European Community Antidumping Regulation: Law and Practice

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I. INTRODUCTION

The European Economic Community (EEC or Community) will become a single trading partner on December 31, 1992.1 Under the Treaty Establishing the European Economic Community (EEC Treaty), the Community has the obligation to set Community-wide standards to protect trade from unfair competition.2 Dumping constitutes one prevalent form of unfair competition. By imposing antidumping duties, the Community can protect local industries from foreign products dumped into the Community. Because foreign exporters may try to circumvent antidumping duties by assembling the product within the Community, thereby creating a “European” product, antidumping duties may be extended to component parts.

1 Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. Article 8(a) of the EEC Treaty provides that the European Economic Community (EEC or Community) will become a single internal market “progressively . . . over a period expiring on 31 December 1992, . . . without internal frontiers in which the free movement of goods, persons, services and capital is ensured.” Id. at art. 8(a). Article 8(a) was added to the EEC Treaty by article 13 of the Single European Act, Feb. 17, 1986, 30 O.J. Eur. Comm. (No. L 169) 1 (1987).

2 EEC Treaty, supra note 1, at art. 113. Article 113(1) provides in part: “After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to . . . measures to protect trade such as those to be taken in case of dumping . . . .” Id. at art. 113(1). Article 113(2) states that “[t]he Commission shall submit proposals to the Council for implementing the common commercial policy.” Id. at art. 113(2). Article 113(4) mandates that “the Council shall act by a qualified majority.” Id. at art. 113(4). The Commission of the European Communities (Commission) proposes regulations which must pass through the Council of the European Communities (Council) to become binding on all member states. S. BUDD, THE EEC: A GUIDE TO THE MAZE 33 (1987). For an introductory discussion of the history of the Community and the responsibilities of the governing bodies, see 1 LAW OF THE EUROPEAN COMMUNITIES paras. 1.01–1.69 (D. Vaughan ed. 1986); M. HOPKINS, POLICY FORMATION IN THE EUROPEAN COMMUNITIES 1–9 (1981); E. VERMULST, ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES 7–10 (1987); J.F. Bellis, The EEC Antidumping System, in ANTIDUMPING LAW AND PRACTICE 41, 44–47 (J. Jackson & E. Vermulst eds. 1989) [hereinafter LAW AND PRACTICE]. See generally Deardorff, Economic Perspectives on Antidumping Law, in LAW AND PRACTICE, supra, at 23–39.
Community antidumping legislation must be in accordance with the General Agreement on Tariffs and Trade (GATT). In 1979, the Community entered into the Agreement on Implementation of Article VI of GATT (1979 Anti-Dumping Code). This agreement replaced the previous agreement, the 1968 Anti-Dumping Code. The Council of the European Communities (Council) enacted Regulation 3017/79 to remain in compliance with GATT obligations. In 1984, Regulation 2176/84 replaced Regulation 3017/79.

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4 Decision 80/271, Council Decision of 10 December 1979 Concerning the Conclusion of the Multilateral Agreements Resulting from the 1973 to 1979 Trade Negotiations, 23 O.J. EUR. COMM. (No. L 71) 1 (1980) [hereinafter Decision 80/271]. The Council approved the 1979 Anti-Dumping Code on behalf of the Community. Id. at art. 1(2). The text of the 1979 Anti-Dumping Code is reprinted after Decision 80/271. Id. at 90; see also J. Beseler & A. Williams, Anti-Dumping and Anti-Subsidy Law: The European Communities 5–18 (1986). The 1979 Anti-Dumping Code was negotiated during the Tokyo Round Agreements. See Dumping in International Trade, supra note 3, at 7–8.


Regulation 3017/79 as the Community’s primary antidumping regulation. In 1987, the Council enacted Regulation 1761/87 as a “technical” amendment to Regulation 2176/84. In 1988, the Council passed yet another antidumping law, Regulation 2423/88 which incorporated all previous antidumping laws in the Community.

Part II of this Comment considers the provisions of Regulation 2176/84. Part II also considers the amendment to this legislation, Regulation 1761/87. Part III discusses the provisions of the most recent Community antidumping enactment, Regulation 2423/88, and how it differs from the previous antidumping law. Part IV

7 Regulation 2176/84, supra note 6, at art. 18; see J. Beseler & A. Williams, supra note 4, at 28–29. The changes the Commission proposed regarding Regulation 3017/79 were codified in Regulation 2176/84. See generally Proposed Regulation 2176/84, supra note 6. Regulation 2176/84 implements the 1979 Anti-Dumping Code. E. Vermulst, supra note 2, at 8–9.


reviews the Community's previous application of its antidumping legislation to the importation of ball bearings and their final intra-Community assemblage. Part IV also examines a legal challenge made to the application of the legislation. This Comment concludes that Regulation 2423/88 achieved its objective to clarify the Community's antidumping law, but that mere clarification was insufficient.

II. Previous Community Antidumping Law: Regulations 2176/84 and 1761/87

The Council enacted Regulation 2176/84 as its primary antidumping law in 1984.10 Three years later, the Council found the regulation inadequate and subsequently passed an amendment.

A. Provisions of Regulation 2176/84

Regulation 2176/84 attempted to protect the Community from injury caused by products dumped from outside the Community by imposing antidumping duties on the dumped products.11 Several conditions must be met before an antidumping duty can be imposed upon a product. This Section examines the criteria used to determine whether a product has been dumped into the Community and whether the dumping has caused injury.12

1. The Determination of Normal Value

One condition that must be met before an antidumping duty is levied on a product is a finding that the normal value of the product or like product is greater than the product's export price

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10 Regulation 2176/84 repealed Regulation 3017/79. Regulation 2176/84, supra note 6, at art. 18.
11 Regulation 2176/84, supra note 6, at art. 1; J. Beseler & A. Williams, supra note 4, at 41-52 (an introductory discussion of dumping). For a discussion of the procedures involved in initiating and conducting antidumping investigations, see id. at 173-205; E. Vermulst, supra note 2, at 194-225; Bellis, supra note 2, at 47-51. For a comparison of the procedures used in antidumping investigations in the United States and the Community, see E. Vermulst, supra note 2, at 311-33; Horlick, The United States Antidumping System, in LAW AND PRACTICE, supra note 2, at 99-166.
12 See Bellis, supra note 2, at 69-97 (discussion of the substantive determination of dumping, including dumping from non-market economies).
to the Community. The normal value of the product can be established by computing the price of the product in the ordinary course of trade in the exporting country or country of origin. If the product is sold in the Community for less than this amount, the imposition of an antidumping duty may be necessary.

If the product is not sold in the exporting country or country of origin, the computation of the normal value is more difficult. In this situation, the normal value under Regulation 2176/84 was determined in either of two ways. First, the normal value was the highest export price of a like product to a third country. Second, if the product was not exported to a third country, the normal value was constructed. The constructed normal value

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13 Regulation 2176/84, supra note 6, at art. 2(2). Regulation 2176/84 defines a like product as that which is "alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration." Id. at art. 2(12). "The decisive criterion . . . is the physical character of the product rather than its usage." J. Beseler & A. Williams, supra note 4, at 88. The authors propose that "economic substitutes such as coal and oil, butter and margarine or wool and cotton" are not necessarily like products. Id.; see also E. Vermulst, supra note 2, at 629-31; Baker, "Like" Products and Commercial Reality, in LAW AND PRACTICE, supra note 2, at 287-94.

14 Regulation 2176/84, supra note 6, at art. 2(3)(a). The phrase "ordinary course of trade" is subject to varying interpretations as it is not explicitly defined in Community legislation. J. Beseler & A. Williams, supra note 4, at 54. Transactions made in the ordinary course of trade are generally thought to be those made "at arm's length in normal open market transactions." Id. "Monopoly or cartel prices are considered to be in the ordinary course of trade . . . ." Id. Sales at a loss over a long period of time are outside the definition of ordinary course of trade. Id. at 62; see also Regulation 2176/84, supra note 6, at art. 2(4). Sales made between a parent corporation and a subsidiary or between firms related in any way are deemed to be made outside the ordinary course of trade. J. Beseler & A. Williams, supra note 4, at 54-55. Firms are related when "one controls the other or when both are jointly controlled by a third." Id. at 55. The rationale for treating related firms as not trading at arm's length is that the firms' relationship may influence prices and costs. Id. at 54. The firms may also be affected by arrangements which are compensatory in nature. Id. at 55.

Even if the product is sold in the exporting country, however, if a proper comparison of the sales prices in the exporting country and the Community cannot be made, the normal value is not computed this way. See E. Vermulst, supra note 2, at 416-38; J. Beseler & A. Williams, supra note 4, at 52-80.

15 See Regulation 2176/84, supra note 6, at arts. 2(1), 2(2). An antidumping duty may not be required, however, if the dumping does not cause injury. See infra notes 28-32 and accompanying text.

16 Regulation 2176/84, supra note 6, at art. 2(3)(b).

17 Id. at art. 2(3)(b)(i). Although the export price may be set at the highest export price to any third country, it should be a representative export price. Id. Regulation 2176/84 provides four ways to construct the normal value when sales at a loss are made over a long period of time and at prices which do not allow recovery of costs within a reasonable time in the ordinary course of trade. Id. at art. 2(4).

18 Id. at art. 2(3)(b)(ii); see J. Beseler & A. Williams, supra note 4, at 58-61.
was determined by adding the cost of production to a reasonable profit margin. The cost of production was constructed by determining the costs of materials and manufacturing as well as the selling, administrative, and other general expenses.\textsuperscript{19} The reasonable profit margin under Regulation 2176/84 was the profit normally realized on the same category of products in the market where the product is produced or exported.\textsuperscript{20}

2. The Determination of Export Price

If an antidumping duty is to be imposed, it must not exceed the dumping margin.\textsuperscript{21} The dumping margin is the difference between the normal value and the export price to the Community.\textsuperscript{22} Consequently, before any definitive antidumping duty can be imposed by the Council, a determination of the export price must also occur.\textsuperscript{23}

Like the normal value of a product, the export price can be either the actual price or a constructed price if the actual price is indeterminable.\textsuperscript{24} The actual export price under Regulation 2176/84 was the price that would be paid for the product in the Community.\textsuperscript{25} The constructed export price was more difficult to determine. If the export price had to be calculated, it was deemed to be the price at which the product was sold to the first independent buyer, plus an allowance.\textsuperscript{26} The export price was determined on any reasonable basis if the product was not sold to an

\textsuperscript{19} Regulation 2176/84, supra note 6, at art. 2(3)(b)(ii). The cost of manufacture includes both fixed and variable costs of the materials and manufacture of the product. \textit{Id.}

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.} at art. 13(3). \textit{See J. Beseler & A. Williams, supra note 4, at 112-15 (discussion of the dumping margin).}

\textsuperscript{22} Regulation 2176/84, supra note 6, at art. 2(13)(a). For a discussion of the allowances and adjustments that may be made in order to achieve a fair comparison, see J. Beseler & A. Williams, supra note 4, at 89-112.

\textsuperscript{23} \textit{See} Regulation 2176/84, \textit{supra} note 6, at art. 2(2); E. Vermulst, \textit{supra} note 2, at 438-54; J. Beseler & A. Williams, \textit{supra} note 4, at 80-88. For a comparative analysis of the export price and normal value as used in the United States and the Community, see E. Vermulst, \textit{supra} note 2, at 481-500.

\textsuperscript{24} \textit{Compare} Regulation 2176/84, \textit{supra} note 6, at art. 2(8)(a) \textit{with} art. 2(3)(b)(ii); \textit{see J. Beseler & A. Williams, supra} note 4, at 80-86.

\textsuperscript{25} Regulation 2176/84, \textit{supra} note 6, at art. 2(8)(a).

\textsuperscript{26} \textit{Id.} at art. 2(8)(b). An allowance for costs associated with transportation, insurance, customs duties, and taxes, as well as a reasonable profit margin, are to be included in the constructed export price. \textit{Id.}
independent buyer or the product was not imported into the Community in the same condition in which it was sold.\textsuperscript{27}

3. The Determination of Injury

Once the Commission determined that the normal value exceeded the export price, the Commission determined whether a Community industry had been injured.\textsuperscript{28} In its injury determination, the Commission was previously bound by Regulation 2176/84 which listed several factors that were indicative of injury. The first factor was whether the volume of dumped imports into the Community increased. The second factor was whether the price of the dumped product was considerably lower than that of a like product. The final factor was the impact of the dumping on Community industries. The regulation instructed the Commission to look at such things as sales, market share, production rates, and profits.\textsuperscript{29}

In addition to imposing a provisional antidumping duty for past injuries, the regulation empowered the Commission to impose a provisional antidumping duty when there was a threat of injury to a Community industry.\textsuperscript{30} The Commission determined whether the threat of injury would develop into actual injury to a Community industry.\textsuperscript{31} Under Regulation 2176/84, the Commission would have looked at how the volume of imports varied

\textsuperscript{27} Id.

\textsuperscript{28} Id. at art. 2(1). Regulation 2176/84 defines a Community industry as “Community producers as a whole of the like product or . . . those of them whose collective output of the products constitutes a major proportion of the total Community production of those products.” Id. at art. 4(5). A Community producer that is an importer of the dumped product or related to an exporter or importer is not included within the definition of a Community industry. Id. If the Community is divided into more than two markets for a product, the producers in one of the markets sell all or almost all of the production in that market, and producers elsewhere in the Community do not supply the demand in that market, the producers within each market may be considered a Community industry. Id. For additional information on the injury determination, see E. Vermulst, supra note 2, at 631–57; J. Beseleer & A. Williams, supra note 4, at 147–72. For a comparison of the injury determination in the United States and the Community, see E. Vermulst, supra note 2, at 673–92; Vermulst, Injury Determinations in Antidumping Investigations in the United States and the European Community, 7 N.Y.L. Sch. J. Int’l & Comp. L. 301 (1986).

\textsuperscript{29} Regulation 2176/84, supra note 6, at art. 4(2).

\textsuperscript{30} Id. at arts. 4(1), 4(3). According to Regulation 2176/84, an injury is found when the dumped products are “causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry.” Id. at art. 4(1).

\textsuperscript{31} Id. at art. 4(3).
over time. The regulation also required the Commission to determine whether the exports from the exporting country or country of origin to the Community could, and the probability that they would, increase in the foreseeable future.32

In summary, before an antidumping duty could be imposed on a product under Regulation 2176/84, the product must have been imported from a nonmember state, sold in the Community for less than its normal value, and caused or threatened to cause injury to a Community industry.

B. Provisions of Regulation 1761/87

The first condition to the application of Regulation 2176/84 was that the product be imported from outside the Community.33 One way for producers of imported products to avoid the application of Regulation 2176/84 was to conduct the final assembly of the product within the Community, thereby producing a “European” product exempt from any restrictions on its trade.34 As a result, the Council found that widespread circumvention of Regulation 2176/84 posed a threat to the Community and amended Regulation 2176/84 in 1987.35 Regulation 1761/87 allowed the Commission to investigate the production activities of “assembly plants” and, where necessary, impose duties on those products.36

Regulation 1761/87 required that certain conditions be met before the Commission could impose a provisional antidumping

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32 Id. at arts. 4(3)(a)-(b).
33 See id. at art. 1; Proposed Regulation 1761/87, supra note 8, at Explanatory Memorandum.
35 Regulation 1761/87, supra note 8, at 9; SIXTH ANNUAL REPORT, supra note 34, at 12.
36 Regulation 1761/87, supra note 8, at 9; SIXTH ANNUAL REPORT, supra note 34, at 12; see New Developments, Nissan Cars Manufactured in Britain are “Made in Japan,” France Charges, [1985–1988 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 11,028 (1988). In a recent dispute, France maintained its position that Nissan cars built in the U.K. would not be considered European until at least 80 percent of their parts originated within the Community. Id. Last year, after intervention by the Commission, France agreed to remove all restrictions on the cars assembled by Nissan in the United Kingdom. New Developments, France Removes Obstacles to Import of Japanese Cars Manufactured in the U.K., 4 Common Mkt. Rep. (CCH) ¶ 95,134 (1989); see also Griffith, Antidumping Duties on Parts in the EEC, in LAW AND PRACTICE, supra note 2, at 311–25; see generally Steenberg, Circumvention of Antidumping Duties by Importation of Parts and Materials: Recent EEC Antidumping Rules, 11 FORDHAM INT’L L.J. 332 (1988); De Smedt, EC Anti-dumping Law: EC Applies Duties to Foreign-owned Assembly Operations in the EC, 15 INT’L BUS. LAW. 479 (1987).
duty on products produced in such assembly plants. \(^{37}\) Intra-Community assembly had to be conducted by a company that was either related to or associated with a foreign exporter dumping like products into the Community. \(^{38}\) Such a relationship could exist between a foreign parent corporation and a European subsidiary. \(^{39}\) Second, the assembly or production levels must have either begun or increased substantially after the opening of the initial antidumping investigation of the related or associated manufacturer before a provisional antidumping duty could be imposed. Most importantly, the product’s component parts made in the Community had to be below a certain level of the total value of the product. \(^{40}\) Specifically, the value of the component parts of the product originating in the importing country must have exceeded the value of all other component parts by at least 50 percent. \(^{41}\) Therefore, Regulation 1761/87 made it more difficult for manufacturers outside the Community to take advantage of the Community’s internal free market.

To ensure fairness, Regulation 1761/87 also required that each instance of alleged circumvention be handled with regard to three factors: the costs associated with production in the Community, the amount of research and development that occurred in the Community, and the amount of technology invested in the Community. \(^{42}\) Despite the Community’s interest in encouraging investment in the Community, it had to balance investment against the circumvention of its antidumping laws. \(^{43}\)

### III. Current Community Antidumping Law: Regulation 2423/88

The Council updated the Community’s antidumping law because of difficulties in achieving correct interpretation and application. \(^{44}\) Regulation 2423/88 became effective in August 1988,

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\(^{37}\) See infra notes 38–43 and accompanying text.

\(^{38}\) Regulation 1761/87, supra note 8, at art. 1. The Commission has great discretion in defining the terms “related” and “associated.” Griffith, supra note 36, at 312.

\(^{39}\) See infra notes 104–11 and accompanying text.

\(^{40}\) Regulation 1761/87, supra note 8, at art. 1; Griffith, supra note 36, at 313–14. The Commission is concerned with a part’s “value” not its “price.” Id. at 314.

\(^{41}\) Regulation 1761/87, supra note 8, at art. 1; see infra notes 104–11 and accompanying text. “[I]n practice . . . the value of [foreign] parts must be more than \(60\)% of all parts.” Griffith, supra note 36, at 313.

\(^{42}\) Regulation 1761/87, supra note 8, at art. 1.

\(^{43}\) See id.

\(^{44}\) Regulation 2423/88, supra note 9, at 3; Proposed Regulation 2423/88, supra note 9, at 1.
and incorporates both Regulations 2176/84 and 1761/87, but makes minor changes to their provisions. 45

Both Regulation 2423/88 and Regulation 2176/84 provide a methodology for the calculation of a product's normal value. 46 Where the product is sold in the ordinary course of trade on the domestic market of the exporting country or country of origin, the normal value is simply the price paid or payable for the product. 47 This definition, so far, is identical to that in Regulation 2176/84. 48 Regulation 2423/88, however, continues by providing that the price paid or payable for a product shall be reduced by the amount of discounts and rebates directly linked to the sales of the product. Regulation 2423/88 also states that deferred discounts directly related to sales can be recognized only if the exporter supplies evidence to show that these discounts are based on consistent prior practice. 49

In the event that there are no sales of a like product in the exporting country or country of origin, the price of the like product in a third country will be the product's normal value. 50 This provision is identical to the corresponding provision in Regulation 2176/84. 51 The normal value, however, can also be constructed by adding the costs of production to a reasonable profit margin. 52 The costs of production are determined, in both Regulations 2176/84 and 2423/88, on the basis of costs of materials and manufacture in the country of origin, plus a reasonable amount for the selling, administrative, and other general expenses. 53 Unlike Regulation 2176/84, however, Regulation 2423/88,

45 See generally Regulation 2423/88, supra note 9. The amendments which the Commission proposed to the Council are embodied in Regulation 2423/88. See Proposed Regulation 2423/88, supra note 9, at 5–8. One new condition of Regulation 2423/88 is the requirement that importers or their customers pay the antidumping duties. Bellis, supra note 2, at 59.
46 Compare Regulation 2423/88, supra note 9, at art. 2(3) with Regulation 2176/84, supra note 6, at art. 2(3).
47 Regulation 2423/88, supra note 9, at art. 2(3)(a).
48 Compare Regulation 2423/88, supra note 9, at art. 2(3)(a) with Regulation 2176/84, supra note 6, at art. 2(3)(a). See supra note 14 and accompanying text.
49 Regulation 2423/88, supra note 9, at art. 2(3)(a). Proposed Regulation 2423/88, supra note 9, at 3.
50 Regulation 2423/88, supra note 9, at art. 2(3)(b)(i).
51 Compare Regulation 2423/88, supra note 9, at art. 2(3)(b)(i) with Regulation 2176/84, supra note 6, at art. 2(3)(b)(i).
52 Regulation 2423/88, supra note 9, at art. 2(3)(b)(ii).
53 Compare Regulation 2423/88, supra note 9, at art. 2(3)(b)(ii) with Regulation 2176/84, supra note 6, at art. 2(3)(b)(ii).
the most recent legislation, provides a means for calculating these selling, administrative, and general expenses.\textsuperscript{54}

There are three alternative methods by which to calculate the selling, administrative, and general expenses.\textsuperscript{55} The first method requires a determination of the producer's expenses and profits in profitable sales of the like product in the exporting market. The second method is to be used only if the prior method is unavailable, unreliable, or unsuitable. This method requires the calculation of the selling, administrative, and general expenses to be based upon the expenses and profits of other producers in the exporting country profitably selling the like product. Finally, if the Commission determines that the first and second methods are inapplicable, it may look to the expenses and profits related to sales by either the exporter or other exporters in the same general business sector.\textsuperscript{56}

The provisions regarding the calculation of the export price were not altered significantly.\textsuperscript{57} The export price is that price which is paid or payable for the product in the Community.\textsuperscript{58} Regulation 2423/88, however, mandates that this price be reduced by the amount of the taxes, discounts, and rebates directly linked to the sales which form the basis of the Commission's inquiry.\textsuperscript{59} This provision is similar to the provision mandating that the normal value be determined net of discounts and rebates.\textsuperscript{60}

The costs incurred between the time the product enters the Community and subsequent resale are not included in the constructed export price.\textsuperscript{61} A reasonable profit margin is included in the calculation of this allowance.\textsuperscript{62} The new provision in Regulation 2423/88 specifies that the costs to be included are those

\begin{footnotesize}
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\item Id.; Proposed Regulation 2423/88, supra note 9, at 3–4.
\item Regulation 2423/88, supra note 9, at art. 2(3)(b)(ii).
\item Id.
\item Compare Regulation 2434/88, supra note 9, at art. 2(8) with Regulation 2176/84, supra note 6, at art. 2(8).
\item Regulation 2423/88, supra note 9, at art. 2(8)(a); Regulation 2176/84, supra note 6, at art. 2(8)(a).
\item Regulation 2423/88, supra note 9, at art. 2(8)(a); Proposed Regulation 2423/88, supra note 9, at 4.
\item Compare Regulation 2423/88, supra note 9, at art. 2(8)(a) with art. 2(3)(a).
\item Id. at art. 2(8)(b). Regulation 2423/88, in contrast to Regulation 2176/84, does not permit the duties and taxes to be included in the allowance. Regulation 2423/88, supra note 9, at art. 2(8)(b); Regulation 2176/84, supra note 6, at art. 2(8)(b); Proposed Regulation 2423/88, supra note 9, at 4–5.
\item Regulation 2423/88, supra note 9, at art. 2(8)(b); Proposed Regulation 2423/88, supra note 9, at 4–5.
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that would normally be incurred by an importer. As did Regulation 2176/84, Regulation 2423/88 lists the costs of transport, insurance, taxes, and duties as those which could be included in the allowance. Despite several changes between the older and newer legislation, the Council did not alter the injury determination.

IV. Application of Antidumping Legislation by Community Institutions

Since the Community became a signatory to the 1968 Anti-Dumping Code, the Community institutions, the Commission, the Council, and the European Court of Justice (European Court), have had ample opportunity to apply and review the application of antidumping legislation. Two exporters, Nippon

63 Regulation 2423/88, supra note 9, at art. 2(8)(b).
64 Compare Regulation 2423/88, supra note 9, at arts. 2(8)(b), 4 with Regulation 2176/84, supra note 6, at arts. 2(8)(b), 4.
65 Between 1980 and 1987, the Commission opened more than 300 antidumping investigations. Commission of the European Communities, First Annual Report of the Commission of the European Communities on the Community's Anti-Dumping and Anti-Subsidy Activities, COM(83) 519 final/2, at 2 (the Commission initiated 25, 48, and 58 investigations in 1980, 1981, and 1982, respectively) [hereinafter First Annual Report]; Commission of the European Communities, Second Annual Report of the Commission of the European Communities to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities, COM(84) 721 final, at 3 (38 antidumping investigations were opened in 1983) [hereinafter Second Annual Report]; Commission of the European Communities, Third Annual Report of the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities, COM(86) 308 final, at 3 (49 investigations were opened in 1984) [hereinafter Third Annual Report]; Commission of the European Communities, Fourth Annual Report of the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities, COM(87) 178 final, at 3 (36 investigations opened in 1985) [hereinafter Fourth Annual Report]; Commission of the European Communities, Fifth Annual Report of the Commission on the Community's Anti-Dumping and Anti-Subsidy Activities, COM(88) 92 final, at 3 (24 investigations were opened in 1986) [hereinafter Fifth Annual Report]; Sixth Annual Report, supra note 34, at 3 (39 investigations were opened in 1987). Of the more than 300 antidumping investigations opened, only 99 were closed without the application of protective measures. First Annual Report, supra, at 2, 4 (in 1980, 1981, and 1982, respectively, 13, 14, and 9 investigations were closed without the application of protective measures); Second Annual Report, supra, at 6 (in 1983, 11 investigations were closed without the application of protective measures); Third Annual Report, supra, at 5 (10 investigations were closed in 1984 without protective measures); Fourth Annual Report, supra, at 6 (20 investigations were closed in 1985 without protective measures); Fifth Annual Report, supra, at 2 (18 investigations were terminated in 1986 without protective measures); Sixth Annual Report, supra note 34, at 5 (4 investigations were concluded in 1987 without the application of protective measures); Bellis, supra note 2, at 42–43. Japan had the highest
Seiko KK (Nippon) and NTN Toyo Bearing (Toyo), have been the subject of Community investigations under Regulations 2176/84 and 1761/87. The Community antidumping legislation to these two Japanese exporters. This Section also discusses Nippon and Toyo's legal challenges to the Council's imposition of definitive antidumping duties. Because articles 2(3) and 2(8) of Regulation 2423/88 do not differ significantly from previous antidumping legislation, understanding the Community’s previous treatment of these provisions is essential to predict the outcome of similar cases under Regulation 2423/88.

A. The Council and Commission's Interpretation of Antidumping Legislation

In September 1979, the Commission opened an investigation relating to the dumping of ball bearings imported into the Community from, inter alia, Japan. The Commission investigated charges against the foreign exporters Nippon and Toyo. After being informed of the Commission's findings, Nippon and Toyo offered undertakings to the Commission which were accepted in 1981. In 1983, the Commission opened another investigation number of exporters involved in Community antidumping investigations between 1985 and 1987. SIXTH ANNUAL REPORT, supra note 34, at 6. For information on administrative and judicial review of investigations, see Bellis, supra note 2, at 63–68.

The earlier investigations were conducted under Regulation 3017/79. Because Regulation 3017/79 is substantially similar to Regulations 2176/84 and 2423/88, those earlier investigations are relevant to this discussion.


Id. at art. 1. The exporters offered to either eliminate the dumping margin or eliminate the injurious effects of the dumping. Id. at 46. A majority of antidumping investigations are concluded with the acceptance of undertakings. Bellis, supra note 2, at 43, 52–55; J. BESELER & A. WILLIAMS, supra note 4, at 212–22.
of Nippon and Toyo involving the dumping of small ball bearings into the Community. This investigation included a review of the 1981 undertakings insofar as they involved small ball bearings. 70 Upon an affirmative finding of injury from the dumping of small ball bearings into the Community, the Commission imposed a provisional antidumping duty on small ball bearings manufactured by Nippon and Toyo in 1984. 71 During that same year, the Commission also received a separate request for review of the undertakings involving large ball bearings. 72 The Commission concluded the investigation with the imposition of provisional antidumping duties on large ball bearings manufactured by Nippon and Toyo. 73 In 1984 and 1985, the Council imposed definitive antidumping duties on small 74 and large 75 ball bearings manufactured by Nippon and Toyo.

70 Notice of Initiation of an Anti-dumping Proceeding Concerning Imports of Certain Ball Bearings Originating in Japan and Singapore, 26 O.J. EUR. COMM. (No. C 188) 8 (1983) [hereinafter Notice to Initiate Investigation].


72 Notice 84/C 101/04, Notice of Re-opening of an Anti-dumping Investigation Concerning Imports of Certain Ball and Tapered Roller Bearings Originating in Japan, 27 O.J. EUR. COMM. (No. C 101) 11 (1984). This investigation involved large ball bearings, for which the Commission had previously accepted undertakings in Decision 81/406. Id.; see supra note 68 and accompanying text.


In 1984, Nippon and Toyo filed separate applications with the European Court requesting that Regulation 2089/84, which imposed definitive antidumping duties on both exporters, be declared void.\textsuperscript{76} The European Court ruled against both parties.\textsuperscript{77} In 1988, the Commission commenced another investigation upon the allegation that Nippon and Toyo were importing Japanese parts into the Community and assembling them in violation of Regulation 2176/84.\textsuperscript{78} The Commission determined that Nippon and Toyo were not acting in violation of Regulation 2176/84 and closed the investigation.\textsuperscript{79} This Section examines how the Commission and the Council determined that Nippon and Toyo injuriously dumped small ball bearings into the Community and that their subsequent intra-Community assembly of ball bearings was legal.\textsuperscript{80}

1. The Commission's Imposition of Provisional Antidumping Duties upon Japanese Ball Bearings

In March of 1983, the Federation of European Bearing Manufacturers' Associations (FEBMA), representing the Community ball bearings industry, petitioned the Commission to investigate an allegation of dumping.\textsuperscript{81} Based on the evidence provided by FEBMA, the Commission concluded that an investigation of the situation was warranted. The Commission concluded the inves-
tigation by finding that provisional antidumping duties were warranted.82

The Commission determined that the normal value for Nippon and Toyo would be based on their domestic prices where those prices were considered representative of the Japanese domestic market.83 The Commission determined the export prices to the Community in two ways. For the Japanese firm which sold the exports to an independent importer, the Commission primarily based the export price on the price actually paid or payable for the product. The Commission constructed the export price, however, when the exports were made to subsidiaries within the Community. The constructed export price is the price at which the product is sold to the first independent buyer in the Community minus the costs incurred between import and resale.84

The Commission next investigated whether the dumping caused or threatened to cause injury within the Community.85 The Commission found that sales of small ball bearings imported from Japan and Singapore increased significantly during the investigation period. For example, the ball bearing sales amounted to 22,670,000 units in 1979; 26,337,000 units in 1982; and 18,538,000 units for the first six months of 1983. Japan and Singapore concurrently increased their market share of the product from 17.5 percent to 27.9 percent.86

In investigating the existence or threatened existence of injury to the Community, the Commission also examined the effect of the dumping on the Community.87 The Commission found that, in most cases, the resale price of the product was so low that the Community producers could not match the price and still recover their costs and a reasonable profit. The evidence revealed that, in some situations, Community producers’ prices were undercut.

82 Regulation 744/84, supra note 71, at para. 3, art. 2; Corrigendum, supra note 71; Notice to Initiate Investigation, supra note 118, at 8.
83 Regulation 744/84, supra note 71, at para. 11. For exporters from Singapore, the Commission constructed the normal value because there were virtually no sales of a like product on the domestic market. Id. at paras. 13–16.
84 Id. at paras. 17–18. The customs duty and a reasonable profit margin were subtracted from the constructed export price. Id.
85 See Regulation 744/84, supra note 71, at paras. 23–32. For the provisions regarding injury, see Regulation 2176/84, supra note 6, at art. 4; see infra notes 86–88 and accompanying text.
86 Regulation 744/84, supra note 71, at para. 23.
87 Id. at paras. 24–31.
by 44.8 percent. The Commission estimated that Community production fell 4.5 percent between 1979 and 1983. The utilization of capacity of the entire Community industry of ball bearings fell 19 percent between 1979 and 1983. Sales of ball bearings made by Community producers fell 13.3 percent between 1979 and the first six months of 1983. The concurrent decrease in market share for the Community producers was 11.1 percent. The Commission noted that employment in firms specializing in the product decreased 9 percent between 1979 and the first six months of 1983. Other factors which led to the imposition of the provisional duty were that the Community industry's financial losses resulted from competition for market share at price levels below cost and that the Community's small ball bearing industry was not being significantly injured by exports from third countries or reduction in demand. 88

After considering the cumulative effect of these factors, the Commission decided that exports from Japan and Singapore were being dumped into the Community and causing injury to a Community industry. 89 The Commission imposed provisional antidumping duties on the products, including those of Nippon and Toyo, equal to the provisionally established dumping margin. The provisional duties were to apply for four months, unless the Council imposed definitive antidumping duties on the affected exporters' products before that time. 90

2. The Council's Imposition of Definitive Antidumping Duties upon Nippon and Toyo's Ball Bearings

Four months after the Commission imposed provisional antidumping duties upon ball bearings made by Nippon and Toyo, the Council imposed definitive antidumping duties upon both exporters' products. 91 The Council relied, to a large extent, on the Commission's findings. The definitive antidumping duties imposed by the Council, however, were not identical to the provisional duties imposed by the Commission. 92

88 Id. at paras. 24, 26–31.
89 Id. at para. 32.
90 Id. at para. 34, art. 4.
91 Regulation 2089/84, supra note 74, at arts. 1–3.
92 Compare Regulation 2089/84, supra note 74, at art. 1(2) with Regulation 744/84, supra note 71, at art. 2(2); Corrigendum, supra note 71 (the Council imposed duties lower than those imposed by the Commission); see supra notes 71, 74, and accompanying text.
The Council calculated the definitive antidumping duties by first calculating the dumping margin of the Japanese ball bearing exporters. The Council established the normal value of the ball bearings at the price paid by unrelated purchasers on the domestic market. If an exporting company sold directly to unrelated purchasers as well as through its own sales subsidiaries, the Council used only the average combined prices paid by unrelated purchasers as the normal value. The Commission, in contrast, based its provisional determination of the normal value on the exporters’ representative domestic prices of ball bearings. In practice, the different standards applied by the Commission and Council probably yield similar results; both tests seek to determine the price at which the exporter would normally cover its costs and recover a profit.

The Council's calculation of the dumping margin did not involve a specific recalculation of the export prices to the Community, except for Toyo. The Council determined the definitive antidumping duty by comparing the normal value with export prices on a transactional basis. Because Toyo had not allowed the Commission to verify information relating to a Community-based subsidiary, the Commission based its determination of the dumping margin on the best available information. After the calculation of the provisional duty by the Commission, Toyo permitted the verification to occur, resulting in a reduced definitive antidumping duty. Maintaining the Commission's findings regarding injury in the Community, the Council imposed definitive duties on ball bearings made by both Nippon and Toyo. The Council believed that the definitive duties were in the Community's interest and that price undertakings would not be a satisfactory solution.

Both the Commission and Council employed essentially the same method to calculate the antidumping duties to be imposed

93 See Regulation 2089/84, supra note 74, at para. 11.
94 Regulation 2089/84, supra note 74, at para. 11.
95 Regulation 744/84, supra note 71, at para. 11.
96 See Regulation 2089/84, supra note 74, at paras. 16–19.
97 Id. at paras. 16, 19. The Council's duty was lower than that calculated by the Commission. See supra notes 71, 74, and accompanying text.
98 Regulation 2089/84, supra note 74, at para. 21, art. 1(2).
99 Id. at para. 24.
on ball bearings manufactured by Nippon and Toyo.\textsuperscript{100} The determination of the normal value of Nippon and Toyo's ball bearings was simplified because of their sale on the domestic market.\textsuperscript{101} The Council relied on the Commission's findings for the appropriate export price and the injury determination.\textsuperscript{102} The Council's definitive antidumping duties for Nippon and Toyo, while substantial, were lower than that provisionally calculated by the Commission.\textsuperscript{103}

3. Determination that Intra-Community Assembly by Nippon and Toyo was Legal

Almost four years after the Council's imposition of definitive duties against Nippon and Toyo's small ball bearings, the Commission opened another investigation of these two Japanese exporters.\textsuperscript{104} FEBMA's complaint alleged that Nippon and Toyo were assembling ball bearings in the Community in contravention of Regulation 2176/84 and in circumvention of the definitive antidumping duties imposed by the Council.\textsuperscript{105} The Commission subsequently terminated the investigation without extending the duties in force to ball bearings assembled in the Community.\textsuperscript{106}

The Commission examined three areas during its investigation of Nippon and Toyo's alleged violation of article 13(10) of Regulation 2176/84.\textsuperscript{107} The first consideration involved a determination that the assemblers within the Community were wholly-owned subsidiaries of the Japanese exporters Nippon and Toyo.\textsuperscript{108} Second, the Commission considered whether the assembly companies increased their production of ball bearings in the Community after the initiation of the original investigation of the exporters. The Commission found that each assembly company

\textsuperscript{100} Compare supra notes 81–90 with supra notes 91–99 and accompanying text.

\textsuperscript{101} See Regulation 2089/84, supra note 74, at para. 11. In contrast, the normal value of the products of exporters from Singapore had to be constructed. Regulation 744/84, supra note 71, at paras. 12–16; Regulation 2089/84, supra note 74, at para. 12. The Council adopted the Commission's provisional calculation of the constructed normal value. Id.

\textsuperscript{102} See Regulation 2089/84, supra note 74, at paras. 16–21.

\textsuperscript{103} See supra notes 71, 74, and accompanying text.

\textsuperscript{104} Notice 88/C 150/03, supra note 78, at 4.

\textsuperscript{105} Id.

\textsuperscript{106} Decision 89/57, supra note 79, at para. 6.
had increased its production by 40 percent following the period of 1981–1983, during which the increase in production was less than 2.5 percent.\footnote{Id. at para. 7.}

The final aspect of the investigation involved determining the local content value of the intra-Community assembled ball bearings.\footnote{Id. at paras. 8–10.} The Commission included the costs of production in the value of Community-made parts upon the showing of two requirements. First, these parts or materials were required to conform to the requirements of article 13(10)(a) of the antidumping legislation. Second, the parts had to be of Community origin. The value of parts not meeting these requirements was established by determining the prices the assembly companies paid for them. The Commission found that the value of parts originating in Japan was less than 60 percent of the total parts value of ball bearings assembled or produced in the Community. Therefore, the Commission found that there had not been a violation of article 13 and terminated the investigation.\footnote{Id. at Sole Article.}

B. Legal Challenges to Definitive Antidumping Duties

A foreign exporter may challenge the Council’s definitive antidumping duty in the European Court.\footnote{EEC Treaty, supra note 1, at art. 173; see J. BESLER & A. WILLIAMS, supra note 4, at 248–52; E. VERMULST, supra note 2, at 254–74; Kuyper, Judicial Protection and Judicial Review in the EEC, in LAW AND PRACTICE, supra note 2, at 374–83.} Both Nippon and Toyo exercised that privilege by filing separate applications for judicial review of the Council’s actions. Nippon and Toyo alleged, inter alia, that the Council’s calculation of the dumping margin was incorrect.\footnote{Nippon, supra note 67, at 1935–41; Toyo, supra note 76, at 1825–28.} Nippon and Toyo argued that the Commission erred in comparing the export price, calculated on a transaction-by-transaction basis, with the normal value, calculated by using the weighted average of the prices charged on the domestic market. Nippon advanced the additional argument that the Commission did not use the correct method to calculate the appropriate adjustments to the export price.\footnote{Nippon, supra note 67, at 1941–43.} These contentions will be discussed seriatim.
1. "Comparable Basis" Does Not Mean Same Method

The European Court rejected the arguments of both Nippon and Toyo with respect to whether the export price and the normal value must be calculated by the same method.115 The antidumping legislation requires that the export price and the normal value be computed on a comparable basis.116 In defending the validity of its calculation, the Council argued that the regulation contained at least ten methods by which to calculate the normal value and four methods by which to calculate the dumping margin.117 The Council also argued that the rules for allowances exist so that factors affecting price comparability could be evaluated on the basis of different criteria. Most importantly, the Council contended that "fair comparison" does not refer to the calculation of export price and normal value because these are put on a comparable basis by adjustments to them, not by the methods by which they are calculated.118

2. Adjustments to the Export Price

The second argument Nippon raised was that the Council incorrectly calculated the export price.119 Nippon argued that the export price and the normal value must be calculated at the same level of trade. Nippon also claimed that the freight costs, which were greater in its domestic market, should not have been equated with the freight costs of export sales. Nippon stated that the Commission should not have subtracted the freight costs from export prices without also subtracting them from the domestic prices. Finally, Nippon also asserted that an allowance should have been made for the costs associated with customer service.120

Countering Nippon's contentions, the Council stated that the Commission had compared the normal value and export price at

115 Id. at 1962–70; Toyo, supra note 76, at 1852–55. The European Court rejected all of Nippon and Toyo's submissions. See supra note 77 and accompanying text.
116 Regulation 2423/88, supra note 9, at art. 2(9)(a) ("[t]he normal value . . . and the export price . . . shall be compared as nearly as possible at the same time"); Regulation 2176/84, supra note 6, at art. 2(9) ("the export price and the normal value shall be on a comparable basis"); Nippon, supra note 67, at 1965–64; Toyo, supra note 76, at 1853–54.
117 Nippon, supra note 67, at 1937.
118 Id.
119 Id. at 1941–43.
120 Id. at 1941–42.
the same level of trade, the ex-factory level.\textsuperscript{121} The Council indicated that it had made provisions to deduct the freight costs from Nippon's domestic prices.\textsuperscript{122} Finally, the Council claimed that it accounted for the costs of customer service as long as those costs were shown to be associated with the sales in question.\textsuperscript{123}

While these two cases involved the interpretation of Regulation 3017/79, the provisions in question are identical or substantially similar to the analogous provisions in Regulations 2176/84 and 2423/88. Hence, the cases brought by Nippon and Toyo under Regulation 3017/79 could be brought on the same grounds with the same results today under Regulation 2423/88. Regulation 2423/88 was intended to clarify and consolidate the Community's antidumping legal framework.\textsuperscript{124} Yet, if the European Court interprets Regulation 2423/88 consistently with its predecessors, this regulation will only offer the Community a mere consolidation of preexisting law. Suggestions for reform have included greater disclosure of the Commission's calculations and use of confidential information, as well as less reliance on the Commission's findings by the Council and European Court.\textsuperscript{125}

V. Conclusion

In the determination of antidumping duties, the calculation of the export price, normal value, the comparison of the two, and injury are left to the Commission and the Council. The Commission and the Council have had the opportunity to refine the procedures by which the appropriateness and amount of antidumping duties are determined. The European Court has also granted the Community institutions great discretion in the application of these measures. Challenges to antidumping duties have been based on the calculation and comparison of the normal value and export price. These challenges are unsuccessful be-

\textsuperscript{121} Id.; J. Belsey & A. Williams, supra note 4, at 107 (wholesalers' prices to retailers should be adjusted to the ex-factory level). The comparison should involve the same category of buyers or make allowances for differences in such. Id.

\textsuperscript{122} Id. note 67, at 1937.

\textsuperscript{123} Id. at 1943.

\textsuperscript{124} Regulation 2423/88, supra note 9, at 3.

cause of the institutions' discretion and experience in calculating the export price and the normal value. Foreign exporters that want to target the Community's significant internal market will either have to set up assembly or production plants within the Community, as did Nippon and Toyo, or sell their products in an equitable manner alongside the Community producers.

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