct and attempting to enforce them impartially, through adjudicative procedures. At the international level the U.S. government has pressed for agreements—multilateral and bilateral—which codify, in ever-increasing detail, courses of commercial conduct considered mutually unacceptable. Domestically the Congress has enacted a series of legal remedies designed to respond to unfair trade practices.

This phenomenon reflects the expectation that the law itself, rather than the policies of any particular administration, is to fix the basic parameters within which America's international trade is to be conducted. For America's trading partners, which have parliamentary forms of government, the discretion granted to the governing party to direct trade and structure the national economy is far greater.

Howell & Wolff, *supra* note 5, at 3-9.

²⁴³ See *supra* notes 31-40 and accompanying text.

²⁴⁴ See, e.g., Hindley, *EC Imports of VCRs from Japan: A Costly Precedent*, 20 J. WORLD TRADE L. 168 (1986)(discussing the use of the antidumping laws as a trade policy instrument which could accommodate the conflicting political interests); Stegemann, *Anti-Dumping Policy and the Consumer*, 19 J. WORLD TRADE L. 466 (1985)(describing antidumping measures being used as a policy device under conditions that do not involve danger of predatory behavior).

²⁴⁵ J. BESELER & A. WILLIAMS, *supra* note 2, at vi.

²⁴⁶ Nicolaides, *supra* note 1.

and Council, as well as the Court, need to take decisive steps to address and to correct this problem.

VI. AFTERWORD

After this Article was completed, on March 8, 1988, Advocate General Sir Gordon Slynn presented his advisory opinion to the Court in *Electronic Typewriters*.²⁴⁷ He has recommended that the Court rule in favor of the Council and dismiss the exporters' applications for annulment. Continuing the trend in *Ballbearings II*, his position appears to be that the Commission and Council should be given deference in antidumping proceedings because such proceedings are "complex economic situations." If the Court follows the Advocate General's opinion, many of the difficult and potentially abusive situations forecast by this Article could materialize. The Court's judgment is expected later in 1988.

²⁴⁷ See *supra* note 224.