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The „Component Parts" Amendments of the EC Anti-Dumping Rules as Implemented by the Institutions of the EEC: An Infringement of Gatt Law?

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A. INTRODUCTION

The EC anti-dumping rules are laid down in Council Regulation (EEC) No 2423/88 of 11 July 1988[1]. This Regulation repealed the previous anti-dumping Regulation (EEC) No 2176/84 of 23 July 1984[2].

The legal instruments of the EC in the field of anti-dumping reflect, to some extent, the rules laid down in Article VI GATT[3] (dumping) and in subsequent agreements concluded within the framework of GATT in order to implement these rules[4].

A product is considered to have been dumped when its export price to the EC is lower than the normal value of the product. The normal value may be the market price in the exporting country, or in a third country, or a value calculated on the basis of production cost and normal profit. When dumping causes or threatens to cause material injury to an EC industry and the interests of the EC need protection, anti-dumping measures may be imposed[5].

The "component parts Regulation" No 1761/87 of 22 June 1987[6] introduced paragraph 10 to Article 13 of the anti-dumping Regulation that was effective at that time. Regulation 2423/88 did not amend this legislation and also incorporates the so-called "screwdriver Regulation" in Article 13(10).

During the past two years, the EC Commission has initiated proceedings pursuant to Article 13(10) of Regulation 2423/88 in respect of electronic scales[7], electronic typewriters[8], hydraulic excavators[9], ball bearings[10], plain paper photocopiers[11], serial-impact dot-matrix printers[12] and video-casette recorders[13], all of which are manufactured or assembled in the EC.

Anti-dumping duties were "extended" in respect of several of these products[14]. In almost all of these cases, however, the EC Commission has lifted the application of the "extended" anti-dumping duties and replaced these measures with undertakings offered by the companies concerned to observe minimum prices and EC requirements on the maximum percentage of imported component parts[15].

In this paper, I wish to argue that the component parts amendment of the EC anti-dumping Regulation constitutes an infringement of the obligations of the EC under GATT, particularly Articles III and VI thereof, and may not be justified under Article XX GATT ("escape clause"). For this purpose, it is first necessary to examine the substantive elements of the component parts amendment, as well as the way it has been implemented to date by EC institutions.

As far as the procedure for the imposition of "anti-circumvention duties" is concerned, Article 13(10)(d) of Regulation 2425/88 provides that:

> "The provisions of this Regulation concerning investigation, procedure and undertakings apply to all questions arising under this paragraph".

This paper is not, therefore, dealing with procedural aspects of the imposition of anti-circumvention measures. It suffices to refer, in this respect, to the general literature mentioned in note 5, above.

B. COMPONENT PARTS AMENDMENT

1. Background

The inability of the anti-dumping rules to deal with the flexible and mobile nature of the manufacturing processes, particularly in the hi-tech sector, became apparent in the mid eighties.

This mobility of production has meant that, where anti-dumping duties have been imposed on a producer's finished product, the producer could avoid that duty by importing the constituent parts into the EC and assembling them there. This has given birth to a new phenomenon: the "screwdriver" assembly line. Over the past few years, an ever increasing number of these production units have been established in the EC, producing a range of goods, from colour televisions and photocopiers to weighing scales and excavators. The EC Commission regarded this commercial response to anti-dumping duties as evasion and sought ways to counter it.

It was not immediately obvious what could be done because importation of the parts could not be prohibited, as they came in under a customs heading other than that of the finished product[16]. Once the appropriate customs duties had been paid, the parts could be moved freely throughout the EC without being subjected to tariff or quantitative restrictions at internal national borders[17].

Dr J F Beseler (Director responsible for commercial policy measures in Directorate General I of the EC Commission) informed the biennial world conference of the International Bar Association held in New York in September 1986 that the possibility of imposing

anti-dumping duties on products assembled in the EC was actively being considered. In the EC Commission's press release of 11 February 1987, announcing its proposal for the "screwdriver Regulation", Mr Willy De Clerq, then Commissioner for External Relations and Trade Policy, stated:

> "We have observed that whenever the Community opens an anti-dumping enquiry or imposes anti-dumping duties on a product, plants for assembling the product which is the subject of the enquiry or anti-dumping duty miraculously spring up in abundance in the Community".

The formal proposal came in March 1987 and there was an immediate outcry against it from the country whose producers accounted for the vast majority of the so-called "screwdriver" assembly plants, notably Japan. The proposal did not have an easy passage. The EC Commission, for its part, successfully defended its proposed legislation and the component parts amendment to the anti-dumping Regulation was adopted and entered into force on 27 June 1987.

2. Substantive elements

The component parts amendment allows the imposition of anti-dumping duties on products assembled or produced in the EC whenever such assembly or production is considered likely to lead to circumvention of anti-dumping duties already imposed on like products imported from third countries. There are three conditions which must be fulfilled before a duty can be collected in this way:

(1) the assembly operation itself must be carried out by a party related to or associated with the foreign producer whose exports of the like product are subject to a definitive anti-dumping duty;
(2) the assembly or production operation must have started or substantially increased after the opening of an anti-dumping investigation; and
(3) the value of the parts used in the assembly operation and originating in the country of origin of the product subject to anti-dumping duties must exceed the value of all other parts by at least 50% (or, in other words, must constitute at least 60% of the total value of the parts).

(i) Assembly by a related or associated party

For anti-dumping duties to be imposed under the component parts amendment, a first requirement is that:

> "...assembly or production is carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to a definitive anti-dumping duty."

The EC Commission has fleshed out a little the meaning of who is an "associated" party for this purpose. Associated parties include those who have "substantial capital links and close economic and commercial relations" with the third country exporters[18]. The test therefore remains a very wide one.

The EC Commission has also given a wide meaning to the word "assembly". In one case involving electronic typewriters, it was found that the meaning of the word assembly should not be restricted to "physically putting the parts together". The EC Commission said:

> "One company, [A], claimed that it should not be included in this investigation because the assembly operation was not carried out by [A] but by [B] - which did not have any links with the Japanese exporter. However, the investigation revealed that [B]'s activities in this context were limited to the mere assembly of all parts of electronic typewriters which were imported and delivered to it at its premises by [A]. These assembled electronic typewriters were then exclusively sold on the Community market by [A]. [A] bore all costs between importation of the parts and the sale of the finished products. An assembly fee was paid to [B] by [A] but this fee constituted only a small percentage of [A]'s total costs of sale. In these circumstances, this assembly operation should be considered as having been carried out by [A]."[19]

Literal interpretation would suggest that the clear meaning of the passage from Article 13(10)(a) quoted above is that the related or associated party has to put the pieces of the product together. However, whether a text is clear or not is, too, a matter of interpretation.

Teleological interpretation may be used, among other things, to promote the objective for which a rule of law was made or to prevent unacceptable consequences to which a literal interpretation might lead[20].

The EC Commission has found it to be an unacceptable consequence if a company can circumvent the "anti-circumvention" Regulation by contracting assembly to a non-related third party whilst maintaining control of the wider marketing operation. Yet this would be the logical consequence of a literal interpretation of this clause.

It will be interesting to see if the wider interpretation of "assembly", as including those circumstances where a company controls the economic operation of assembling and selling the assembled product without physically putting the bits together, is capable of prevailing against the ordinary meaning of the word.

(ii) Start or substantial increase of assembly or production operations

In most of the cases pursuant to Article 13(10) of Regulation 2423/88, the EC Commission has found that the companies concerned had started their assembly operations after the initiation of the anti-dumping proceeding concerning imports from a third country of the finished products[21].

In cases where a company, participating in a proceeding pursuant to Article 13(10) of Regulation 2423/88, was found to have established assembly or production operations in the EC prior to the opening of the anti-dumping investigation concerning the finished product, the EC Commission had to examine

whether or not a substantial increase in production of the product concerned had taken place within the EC after the initiation of the proceeding. This assessment was made on the basis of the rate of increase in production or assembly operations compared with the rate of increase in previous years. Thus, a 70% annual production increase that followed a period of relative production stability is considered substantial[22]. A more than 40% production increase during two years after a four year period of a total production increase rate of 2.3% is also considered substantial[23]. Obviously, the EC Commission enjoys a large degree of discretion in defining the term "substantial increase". The particular characteristics of each case, such as nature and value of the products, duration of the manufacturing processes, etc, would play a determinant role in this respect[24].

Article 13(10) of Regulation 2423/88 is based on the assumption that the start or substantial increase of assembly or production operations must have occurred in order to circumvent the imposed anti-dumping duties. This provision does not allow for consideration of other market factors such as increased demand, price structure, etc, that may have played a determinant role in taking a decision to increase production. The approach adopted by Article 13(10) of Regulation 2423/88 is in contrast with similar provisions of other instruments of the common commercial policy of the EC[25] and highly questionable from a policy point of view, particularly in the light of the discouraging effect it may have on potential investors from third countries in the EC.

(iii) The "parts or materials" criterion

The third condition for the extension of anti-dumping duties pursuant to Article 13(10) of Regulation 2423/88 requires that:

> "the value of parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty exceeds the value of all other parts or materials used by at least 50%" (emphasis added).

Before assessing the value of the parts or materials used in the assembly or production operations, two basic issues have to be decided, namely:

(1) what constitutes a "part" or "material" in this context; and
(2) which parts or materials originate in the country of exportation of the product subject to the anti-dumping duty.

Parts or materials

No binding definition exists in respect of the terms "part" or "material". More specifically, it is unclear up to which level the EC Commission will undertake to "break down" an assembled product into its component parts in the framework of a procedure under Article 13(10) of Regulation 2423/88.

Difficulties arise in this respect whenever certain parts have been submitted to change or processing prior to the assembly of the finished product, having an impact on their physical characteristics and

functions as individual and freely replaceable parts of the finished product. This is the case when, for example, transistors, resistors or other basic materials are used for the production of components which are, in turn, used in the assembly of the final products.

In dealing with this issue, the EC Commission may examine whether the process of manufacture of the components concerned is such that they cannot be disassembled without being ultimately destroyed, together with their constituent parts. The EC Commission held, in this respect, that printed circuit board ("PCB") assemblies have to be considered as composite single parts because if a PCB is dismantled some of the integrated circuits are destroyed[26].

It should be noted, however, that the EC Commission may take a different approach to this question in future, taking into consideration the particular qualities of the "composite single part" concerned (e.g., its size, its function within the finished product, the number of integrated circuits that it incorporates, etc).

Origin of parts or materials

As far as the origin of the parts is concerned, the general rules of the EC on the common definition of the origin of goods as laid down in Regulation (EEC) No 802/68 of 27 June 1968[27] will apply pursuant to Article 13(7) of Regulation 2423/88. Article 4(1) of this Regulation specifically provides that:

> "Goods wholly obtained or produced in one country shall be considered as originating in that country."

Article 5 of Regulation 802/68 deals with a situation where the manufacturing process of a product has been carried out in more than one country. Accordingly:

> "A product in the production of which two or more countries were concerned shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of the manufacture".

This wording closely follows the wording contained in the Kyoto Convention on the rules of origin[28] and seems, like the pronouncements of the Delphic Oracle, to be intended to be obscure. Whilst in the very simplest of cases this test may provide an adequate answer, the complexities of modern industrial processes, particularly in the hi-tech field, make this test virtually valueless.

The three criteria "last substantial process", "operation which is economically justified" and "an important stage of manufacture" defy any precise definition. They do, however suggest that the basis of origin lies in the nature of the process rather than its value, a technical rather than an economic test.

This is the general view of the the Court. Thus in Gesellschaft für Überseehandel GmbH v Handelskammer Hamburg[29] the Court said:

> "Therefore, the last process or operation referred to in Article 5 of the Regulation is only substantive for the purposes of that provision if the product resulting therefrom has its own properties and a composition of its own, which it did not possess before that process or operation".

Three years later the Court confirmed that the approach to interpreting Article 5 should be technical rather than economic in Yoshida v Kamer van Koophandel en Fabrieken voor Friesland[30]. In that case the Advocate-General Capotorti said in his opinion:

> "I would observe first of all that, as results from the wording of the article, the factors which must be taken into account are of a technical and not economic nature. In substance, it points out the basic function of specific technical operations within the context of the operations, not the greater economic value of comparison with others" (emphasis added)[31].

However, the Advocate-General did not rule out the use of economic criteria:

> "Recourse should only be had to the economic criterion only in cases in which, because of the characteristics of the product, the exclusive or chief use of the technical criterion would be impossible or would give rise to serious difficulties"[32].

At issue in that case was a Commission Regulation which provided that the origin for slide fasteners would only be accorded to a country where the following took place:

> "Assembly including placing of scoops or other interlinking elements onto tapes accompanied by the manufacture of the slides and the formation of the scoops or other interlocking elements".

The Court followed the Advocate-General's opinion and held that the Commission Regulation was invalid:

> "The requirement that virtually all components of a product must be of Community origin, even those of little value which are of no use in themselves unless they are incorporated into a whole, would amount to a repudiation of the very objective of the rules on the determination of origin. The Commission has therefore by that very fact excluded its power under Article 14(3) of Regulation No 802/68"[33].

The Court again ruled that the EC Commission had gone beyond its powers in Paul Cousin and Others[34]. In that case, it followed the opinion of the Advocate-General - Sir Gordon Slynn - who summarised the existing case law of the Court in this way:

> "The result of these cases seems to be that, for a process or operations to satisfy Article 5, it must either endow the processed product with specific properties it did not possess beforehand or effect a significant qualitative change in properties which the product did possess before it was subjected to the process or operation".

The Court, however, appears to have been more irritated by the fact that the EC Commission had provided more severe criteria for the product in that

case (cotton yarn) than for other similar clothes and fabrics:

> "Although the Commission possesses a discretionary power for the application of the general criteria contained in Article 5 of Regulation No 802/68 to specific work or processing operations it cannot however, in the absence of objective justification, adopt entirely different solutions for similar working or processing operations"[35].

This case law of the Court has been confirmed in its recent ruling in Brother International GmbH v Hauptzollamt Giessen[36].

The Court underlined the primacy of the "technical approach" over the "economic approach" when interpreting the "last substantial process or operation" criterion. As far as the economic approach is concerned, it emphasised that whether a distinct level of value-added has been reached or not will depend on a comparison of the value added in the country of the assembly of the final product and in the country or countries of origin of the component parts thereof. According to the Court, a less than 10% value added cannot, in any case, be considered as capable of confering origin.

Whether value-added of a level higher than 10% but less than 20%, 30% or 40% may be capable of confering the origin of the country where the assembly operation took place, will have to be decided on a case-by-case basis. No clear guidelines have been provided by the Court in this respect.

In the absence of EC legislation on the origin of specific products[37], the extensive discretionary powers currently enjoyed by the EC Commission in interpreting and applying Article 5 of Regulation 802/68 will, therefore, continue to be effective. The practice of the EC Commission when applying the economic approach in questions of origin suggests, in any case, that 50% value added suffices in order to confer on a product the origin of the country where manufacture operations amounting to that value were carried out[38].

Value of parts or materials

In all the cases where the EC Commission imposed anti-dumping duties, average values of Japanese parts were found to make up between 70% and 96% of the assembled product[39]. The value of the parts have been calculated on an into-factory, duty paid basis. Requests from some companies to use FOB or CIF values were rejected on the grounds that the relevant value is that of the parts and materials as they are used in the assembly operation[40].

Consideration was given by the EC Commission to other relevant circumstances with regard to the assembly operations pursuant to Article 13(10(a), para (2), of Regulation 2423/88. The EC Commission found that, although in most of the cases it was found that a very limited number of new jobs had been created by the assembly operations, the increasing sales of assembled products resulted in an overall loss of employment in the EC[41].

In addition, the simple and basic nature of the assembly operations was underlined in most cases in which the EC Commission imposed anti-dumping duties,

with reference made to EC producers normally having integrated in-depth production which requires more personnel[42]. The EC Commission has also stressed that the nature of the parts sourced in the EC was relatively simple and that they were of low value (limited, in one case, to packaging materials only)[43].

Finally, neither research and development nor transfer of technology were found to have been carried out within the EC in those cases where the EC Commission decided to extend anti-dumping duties[44].

Anti-dumping duties extended under Article 13(10)(c) of Regulation 2423/88 are imposed in the form of flat rate duties. The amount of the duties is calculated in a manner which ensures that it corresponds to the percentage rate of the anti-dumping duty applicable to the exporters in question on the CIF value of the parts or materials from Japan, as established during the investigation period.

C. THE GATT RULES

The anti-dumping rules of the EC were adopted in accordance with existing international obligations, in particular those arising from Article VI GATT and from the agreement on implementation of Article VI GATT[45]. In addition, recital 33 of Regulation 2423/88 explicitly provides that:

> "...this Regulation should not prevent the adoption of specific measures where this does not prove contrary to the Community's obligations under the GATT" (emphasis added).

The EC has, therefore, in adopting anti-dumping and anti-circumvention measures, to comply not only with

the rules of GATT concerning dumping but also with all other GATT provisions that are binding for the EC[46].

Neither Article VI GATT nor the anti-dumping codices concluded in the framework of GATT implementing Article VI GATT provide for the extension of imposed anti-dumping duties to products manufactured or assembled within the Contracting Party concerned. Therefore, the question of compliance of Article 13(10) of Regulation 2423/88 with Article VI GATT arises prima facie.

In addition, the compliance of the component parts amendment with Article III GATT is highly questionable. Finally, it is unlikely that such an infringement of GATT can be justified under Article XX GATT. These issues are discussed in the following section of this paper.

1. Article VI GATT

Article VI GATT explicitly provides that anti-dumping masures may be taken against products of one country which are introduced into the market of another country whenever such products are dumped and cause injury to the domestic industry of the country adopting the measures.

The anti-dumping codices which implement to Article VI GATT further elaborate on the criteria set out above but do not introduce any provisions in respect of "anti-circumvention duties" provided for in Article 13(10) of Regulation 2423/88.

It should be borne in mind that Article VI GATT constitutes an exception to the most-favoured-nation principle laid down in Article I GATT since it allows

the selective application of anti-dumping measures under certain conditions.

As they introduce an exception to the rule, these conditions have to be interpreted in a restrictive manner. The provisions of Article 13(10) of Regulation 2423/88 are clearly contrary to such a restrictive interpretation of Article VI GATT since they provide for the "extension" (i.e., imposition) of anti-dumping duties to products (notably parts or materials) in respect of which:

(1) no dumping practice has been established; and
(2) no material injury resulting therefrom has been shown.

It appears, therefore, that the extension of anti-dumping duties under the component parts amendment cannot be justified under Article VI GATT or the provisions of the subsequent implementing anti-dumping codices of GATT.

It may however be argued in this respect that the component parts amendment is not covered by Article VI GATT, simply because it does not provide for the imposition of anti-dumping duties on <u>imports</u>.

It is true that measures taken under this amendment are not applied "<u>upon importation</u>" as is the case with anti-dumping dutes. Article 13(10) of Regulation 2423/88 provides that the anti-circumvention duties are imposed on products that are introduced into the EC market after having been assembled or produced in the EC. The duties are thus imposed not on imported parts or materials but on the finished products assembled or produced in the EC. A question therefore arises as to the nature of the measures taken pursuant to the component parts amendment.

2. Article III GATT

Article III:2 GATT, first sentence, provides that:

> "the products of the territory of any Contracting Party imported into the territory of any other Contracting Party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products".

As far as the anti-circumvention duties are concerned, Article 13(10)(c) of Regulation 2423/88 provides that:

> "the amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete products on the CIF value of the parts or materials imported".

It therefore appears that, even if the anti-circumvention duties pursuant to Article 13(10) of Regulation 2423/88 cannot be classified as duties applied "upon importation" but constitute charges imposed domestically, the collection of such charges infringes the non-discrimination principle established under Article III:2 GATT.

Since like parts and materials of EC origin are not subject to any corresponding charge, it appears that the anti-circumvention duties on the finished products subject imported parts and materials to an internal charge in excess of that applied to like

domestic products and that they are consequently contrary to Article III:2 GATT, first sentence.

The same conclusion applies in respect of the acceptance by the EC Commission of undertakings to limit the use of imported parts and materials. This practice accords less favourable treatment to imported products than that accorded to domestic products and is contrary to Article III:4 GATT which is concerned with "all laws, regulations or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use".

This aspect is of particular importance as most of the procedures pursuant to Article 13(10) of Regulation 2423/88 resulted, as has already been indicated, in the acceptance by the EC Commission of undertakings related, inter alia, to changes in the sourcing of parts and materials used in assembly or production operations in the EC. Although there is no obligation under the EC anti-dumping Regulation to offer such undertakings, to accept suggestions by the EC Commission to offer such undertakings and to maintain the undertakings given, the consequence of not offering an undertaking or of withdrawing an existing undertaking is the continuation of procedures that may lead to the imposition of the anti-circumvention duties pursuant to Article 10 of Regulation 2423/88.

The comprehensive coverage of "<u>all</u> laws, regulations or requirements <u>affecting</u>" the internal sale, etc of imported products suggests that not only the requirements which a company is required to carry out but also those which a company voluntarily accepts in order not to place itself in a disadvantageous

situation, constitute "requirements" within the meaning of that provision. Since the EC makes the suspension of the application of anti-circumvention duties dependent on undertakings to limit the use of parts or materials of Japanese origin without imposing similar limitations on the use of like products of EC or other origin, the EC accords treatment to imported products that is less favourable than that accorded to like products of EC origin in respect of their end use.

It appears therefore that the decisions of the EC to suspend proceedings under Article 13(10) of Regulation 2423/88, conditional on undertakings affected by companies in the EC to limit the use of parts or materials originating in a certain third country in their assembly or production operations, are inconsistent with Article III:4 GATT.

3. The possibility of justification of an infringement of GATT under Article XX GATT

Article XX(d) GATT provides that:

> "...nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Contracting Party of measures:
>
> ....
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement..."

Since the imposition of anti-circumvention duties and the acceptence of undertakings constitute "measures"

taken pursuant to Regulation 2423/88, it is necessary to consider whether such measures that infringe Article VI or III GATT, qualify for an exception under Article XX GATT.

In order for a measure to be covered by Article XX(d) GATT, it must "secure compliance with" laws or regulations that are not inconsistent with GATT. It should therefore be examined whether the imposition of anti-circumvention duties contrary to Articles VI and III:2 GATT is a measure "to secure compliance" with the EC's general anti-dumping regulations and the individual regulations imposing provisional and definitive anti-dumping duties and accepting undertakings.

It should be noted in this respect, that the anti-circumvention measures pursuant to Article 13(10) of Regulation 2423/88 do not serve to secure the payment of anti-dumping duties imposed by specific regulations or compliance with undertakings offered in the "main" anti-dumping procedures.

The fundamental interpretative issue in this respect is therefore whether the qualification "to secure compliance with laws or regulations" means that the measure must prevent actions inconsistent with the obligations laid down in laws or regulations or whether it may be construed as covering a measure which prevents actions that are consistent with laws or regulations but circumvent their objectives.

The wording of Article XX GATT does not refer to objectives of laws or regulations. The examples of the laws and regulations indicated in Article XX(d) GATT, namely those relating to customs enforcement and the prevention of deceptive practices also

suggest that Article XX(d) GATT only covers measures designed to prevent actions that would be contrary to national laws or regulations.

If the qualification "to secure compliance with laws and regulations" is interpreted to mean "to enforce obligations under laws and regulations", the main function of Article XX(d) GATT would be to permit Contracting Parties to act inconsistently with the GATT whenever such inconsistency is necessary to ensure that the measures which the Contracting Parties may adopt pursuant to GATT under their laws or regulations are effectively enforced. If on the other hand the qualification "to secure compliance with laws and regulations" is construed as to prevent circumvention of the objectives of the laws and regulations, the scope of application of Article XX(d) GATT would be substantially expanded. Thus, whenever the general aims of a national law or regulation consistent with GATT cannot be achieved by applying this law or regulation, the adoption of further measures infringing GATT could qualify for a exception under Article XX(d) GATT on the grounds that compliance with the general aims of that law is secured.

Such extensive interpretation cannot be accepted, however, given that Article XX GATT constitutes an exception from the most-favoured nation principle of GATT and should, therefore, be construed in the narrowest possible way. Indeed, both Article VI GATT which also constitutes an exception form the most-favoured-nation-principal, as well as Article XIX GATT (safeguard clause) provide for very specific substantive and procedural laws in order for the Contracting Parties to be alowed to deviate from the most-favoured-nation-principle of GATT.

Allowing such deviations in order to secure compliance with general objectives of national laws and regulations does not therefore conform with the system of GATT.

For the reasons indicated above, it is submitted that Article XX(d) GATT covers only those measures relating to the enforcement of specific obligations under national laws or regulations consistent with GATT. Since the general anti-dumping regulation 2423/88 does not provide for obligations that require enforcement but simply lays down substantive procedural rules principally addressed to the EC institutions, only the regulations imposing provisional and definitive anti-dumping duties could be considered as providing for obligations that require enforcement. Such obligations consist in the payment of a certain amount of anti-dumping duties. The anti-circumvention duties do not serve however to secure the collection of such anti-dumping duties.

The anti-circumvention duties imposed pursuant to Article 13(10) of Regulation 2423/88 cannot, therefore, be justified under Article XX(d) GATT. The same considerations apply also in respect of undertakings obtained in the context of anti-circumvention proceedings.

D. CONCLUSIONS

A review of the implementation of the component parts amendment clearly shows that a number of issues, such as the assembly operations carried out by independent parties, the definitionn of the term "part or material", the origin of the parts or materials and issues relating to investment, research and development problems could be reasonably expected to arise again in the future.

One should also bear in mind the 1992 deadline in this context. Undoubtedly, the internal market is accompanied by a nagging concern that reducing barriers to trade within the EC will result in gains for foreign multinationals and not for EC industries. Consequently, there is a renewed interest in all forms of protection measures.

In the light of these developments, the importance of GATT as an effective shield against protectionism becomes apparent. It has been shown that the component parts amendment of the EC anti-dumping Regulation constitutes a breach of Articles III and VI GATT and does not qualify for exception under Article XX GATT.

As the GATT rules are not directly applicable within the EC, it appears that this conclusion is likely to have a small impact on the position of individual companies affected by the anti-circumvention laws of the EC[47].

On the other hand, the dispute settlement procedure of GATT (Article XXIII) may be initiated against the EC pursuant to an application by another Contracting Party of GATT. Japan has had recourse to this procedure in 1988 and a panel has been established in order to investigate the compliance of the EC anti-circumvention rules with GATT. These procedures are currently pending.

If the GATT panel decides that the EC anti-circumvention legislation is contrary to GATT and if its conclusions are adopted by the Council of GATT, which consists of the Contracting Parties of GATT and usually decides unanimously, the EC would then have to take all necessary measures in order to abolish its anti-circumvention legislation.

Otherwise, the complaining Contracting Party, in this case Japan, may be authorised to take retaliatory actions in order to remedy the situation.

These procedures, however, are characterised by long duration and involve political elements that may water down the effects of a legal finding. In addition the customary unaminity principle in the decision-taking procedures of the GATT Council would require that the EC should agree to a panel report taht rules against it.

Recognition of the direct effect of certain GATT provisions which are sufficiently precise, specific and leave no implementing discretion to the authorities of the Contracting Parties of GATT (e.g., Article III GATT), therefore, appears to be the most appropriate step in preventing Contracting Parties of GATT from engaging in infringements of GATT.

POST SCRIPTUM

On 9 March 1990, the panel established in 1988 pursuant to Article XXIII GATT in order to consider the compliance of Article 13(10) of Regulation 2423/88 with GATT adopted its final report.

The panel concluded that:

(1) the duties imposed by the EC under Article 13(10) of Regulation 2423/88 on products assembled or produced within the EC by enterprises related to Japanese manufacturers of products subject to anti-dumping duties are inconsistent with Article III(2) GATT, first sentence and are not justified by Article XX(d) GATT;

(2) the decisions of the EC to suspend proceedings under Article 13(10) of Regulation 2423/88, conditional on undertakings by enterprises in the EC to limit the use of parts or materials originating in Japan in their assembly or production operations, are inconsistent with Article III(4) GATT and are not justified by Article XX(d) of GATT; and

(3) the Contracting Parties of GATT should request the EC to bring its application of Article 13(10) of Regulation 2423/88 into conformity with its obligations under GATT.

The panel took the view that the component parts amendment does not constitute, per se, an infringement of GATT since it does not oblige the EC institutions to impose anti-circumvention duties when certain conditions are fulfilled.

The panel makes it clear, however, that the application of anti-circumvention rules is contrary to Article III GATT and may not be justified under Article XX(d) GATT. It should be noted that the conformity of the anti-circumvention legislation of the EC with Article VI GATT has not been considered by the panel as the EC did not develop any argument relevant to the application of this Article.

The panel report has been submitted to the Council of GATT for adoption. If the report is adopted, EC should cease to collect imposed anti-circumvention duties and not further require certain EC companies to comply with obligations deriving from various undertakings offered in the framework of Article 13(10) of Regulation 2423/88.

The institutions of the EC would also have to refrain from imposing anti-circumvention duties or accepting undertakings under Article 13(10) of Regulation 2423/88 in the future. Otherwise, the EC would be infringing its obligations deriving from GATT. This may result in the authorisation of Japan, by the Council of GATT, to take retaliatory trade measures against the EC.

Apart from its implications for existing EC legislation, the panel report has exposed the EC anti-dumping policy, as exercised until present to considerable criticism by its major trading parties. This development will affect the current negotiations held under the GATT Uruguay Round on a new anti-dumping code.

NOTES

1. Council Regulation (EEC) No. 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community, OJ L209 of 2.8.88, 1 et seq.

2. OJ L201 of 30.7.84, 1 et seq; see Article 18 of Regulation 2423/88.

3. The text of GATT as currently in force is provided in Basic Instruments and Selected Documents, Volume IV, Geneva, March 1969.

4. The first agreement on the implementation of Article VI GATT ("the first anti-dumping code") was signed on 30 June 1967 as a result of the "Kennedy Round" of Multilateral Trade Negotations in the framework of GATT (1964-1967). The first anti-dumping Regulation of the EC, implementing the provisions of this agreement, was adopted by the Council of the EC on 27.11.67 (Regulation 459/68, OJ L305 of 19.12.68, 1 et seq). The "second anti-dumping code" ("Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade"), currently in force, was concluded on 12.4.79 as a result of the "Tokyo Round" of Multilateral Trade Negotiations (see Basic Instruments and Selected

Documents, 26th Supplement, Geneva 1980, 171 et seq).

5. For an analysis of the substantive and precedural requirements for the adoption of anti-dumping measures, see Beseler, Williams, Anti-Dumping and Anti-Subsidy Law & the European Communities, London 1986; Van Bael, Bellis, EEC Anti-Dumping and Other Trade Laws, Bicester 1985; Vermulst, Anti-Dumping Law and Practice in the United States and the European Communities, Amsterdam 1987; and Cunnane, Stanbrook, Dumping and Subsidies, London and Brussels 1983.

6. OJ L167 of 26.6.87, 9 et seq.; see, generally, Hailbronner, Bierwagen, "Neue" Formen des Dumping und ihre Regelung im Aussenwirtschaftsrecht der Europäischen Gemeinschaften, RIW 1988, 705 et seq.; Grolig, Bogaert, The Newly-Amended EEC Anti-Dumping Regulation: Black Holes in the Common Market?, JWTL 1987, 79 et seq.; Van Gerven, New Anti-Circumvention Rules in EEC Anti-Dumping Law, The Internation Lawyer 1988, 809 et seq.

7. Council Regulation (EEC) No. 1021/88 of 18 April 1988 (OJ L101 of 20.4.88, 1 et seq); see also Commission Decision of 18 April 1988 (OJ L101 of 20.4.88, 28 et seq); and Council Regulation No. 2735/88 of 31 August 1988 (OJ L244 of 2.9.88, 1).

8. Council Regulation (EEC) No. 1022/88 of 18 April 1988 (OJ L101 of 20.4.88, 4 et seq); see also Commission Decision of 18 April 1988 (OJ L101 of 20.4.88, 26 et seq) and Council Regulation (EEC) No. 1329/88 (OJ L123 of 17.5.88, 31 et seq).

9. Commission Decision of 18 April 1988 (OJ L101 of 20.4.88, 24 et seq).

10. Commission Decision of 20 January 1989 (OJ L25 of 28.1.89, 90 et seq).

11. Council Regulation (EEC) No. 3205/88 of 17 October 1988 (OJ L284 of 19.10.88, 36 et seq); see also Commission Decision of 17 October 1988 (OJ L284 of 19.10.88, 60 et seq); Council Regulation (EEC) No. 4017/88 of 19 December 1988 (OJ L355 of 23.12.88, 1 et seq); Commission Decision of 16 November 1988 (OJ L355 of 23.12.88, 66 et seq); and Commission Decision of 1 February 1990 (OJ L34 of 6.2.90, 28 et seq).

12. Council Regulation (EEC) No. 3042/89 of 6 October 1989 (OJ L291 of 10.10.89, 52 et seq); Commission Decision of 6 October 1989 (OJ L291 of 10.10.89, 57 et seq); and Commission Decision of 13 October 1989 (OJ L340 of 23.11.89, 25 et seq).

13. This procedure is currently pending before the Commission of the EEC (OJ C172 of 7.7.89, 2).

14. This has been the case in respect of electronic scales, electronic typewriters, plain paper photocopiers and serial-impact dot-matrix printers.

15. See, in this respect, the Commission Decisions mentioned in notes 7-12.

16. For the customs classification of finished goods and parts, see the general rules laid down in the Combined Nomenclature of the EEC (OJ L282 of 2.10.89).

17. See Article 10 of the EEC Treaty which provides that:

> "Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State...".

18. Council Regulation (EEC) No. 1021/88 of 18 April 1988, para (6) (OJ L101 of 20.4.88, 1).

19. Council Regulation (EEC) No. 1022/88 of 18 April 1988, para (7) (OJ L101 of 20.4.88, 5).

20. See Schermers, Waelbroeck, Judicial Protection in the European Communities, 4th edition, Deventer 1987, 17 et seq.

21. See, for example, Regulation No. 1021/88 (OJ L101 of 20.4.88, 1), para (7) (electronic scales); Regulation No. 1022/88 (OJ L101 of 20.4.88, 5), para (8) (electric typewriters); Regulation No. 3205/88 (OJ L284 of 19.10.88, 37), para (10) (plain paper photocopiers); and Regulation No. 3042/89 (OJ L291 of 10.10.89, 53), para (9) (serial-impact dot-matrix printers).

22. Regulation No. 3205/88 (OJ L 284 of 19.10.88, 37), para (10).

23. Ibid, para (11); see also Commission Decision of 17 October 1988 (OJ L284 of 19.10.88, 61, para (10)).

24. Glashoff, Antidumpingzoll auf in der Europäischen Wirtschaftsgemeinschaft montierte oder hergestellte Waren (RIW 1987, 774 et seq, 779).

25. See, for example, Article 6 of Council Regulation (EEC) No. 802/68 on the common definition of the origin of goods (OJ L148 of 28.6.68) which provides that:

"Any process or work in respect of which it is established, or in respect of which the facts as ascertained justify the presumption, that its sole object was to circumvent the provisions applicable in the Community or the Member States to goods from specific countries shall in no case be considered, under Article 5, as conferring on the goods thus produced the origin of the country where it is carried out."

In the case Brother International GmbH v Hauptzollamt Giessen, Case C-26/88, decision of the European Court of Justice of 15 December 1989, not yet reported, the Court interpreted the provision and stated that:

"The transfer of assembly from the country in which the parts were manufactured to another country in which existing factories are used does not in itself justify the presumption that the sole object of the transfer was to circumvent the applicable provisions unless the transfer of assembly coincides with the entry into force of the relevant regulations. In that case, the manufacturer concerned must prove that there was a reasonable ground for carrying out the assembly operations in the country from which the goods have been exported." (emphasis added).

Article 13(10) of Regulation 2423/88 is contrary to the approach adopted by the Court in Brother since it does not provide a company involved in an anti-circumvention proceeding with the possibility of indicating commercially sound reasons for the performance of assembling operations in the EC.

26. See Council Regulation (EEC) No 3042/89 of 6 October 1989 (serial-impact dot-matrix printers) (OJ L291 of 10.10.89, 53), para (12).

27. See note 25.

28. OJ L166 of 4.7.77, 3 et seq.

29. Case 49/76, [1977] ECR 41 et seq, at p. 53.

30. Case 34/79 [1979] ECR 115 et seq.

31. Ibid, point 4, 140.

32. Ibid, 141.

33. Ibid, point 12, 136.

34. Case 162/82 [1983] ECR 1101.

35. Ibid, point 3, 1102.

36. See note 25 above.

37. According to Article 14 of Regulation 802/68, the Commission and the Council have the power to adopt measures (in the form of Regulations) laying down rules on the origin of specific products.

At the moment, specific EC rules exist relating to eggs, spare parts, receivers, basic wines, tape recorders, meat and offal, textile products, ceramic products, roller bearings, semi-conductors and photocopiers. These rules have primacy over the general rules laid down in Regulation 802/68.

38. This conclusion is confirmed by the percentages of value added laid down in several of the Regulations dealing with the origin of specific products.

39. For a further analysis of potential issues involved in determining the value of parts, see Glashoff, note 24, above, 779.

40. See Regulation 1022/88 (OJ L101 of 20.4.88, 5), para (9).

41. Ibid, 6, para (20).

42. Ibid.

43. Regulation 3205/88 (OJ L284 of 19.10.88, 39) para (22).

44. See, for example, Regulation No 1021/88 (OJ L101 of 20.04.88, 2), para (15).

45. Recital 5 of the preamble of Regulation 2423/88.

46. The Court of Justice has confirmed in several occasions the fact that the EEC is bound by the GATT. See, for example, judgement of the court in case Amministrazione Delle Finanze Dello Stato v SPI and SAMI of 16 March 1983, [1983] ECR 801, 829, para 19:

"The answer to be given to the question submitted is therefore that, since as regards the fulfilment of these commitments laid down in GATT the Community has been substituted for the Member States with effect from 1 July 1968, the date on which the Common Customs Tariff was brought into force, the provisions of GATT have since that date been amongst those which the Court of Justice has jurisdiction, by virtue of Article 177 of the EEC Treaty, to interpret by way of a preliminary ruling, regardless of the purpose of such interpretation. With regard to the period prior to the date, such interpretation is a matter exclusively for the courts of the Member States."

47. For an analysis of the effects of GATT within the EEC, see Adamantopoulos, Das Subventionsrecht des GATT in der EWG, Köln, 1988, 97 et seq with further references.