OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 4 June 1991 *

Summary

* Original language: Dutch.

Mr President,
Members of the Court,

1. The Court is asked to decide on the validity of a Council regulation instituting an anti-dumping duty on imports of certain types of paint brushes originating in China.

1. Background

2. The proceedings which gave rise to the adoption of the regulation at issue originated in an investigation opened by the Commission in 1986 upon a complaint from the Fédération Européenne de l'Industrie de la Brosserie et la Pinceauterie (FEIBP). According to that complaint, dumping was being practised in respect of imports of certain brushes originating in China.[1] The Commission's investigation led it to the conclusion that such dumping was indeed being practised and that such imports at dumping prices had caused injury to the Community industry in three Member States (namely Germany, the United Kingdom and Ireland, in which roughly 90% of Chinese exports were concentrated). After the termination of the Commission's 'preliminary investigation', the China National Native Produce and Animal By-Products Import and Export Corporation (hereinafter referred to as 'China National') offered an undertaking to limit its exports of brushes to the Community. That undertaking was accepted by Council Decision 87/104/EEC,[2] in which the Council considered in particular that the effect of the undertaking offered 'will be that exports cease to such an extent that the injury suffered by the Community industry is eliminated' and in these circumstances the investigation was terminated without imposition of anti-dumping duties.[3]

3. In October 1988 the *Official Journal of the European Communities* published a notice in which the Commission stated that the FEIBP had lodged a fresh complaint alleging that the said undertaking given by the Chinese firm had not been complied with.[4] After examining the official statistics available for 1987, the Commission came to the conclusion that the level specified in the undertaking had indeed been exceeded and proposed to the Council that it revoke its decision accepting the undertaking.[5] At the same time the Commission decided to reopen the anti-dumping procedure and to apply forthwith provisional measures in pursuance of Article 10(6) of the basic regulation.[6] In accordance with that provision Commission Regulation (EEC) No 3052/88 (hereinafter referred to as 'the provisional regulation') imposing a provisional *ad valorem* anti-dumping duty of 69% of the net price per piece of the products in

1 — See notice of initiation of an anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China (OJ 1986 C 103, p. 2).

2 — Of 9 February 1987 accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China, and terminating the investigation (OJ 1987 L 46, p.45).

3 — See recital 21 to Decision 87/104/EEC.

4 — See notice of reopening of an anti-dumping proceeding concerning imports into the Community of paint, distemper, varnish and similar brushes originating in the People's Republic of China (OJ 1988 C 257, p. 5).

5 — Ibid.

6 — That provision gives the Commission, where it has reason to believe that an undertaking has been violated and where Community interests call for such intervention, authority to 'apply ... anti-dumping ... duties forthwith on the basis of the facts established before the acceptance of the undertaking'.

question was published in the Official Journal of the same date.[7] On 14 November 1988 the Council adopted a decision accepting the Commission proposal to repeal Decision 87/104/EEC and consequently revoking acceptance of the undertaking regarding the Chinese firm's exports.[8] Finally on 20 March 1989 the Council confirmed the provisional anti-dumping duty imposed by the Commission and by Regulation (EEC) No 725/89 (hereinafter referred to as 'the definitive regulation')[9] imposed a definitive anti-dumping duty of the same amount.

4. The validity of the definitive regulation is being challenged by the firm Nölle (hereinafter referred to as 'Nölle'), a German importer of paint brushes who, between 21 November 1988 and 14 February 1989, imported into the Community for free circulation three consignments of cleaning and disposable paint brushes originating in China. The goods were cleared by the Hauptzollamt Bremen-Freihafen (Neustädter Hafen office), which demanded a provisional anti-dumping duty under the provisional regulation. After publication of the definitive regulation these amounts were definitively collected by the Hauptzollamt. Nölle's complaint to the Hauptzollamt was dismissed and Nölle lodged with the court of reference an application for reimbursement of the amounts paid, alleging that the definitive regulation was incompatible in several respects with higher-ranking rules of Community law and in particular with Council Regulation (EEC) No 2423/88 (hereinafter referred to as 'the basic regulation').[10]

The court of reference states that the arguments put forward by Nölle raise doubts as to the validity of the definitive regulation, above all as regards the choice of reference country for determination of the normal value. However, it rightly[11] considers itself as not having jurisdiction to declare the regulation invalid and accordingly asks the Court to decide that question.

5. As the order for reference also states, Nölle challenges the validity of the definitive regulation mainly on three grounds, which I shall consider in turn later: the imposition of an anti-dumping duty is not necessary to safeguard the Community interest (paragraphs 8 to 12); the normal value was wrongly calculated (paragraphs 13 to 32) and imports of the products concerned into the Community did not cause material injury to the Community interest (paragraphs 33 to 48).

6. I shall make two further observations before going into the substance of the matter. First: as the question put to the Court concerns the *validity* of a Community act, the Court must take into account in considering it the relevant facts underlying

7 — Of 29 September 1988 imposing a provisional anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China (OJ 1988 L 272, p. 16), amended by Commission Regulation (EEC) No 3543/88 of 4 November 1988 (OJ 1988 L 303, p. 11).

8 — See Council Decision 88/576/EEC of 14 November 1988 repealing Decision 87/104/EEC accepting an undertaking given in connection with the anti-dumping proceeding concerning imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and terminating the investigation (OJ 1988 L 312, p. 33).

9 — Regulation of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports (OJ 1989 L 79, p. 24).

10 — Regulation of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1).

11 — See judgment in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199).

the measure and if necessary have regard also to the arguments and evidence put forward by the Community institutions during the administrative proceedings. In that respect Nölle, in its written observations submitted to the Court, referred to the 'point of view' (including accompanying evidence) which it put to the Commission during the administrative proceedings. These documents are in the possession of the Commission and the Council and also appear in the documents provided by the court of reference, so that they may be consulted by the other parties to the main proceedings. Moreover at the hearing the Commission's representative did not raise any objection to their use. Where necessary I shall make use of them in the following analysis.

7. My second observation concerns Nölle's objections to the statement of the *reasons* on which the definitive regulation is based. Nölle points out that in that regulation the Council did not discuss a number of arguments and evidence put forward by Nölle during the administrative proceedings, so making it impossible for Nölle to determine the reasoning on which the regulation at issue was finally based.

In that connection it is appropriate to recall the Court's case-law relating to the rules of competition, in which the Court has many times stated that:

'Although under Article 190 of the Treaty the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and law raised by every party during the administrative proceedings.' [12]

These observations seem to me to apply equally with regard to the statement of the reasons on which acts of the institutions in the field of anti-dumping proceedings are based. They imply that the extent of the duty to express such reasons does not result in the first place from the arguments put forward during the administrative proceedings by the parties concerned by the adoption of the measure in question. It is more appropriate to consider whether the reasons expressed support the operative part of the decision and whether the factual and legal features on which the legal justification of the decision depends are correctly evaluated and appraised. I shall base my discussion of the definitive regulation on that principle.

2. The Community interest

8. Whilst I am aware that it is unusual so to do, I prefer to consider the arguments put forward by Nölle on the Community interest before those relating to the existence of dumping practices and the injury caused, as that will allow me to consider the factual background to the case.

12 — See judgments in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* paragraph 66 [1980] ECR 3125; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraphs 11 to 14; Case 86/62 *Hasselblad* v *Commission* [1984] ECR 883, paragraphs 16 to 18; Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 26; Joined Cases 240 to 242, 261, 262 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, paragraphs 86 to 88.

Nölle's main argument in calling in question the Community interest in the adoption of the decision is to assert that the anti-dumping proceeding was set in motion by Community producers to support and preserve an illegal agreement.

9. Nölle states that exports of Chinese paint brushes to the Community began towards the end of the 1970s to satisfy the growing demand by non-professionals (since paint brushes manufactured in China are cheap disposable brushes whose price is significantly less than that of brushes of European make for professional use). Originally imports into the Community were entirely in the hands of Community producers of brushes (or of importers connected with them). In the first half of the 1980s, however, a number of independent importers (including Nölle) also succeeded in obtaining supplies from China and setting up an independent import network. According to Nölle the anti-dumping proceeding was instigated by Community producers to bar the independent importers from the market: in particular they put pressure on China National and persuaded it to limit its exports as a result of which, in addition, the goods were subsequently delivered only to the Community producers. Nölle submitted two documents to prove this point.

It submitted in the first place a letter dated 30 October 1986 (that is, three months before the Council, by Decision 87/104/EEC, accepted the undertaking to limit exports), addressed to one of the two independent importers. The letter is from one of the German producers who had instigated the FEIBP's complaint and had also taken part in the Commission's investigations.[13] The letter states *inter alia*:

'You know that the European Community has initiated an anti-dumping proceeding against the import of Chinese brushes, which has led to the conclusion of an agreement by which the Chinese have undertaken to limit their exports. According to that agreement brushes will no longer be supplied except on the basis of a selective distribution scheme to factories traditionally brush producers, by traders in pig bristle.'

Nölle submitted in the second place a telex of 9 August 1988 from China National, also sent to an independent importer, in the following terms:

'For your information. According to the agreement between our head office + European Manufacturers Federation that Chinese brushes not allowed to export + re-export to other customers but our agent in EEC.

Like to cooperate with our company consult to settle the matter.'

13 — See Annex 53 to the written observations of 22 November 1988 addressed to the Commission; the extract of the letter which follows is repeated also in paragraph 47 of Nölle's written observations lodged in these proceedings.

10. Nölle thinks that both these documents, which were submitted to the Commission during the administrative proceedings,[14] prove that European producers imposed on Chinese exporters rules according to which independent Community importers (including Nölle) were no longer to be supplied except through Community producers. Nölle emphasizes that it cannot be in the Community interest to support or maintain an agreement contrary to the rules of competition by imposing a restriction on exports followed by anti-dumping duties. Before adopting such measures the Community institutions are bound, on the other hand, to take account of the whole existing economic context and not to apply the basic regulation in such a way as to restrict or distort competition within the common market.[15]

11. Nölle's allegation raises the problem of the relationship between anti-dumping policy and competition policy, a subject which has assumed greater and greater importance in recent years.[16] The harmonious application of the two policies is not always automatic. The primary aim of competition policy under the Treaty is to safeguard *competition* on the Community market in the ultimate interest of the consumer, whilst the system of the anti-dumping scheme is intended to protect European industry (that is, the *competitors*) against competition (regarded as unfair) from imported products sold below their normal value. The imposition of an anti-dumping duty may therefore result, with the aim of protecting European industry, in a price increase and a diminution of global competition within the common market. The balancing of these opposing interests is a matter for the Commission and the Council which, in assessing whether the imposition of an anti-dumping duty is in the Community interest, must rely on a twofold guideline: on the one hand the *object* of anti-dumping proceedings cannot be to enforce or encourage practices contrary to the rules of competition,[17] and on the other hand anti-dumping measures and proceedings must be prevented, as far as possible, from having such an *effect*.

The pressures involved find expression in the twofold conflict of interests facing the Community institutions in this case. In the first place they had to strike a balance between the Community producers' interest in the adoption of measures against imports at dumping prices and the consumers' interest in having access to cheap paint brushes.[18] In the second place the

14 — See for example its written observations of 22 November 1988, pages 28 to 30, and of 15 December 1988, pages 7 and 8.

15 — Referring to J. F. Beseler and A. N. Williams, *Anti-Dumping and Anti-Subsidy Law, The European Communities*, London, 1986, pp. 37 ff.

16 — See for example Vandoren, P.: 'The Interface between Antidumping and Competition Law and Policy in the European Community', *Legal Issues of European Integration*, 1986, p. 3; Temple Lang, J.: 'Reconciling European Community Anti-trust and Anti-dumping, Transport and Trade Safeguard Policies — Practical Problems', 1988, *Annual Proceedings of the Fordham Corporate Law Institute* (B. Hawk, ed. 1989), Chapter 7; Messerling P.: 'The E. C. Antidumping Regulations: A First Economic Appraisal, 1980-1985', *Weltwirtschaftliches Archiv* 1989, p. 563, and Kulms, R.: 'Competition, Trade Policy and Competition Policy in the EEC: The Example of Antidumping', *Common Market Law Review*, 1990, p. 285.

17 — An application of this principle will be found in Commission Regulation (EEC) No 1362/87 of 18 May 1987 imposing a provisional anti-dumping duty on imports of ferro-silico-calcium/calcium silicide originating in Brazil (OJ 1987 L 129, p. 5) in which it is stated (in reply to the argument that Community producers made an effort to bring the Brazilian exporters into their cartel): 'The Commission takes the view that the purpose of anti-dumping proceedings is not and cannot be to enforce or encourage restrictive business practices and that the opening of such a proceeding does not therefore deprive an enterprise of its right to avail itself of the provisions of Articles 85 and 86 of the Treaty establishing the European Economic Community' (see recital (12) to that regulation).

18 — On this subject see recital 12 to the definitive regulation.

Community institutions were faced with the possibility that the anti-dumping proceeding would be used by Community producers to drive independent importers from the market, as Nölle maintains.

12. Nölle's arguments do not convince me. As regards balancing Community producers' interest against the consumer interest, it does not appear that the Community institutions' assessment, in the proceedings at issue, of the Community interest can be considered unreasonable.[19] As regards the use of the anti-dumping proceeding to the detriment of independent producers, the regulation rightly points out[20] that the actual imposition of anti-dumping duties in itself has an equal effect on all importers of brushes from China and does not therefore injure the independent importers. The two documents mentioned by Nölle, which are open to interpretation, do not in my opinion make it appear sufficiently probable that there was a cartel agreement between Community producers which would be strengthened by the imposition of anti-dumping duties. Since Nölle, as was confirmed by its counsel at the hearing, never raised with the Commission a formal complaint about the exclusion from the market of independent exporters (including itself) so that the alleged breach of the rules of competition could be examined, the Commission cannot be criticized for failing to follow these documents up.

19 — I shall consider later (paragraphs 33 to 48) the assessment by the institutions of the *injury* suffered by the Community producers.

20 — In the third paragraph of recital 341.

3. Calculation of the normal value

3.1. *Recourse to a reference country*

13. To calculate the normal value of the brushes imported from China, the Commission and the Council applied Article 2(5) of the basic regulation, which provides that in the case of imports from non-market economy countries, normal value is to be determined on the basis of a market economy 'reference country'. The definitive regulation states in this respect:

'In order to establish whether the imports from the People's Republic of China were being dumped, the Commission had to take account of the fact that the country does not have a market economy and therefore based its calculations on the normal value in a market economy country.'[21]

During the administrative proceedings before the Commission, Nölle maintained that the Commission and the Council wrongly considered that at the time of the investigation and of the provisional and definitive regulations China was to be regarded as a country not having a market economy. It points out in this connection that since the mid-1980s China had gradually abandoned the model of the planned economy, that Chinese under-

21 — Recital (14) to the definitive regulation.

takings were thenceforth required to produce and sell for profit and that there was lively competition between Chinese producers and exporters.

Nölle's arguments on this point cannot be accepted. Academic lawyers rightly stress that the decisive criterion is the existence of a centrally-planned economy and that the fact that certain features of a market economy are to be found in a centrally-planned economy is not enough to turn it into a market economy.[22] Article 2(5) of the basic regulation moreover expressly mentions China as a country not having a market economy[23] so that the Commission and the Council were obliged to calculate the normal value by recourse to a reference country.

3.2. *Choice of Sri Lanka as a reference country*

14. Moreover during the proceedings both before the Commission and before the Court, Nölle insisted that the Commission and the Council wrongly chose Sri Lanka as a reference country. Before considering its arguments I should like to make two general observations on this point.

3.2.1. *General observations*

15. The purpose of calculating the normal value on the basis of a reference country is to avoid taking into account prices and costs in countries not having a market economy which are not normally the result of the laws of supply and demand.[24] This is a method of calculation which is used for lack of a better: it goes without saying that no single country can provide a perfect reference basis and the normal value thus calculated will always be a more or less imperfect approximation. In this respect Article 2(5) of the basic regulation provides that the normal value must be determined 'in an appropriate and not unreasonable manner'. It must therefore be accepted that the choice of a reference country implies an appraisal of complex economic factors and that the Commission and the Council have a considerable *power of assessment.* The Court's task is to check whether the factual situation on which the choice at issue was based has been established with the necessary care and was correctly assessed and whether the Community institutions' decision could reasonably have been based thereon. The guideline in this investigation involves the duty of the Community institutions, whilst taking account of the

22 — See for example the work of J. F. Beseler and A. N. Williams, op. cit., p. 67, cited with approval by F. G. Jacobs, 'Anti-dumping procedures with regard to imports from Eastern Europe' in *The political and legal framework of trade relations between the European Community and Eastern Europe* (M. Maresceau, Ed.), 1988, p. 294.

23 — Article 2(5) of the basic regulation regards 'in particular' as non-market economy countries those to which Regulation (EEC) No 1765/82 on common rules for imports from State-trading countries (OJ 1982 L 195, p. 1) and Regulation (EEC) No 1766/82 on common rules for imports from the People's Republic of China apply.

24 — See the judgments in Joined Cases 294/86 and 77/87 *Technointorg* v *Commission and Council* [1988] ECR 6077, paragraph 29 and Joined Cases C-304/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council*, [1990] ECR I-2945, paragraph 26.

possible alternatives, to try to find a country in which the prices for a like product are formed in circumstances which are *as similar as possible* to those in the country of export, provided that it is a market economy country.[25] In the proceedings in this case only two countries came in for consideration: Sri Lanka (which was chosen by the Commission and the Council at the suggestion of the Community industry which had raised the complaint) and Taiwan (which had been suggested by Nölle but rejected by the Commission and the Council).

16. A second general observation concerns the *criteria* determining the choice of reference country. Nölle, referring to the institutions' established practice, maintained that the search for an appropriate reference country requires consideration of the following factors amongst others: (1) whether a possible reference country's internal market is large enough; (2) whether the domestic price of the products is determined by relationships in the market economy, which implies that there is sufficient competition within the reference country; and (3) whether the relevant branch of industry in the reference country is sufficiently similar to the same branch in the country of export, for example as regards access to the essential raw materials. At the hearing the Commission representative confirmed that in general the Commission recognizes these criteria as guidelines but that each of the criteria must be applied with due regard to the specific circumstances of a given investigation.

25 — See my Opinion of 8 November 1988 in the *Neotype* case, already cited in note 24, paragraph 17 [(1990] ECR 2945).

3.2.2. *Discussion of Nölle's objections to the choice of Sri Lanka as a reference country*

17. I now come to discuss Nölle's arguments relating to the three criteria just mentioned, as put forward by Nölle.

First, Nölle criticizes the choice of Sri Lanka on the ground that *too small a volume* of the products 'like' those affected by the anti-dumping duties is manufactured there. Nölle starts by pointing out, without being challenged on this point by the Commission or the Council, that anti-dumping duties are charged on round and flat brushes, radiator and ceiling brushes originating in China, whereas Sri Lankan production consists mainly of fine or very fine paint brushes for artists (for water colours) and for school children; flat brushes (which in Germany for example represent at most 30% of brush sales) are the only ones, of those affected by the anti-dumping duties, which are manufactured in Sri Lanka and, what is more, in very small quantities. Nölle goes on to argue that since brushes of that type are the only ones which can be considered for calculating the normal value, it follows that the Sri Lankan market is too small for those prices to be regarded as representative for calculating the normal value of the products which were the subject of the investigation of dumping practices, since the Sri Lankan market amounts to less than 5% of Chinese exports to the Community.

18. Nölle's argument is based on paragraph 31 of the grounds of judgment in Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council*,[26] which related to the calculation of the normal value of electric motors (originating in a number of non-market economy countries) on the basis of sale prices on the domestic market of Yugoslavia (which had been chosen as reference country). In that case recourse to the Yugoslav market prices had been challenged by the applicant on the ground that the Yugoslav market was too small.[27] In paragraph 31 of the grounds of judgment the Court rejected that argument in the following terms:

'... The size of the domestic market is not in principle a factor capable of being taken into consideration in the choice of a reference country as determined by Article 2(5), in so far as during the period of the investigation there is a sufficient number of transactions to ensure the representative nature of the market in relation to the exports in question. In that context it should be remembered that, in the judgment in Case 250/85 *Brother* v *Commission* [1988] ECR 5683, paragraphs 12 and 13, the Court rejected the challenge against the institutions' practice of fixing the minimum level of representativity of the domestic market, for the purpose of calculating the normal value in accordance with Article 2(3) of Regulation No 2176/84,[28] at 5% of the exports in question. It is apparent neither from the file nor from the arguments put forward before the Court that the Yugoslav market was not representative in the abovementioned sense.'

26 — Already cited, note 24.

27 — See paragraph 30 of the grounds of judgment.

28 — The predecessor of the present basic regulation.

Nölle points out that as compared with total annual exports of Chinese brushes to the Community, amounting to between 45 and 60 million brushes,[29] the volume of the Sri Lankan market reaches some 750 000 brushes a year,[30] or between 1.6 and 1.25% so that this market and the prices formed thereon cannot be regarded as representative.

19. As a *second* argument tending to show the inappropriate nature of Sri Lanka as a reference country and, as regards the first argument, the unrepresentative nature of the Sri Lankan market as compared with the Chinese market, Nölle points out that there are in Sri Lanka only two producers manufacturing brushes of the type to which the investigation related.[31] Furthermore, it appears that one of these two (Harris Ceylon) is a subsidiary of one of the Community firms which lodged a complaint with the Commission. Nölle claims that in these circumstances and regard being had in particular to the very small size of the market, there cannot be *any sufficient competition* to guarantee marketing or manufacture of the said brushes, according to the rules of a market economy.

The Commission and the Council reply, not unreasonably, that the fact that there are only two firms does not necessarily preclude

29 — See the Commission's observations, point II.2.7.

30 — This appears to be common ground between the parties.

31 — The Community institutions did not essentially contest this. The last paragraph of recital (17) to the definitive regulation states that in Sri Lanka 'two producers ... supply approximately 90% of the home market'. In its written observations the Commission mentioned that there are still certain exports of Chinese paint brushes to Sri Lanka representing a market share of some 5%. It gave no information as to the remaining percentage.

the existence of a market economy. However, it does not follow, either, that if it is possible to identify in a country two producers of a like product, the choice of the said country as a reference country is automatically 'appropriate and not unreasonable' — such an appraisal requires all the specific circumstances to be taken into account. In this case Nölle has supplied various price comparisons from which it appears that the prices applied for Sri Lankan products are perceptibly higher than those applied by two representative producers in the Community — one Italian and one German. Paradoxically the result is that despite the considerable difference in wage rates the value of a brush manufactured in Sri Lanka is higher than that of a brush manufactured in Italy or Germany. [32]

20. What is to be made of these first two arguments of Nölle's, which I am considering together here? From the passage quoted (in paragraph 18) from the judgment in *Neotype Techmashexport* v *Commission and Council*, it may be seen that the requirement of a minimum size for the domestic market of the reference country tends to ensure the representative nature of that market as compared with the exports at issue, that is, with exports to the Community from the non-market economy country. [33] In other words that condition is explained by the need to calculate the normal value of exports from the non-market economy country by recourse to a reference country in which a like product is sold or manufactured in circumstances *as similar as possible*. That comparability may be compromised if the volume of the reference country's domestic market is too different from that of the market which is the subject of the dumping investigation. In the passage quoted from the judgment in *Neotype Techmashexport* v *Commission and Council*, previously cited, the Court, by analogy with Case 56/85 *Brother* v *Commission* [1988] ECR 5655 fixed the minimum level of such comparability at 5%. The *Brother* case related to the calculation of the normal value of imports from a market economy country (in that case Japan) and the minimum level of comparability related to the comparison between the domestic Japanese market and exports (from Japan) to the Community. In the *Neotype* judgment the Court also applied that minimum level to a case in which, as here, the normal value was calculated by recourse to a reference country; it thus laid down the rule that whenever the volume of a reference country's domestic market reaches at least 5% of the relevant exports to the Community from the country subject to the dumping investigation, that domestic market may be regarded as representative.

21. The fact that the volume of the Sri Lankan domestic market amounts to only 1.25 to 1.6% of Chinese exports to the Community and so is considerably less than the minimum 5% level does not, however, imply that the Sri Lankan market cannot in any case be representative. It emerges in fact from the passage already quoted from the *Neotype* judgment that the criterion used in the *Brother* case constitutes only one of the ways in which the representative nature of the reference country's domestic market may be confirmed. In other words, where

32 — See paragraph 28 of Nölle's written observations and the updated calculations submitted at the hearing.

33 — The authentic German text in the *Neotype* case refers to 'die betreffenden Ausfuhren' and the French text to 'exportations en cause'. Paragraph 31 of that judgment is not very clear, but it seems to concern exports from non-market economy countries (which are the subject of the Commission investigation) and not exports from the reference country.

the market of the country which is the subject of the dumping investigation is as extensive as the Chinese market, the *Neotype* judgment certainly does not prevent the representative nature of the reference country's domestic market from being deduced from other circumstances justifying the conclusion that that market may nevertheless be used as a reliable basis for calculating the normal value of the exports subject to the dumping investigation.

However, the Community institutions then have to show that other similar circumstances do in fact exist. Whether they have done so in this case is highly questionable. It is true that the definitive regulation indicates in general that in both China and Sri Lanka the production of flat brushes depends above all on small-scale manual production and that it therefore matters little that the total volume produced in China is larger than that in Sri Lanka [34] but, even when they were questioned on this at the hearing, neither the Commission nor the Council submitted figures showing that the percentages of labour costs, capital costs and the cost of raw materials are comparable for brushes manufactured in China and in Sr Lanka. At the hearing the Commission's representative, when pressed for an answer, made only vague and very general references to wage levels in Sri Lanka and China (compared to wage levels in the United Kingdom and Taiwan) but by no means related them to other components of the cost price of the brushes concerned. The institutions therefore did not submit to the Court any factors capable of supporting the substance of their position.

Furthermore, the doubt as to the representative nature of the Sri Lankan market as compared to the Chinese market is strengthened by the fact previously mentioned (paragraph 19) that there are only two firms on the Sri Lankan market producing flat brushes and that, moreover, they can only supply foreign purchasers to a very limited extent, [35] as well as by Nölle's calculations previously mentioned (end of paragraph 19), which were not contradicted by the Community institutions and which show that the prices applied by Sri Lankan producers of brushes are considerably higher than the prices applied by two representative Community producers. [36]

22. Nölle's *third argument*, to which I should now like to refer, is also such as to increase my doubts as to the appropriate nature of Sri Lanka as a reference country. This argument relates to the difference between Sri Lanka and China as regards *access to raw materials*. Nölle points out that

34 — In the fourth paragraph of recital 17 to the definitive regulation.

35 — At the hearing Nölle produced two documents, the first a fax communication of 4 January 1991 from the Harris firm on the subject of an order for delivery saying, as regards its establishment in Sri Lanka, 'Production of paint brushes and artist brushes [by the Harris establishment in Sri Lanka] is, in fact, only adequate for domestic requirements and prices, in view of the limited production, offer no real savings over the prices which [Harris England] can offer you'. The second document is a fax report of 31 December 1990 from the Netherlands agent van Ravi stating, also with regard to an order for delivery: 'In view of limited production, Ravi industries is not in a position to offer large quantities . . . '

36 — See moreover the fax from Harris referred to in the preceding note.

China has a considerable comparative advantage because it has its own principal raw materials necessary for the manufacture of brushes. More precisely, Nölle maintains (without contradiction on this point from the Commission or the Council) that China has practically a monopoly of the production of pig bristle, whilst the Sri Lankan industry is obliged to import pig bristle as well as the wooden handles and ferrules (intended for securing and holding the hairs of the brush). Moreover the pig bristle is not imported into Sri Lanka direct from China but, for political reasons, must be routed through Hamburg or London, which entails a *considerable extra cost* for transport.

23. The Commission and Council did not accept this argument because, as stated in recital 17 to the definitive regulation:

'even assuming that such a comparative advantage exists, could be properly quantified and is not offset by competitive weaknesses, it is not clear how this would be reflected in the normal value if the same conditions obtained in the market-economy third country, given that prices reflect demand as well as costs. Moreover, even if it were possible to obtain an exact measurement of such advantages or disadvantages, any adjustment of costs established in a market economy on that basis would imply reliance on the costs in a non-market economy, which is precisely what Article 2(5) of Regulation (EEC) N° 2423/88 is designed to prevent.' [37]

The Community institutions' main argument thus is that structural differences in *production costs* cannot be considered in the choice of a reference country, because the value of a product is equally determined by the demand for it. That argument is not altogether convincing: even supposing that demand factors have, *amongst others*, a certain relevance for determining the value of a product, that does not mean that supply factors (including production costs) are *irrelevant*.

24. The passage I have just quoted mentions an additional argument: that in this case it would not be possible to take such structural differences in costs into account because it would then be necessary to adapt the costs of the reference country's producers on the basis of the (undiscoverable) structure of the costs of the non-market economy country's producers.

I do not find that argument convincing either. The differences suggested by Nölle concern supplementary costs incurred by the Sri-Lankan firms owing to the fact that Sri Lanka does not have the raw materials necessary for the manufacture of brushes and has to import pig bristle, which comes through Europe. According to Nölle, the effect of these differences (as of the other

37 — Third paragraph of recital 17 to the definitive regulation.

differences already considered) is that Sri Lanka is not a representative reference country in comparison with China. At this stage of the reasoning therefore the question is *not* the determination of cost structures with a view to making adjustments in the determination of export prices (in accordance with Article *2(8)* of the basic regulation) or to take account of cost or other differences between the reference country previously chosen and the non-market economy country in comparing the normal value with the export price (in accordance with Article *2(9)* of the basic regulation). On the contrary the question is the actual choice of as appropriate a reference country as possible (in accordance with Article *2(5)* of the basic regulation). This choice must be made by having regard to the whole of the economic context, whereby account should also be taken of objectively ascertainable differences between the two countries, such as differences in transport costs resulting from unequal access to raw materials, and not relating to the nature of the country as a market economy or otherwise. Moreover it is actually the practice of the Community institutions to take this factor into account in the choice of a reference country.[38]

25. The need to take into account in the choice of a reference country the difference in production costs — and in particular difference in transport costs resulting from unequal access to raw materials — seems moreover to follow from the scheme of the basic regulation. Moreover under the provisions of Article *2(8)* and *(9)* of the basic regulation, once the reference country has been chosen, account may no longer be taken, for calculating the export price and comparing it with the normal value, of cost differences resulting from unequal access to raw materials or consequent differences in transport costs.[39] It follows, in my view, that these differences, which are nevertheless important, must be taken into account in the choice of reference country.

26. Neither the definitive regulation nor the written or oral observations put before the Court by the institutions make it possible to assess the relevance of this difference in transport costs. Nor do these observations make it possible to check whether it is correct that the cost of transport of imports of pig bristle, in which China is said to have a quasi-monopoly, is much higher for Sri Lanka than other countries (such as Taiwan, which I shall mention later), where perhaps imports do not have to go via Europe, or not to the same extent. The institutions are accountable for this defect in the argumentation.

27. From the foregoing analysis of Nölle's arguments it may be seen that the appropriate nature of Sri Lanka as a reference

38 — See for example Council Regulation (EEC) No 407/80 of 18 February 1980 imposing a definitive anti-dumping duty on a certain type of sodium carbonate originating in the Soviet Union (OJ 1980 L 48, p. 1). In that regulation Austria was chosen as the reference country for calculating the normal value of sodium carbonate on the ground in particular that, as in the exporting countries, the raw materials were directly available there (see the sixth recital to the regulation).

39 — See, in application of this principle, the adjustments referred to in recital 20 to the definitive regulation.

country may be called in question from two points of view, namely as regards the market volume and the producers active on that market and thus from the point of view of the competitive nature of the market and the cost of raw material supplies. I do not claim that these factors ought to have led the Community institutions to reject Sri Lanka at once as a reference country. However, it should have led the institutions to consider at the stage of the administrative proceedings the alternative suggested *by Nölle*, namely Taiwan[40] *if*, on the basis of the data available to them, there were grounds for thinking that that country might be more appropriate than Sri Lanka, which had been suggested *by the Community producers*. In my opinion it was only in the event of its appearing, after a sufficiently careful consideration of the alternative country proposed, that Taiwan as a reference country showed the same shortcomings (or others), that the Community institutions were entitled to proceed on the basis that Sri Lanka, in spite of the weaknesses noted, could be accepted as a reference country.

The data supplied by Nölle have made it appear that at least at first sight Taiwan did not show the weaknesses mentioned for Sri Lanka. As regards the *number of producers* the parties agree in thinking that it is much higher for Taiwan than Sri Lanka, even though they do not agree as to the exact number (10 or 20 to 25). As regards *size of the domestic market* it seems from the figures available (which have not been disputed by the institutions) that the Taiwanese market is significantly greater than the Sri Lankan market.[41] With regard to *access to raw materials* it seems that the cost handicap is less for Taiwan than for Sri Lanka: it is common ground that Taiwan has its own supplies of some wood and moreover at the hearing Nölle stated that until 1986 or 1987 pig bristle was imported into Taiwan through Hong Kong and subsequently direct from China.

28. In a matter such as this, in which the Community institutions have a wide discretion, it is all the more important that the decision adopted shall be subject to a careful review by the Court with regard to observation of essential formalities and the principles of good administration, which include the duty of care. From the same point of view the Court reviews the question whether, in accordance with the duty of care, an authority on which a wide discretion is conferred has determined with the necessary care the features of fact and of law on which the exercise of its

40 — At the hearing Nölle claimed that during the investigation which preceded Council Decision 87/104/EEC (already cited, note 2), it had already challenged the choice of Sri Lanka and suggested other countries, including Taiwan. Then immediately after publication of the notice of reopening of the investigation for the provisional regulation in October 1988 it concentrated on Sri Lanka. In its written observations of 22 November and 15 December 1988, it sent the Commission certain evidence intended to show the suitability of Taiwan.

41 — That appears in particular from an article from a specialist periodical quoted at the hearing by both Nölle and the Commission ('Paint Brushes', which appeared in the periodical *Asian Hardwares* in October 1988 attached as Annex 5 to Nölle's observations of 22 November 1988), in which various Taiwanese distributors (and their subcontractors) are described as having a *monthly* production capacity of 300 000 to 3 000 000 brushes.

discretion depends.[42] That is why the Court's case-law places emphasis upon the observance of the rights of the defence, the prevention of misuse of power, the requirement of a statement of the reasons on which a decision is based and the duty to take into account all the essential factors.[43] In the circumstances of this case, my view is that the duty of care required the Community institutions to give serious consideration to the suitability of the alternative proposed by Nölle. In this respect it was their duty to gather sufficient information about the Taiwanese market to allow them either to confirm or to reconsider the choice of Sri Lanka.

Did the institutions comply with that duty in this case? For an answer to that question I must consider the grounds on which they relied to justify their decision to reject Taiwan.

29. On this subject the definitive regulation states as follows:

'The comparison involving Taiwan suggested by the two importers was based on a finer, mainly synthetic-bristle "American" type of brush produced for export to the United States and Canada, quite distinct from the Chinese product, and with different production costs.'[44]

At the hearing Nölle's reply to that was that it had tried to supply to the Commission price quotations which actually related to wooden-handled brushes.[45] Moreover it refers to an article in a specialist periodical, which was mentioned at the hearing by both Nölle and the Commission,[46] to the effect that wooden-handled paint brushes are also manufactured in Taiwan even though polypropylene handles are being used more and more because of supply problems. Nölle thinks it was certainly possible to obtain

42 — See also my Opinion of 7 March 1989 in Case 70/87 *Fediol* v *Commission* [1989] ECR 1797. That case raised the question whether the Community institutions' interpretation of the concept of 'illicit commercial practices' in Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (OJ 1989 L 252, p. 1) was subject to review by the Court. The Court has also confirmed the existence of the duty of care in other fields of Community law in which the institutions have powers of administration or management. See for example the judgments in Case C-10/88 *Italy* v *Commission* [1990] ECR I-1229, paragraph 13 (as regards management of the EAGGF), Case 122/78 *Buitoni* [1979] ECR 677, and Case 181/84 *Man Sugar* [1985] ECR 2889 (as regards the export licence system); Case 64/82 *Tradax Graanhandel* v *Commission* [(1984] ECR 1359 (as regards determination of levies); Case 111/63 *Lemmerz-Werke* v *High Authority* [1965] ECR 677, 716 and Case 46/85 *Manchester Steel* v *Commission* [1986] ECR 2351, paragraphs 11 and 15 (as regards the ECSC Treaty); Case 417/85 *Maurissen* v *Court of Auditors* [1987] ECR 551, paragraphs 12 and 13, Case 125/80 *Arning* v *Commission* [1981] ECR 2539, and Case 105/75 *Giuffrida* v *Council* [1976] ECR 1395, paragraphs 11 and 17 (as regards the law relating to officials).

43 — A classical formulation of this principle is to be found in the judgment in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 30.

44 — Second paragraph of recital (16) to the definitive regulation.

45 — Referring to Annexes XIV to XVI to its written observations of 22 November 1988 and Annexes VI and VII to its written observations of 15 December 1988, from which admittedly it is impossible to deduce clearly whether it is a question of wooden-handled or synthetic-handled brushes. However, Nölle rightly indicated that during the administrative proceedings the Commission never objected to the information it had supplied on this subject.

46 — Already cited, note 41.

from Taiwanese producers full information about wooden-handled brushes.

'... when the Commission duly approached the main Taiwanese producers they refused to co-operate.'[47]

At the hearing the Commission explained that after addressing a letter to the two main producers in Taiwan, which was not answered, it did not think it necessary to make any other approaches. A copy of that letter — sent to one undertaking by fax on Thursday 8 December 1988 and to the other by telex on Friday 9 December 1988 — was produced at the hearing. I think it appropriate to give the text in full:

Only at the hearing did the Commission add that as regards the average level of wage costs, Sri Lanka was closer to China than Taiwan. In reply to a question from the Court the Commission stated that, taking the average wage cost in the United Kingdom as 100, it was 50 in Taiwan, 12 in Sri Lanka and 7 in China. That information is not without interest, particularly as it is common ground that the manufacture in China of the products in question is labour-intensive. It must nevertheless be pointed out that the Commission's arguments on this point are of a particularly general nature: it did not state the basis of the data which it supplied. Moreover that argument does not appear in the definitive regulation and no source is given. Since, as the Commission itself admits, it made no checks with regard to brush producers in Taiwan, I imagine it has relied on statistics of the average wage rates for workers in China, Sri Lanka and Taiwan.

'*Subject*: anti-dumping proceeding — Imports into the EEC of paint brushes from the People's Republic of China.

The Commission of the European Communities has reopened the above proceeding in September 1988. Since PR China is not a market economy country, the Commission has to establish normal value for the product in question on the basis of the domestic selling prices ex factory on the market of a market economy country provided they are representative and profitable or on the basis of the constructed value (cost of production + profit) in this market economy country.

30. I do not think the foregoing arguments (the second of which was put forward at a late stage) are sufficiently well supported to give a final answer to the question whether or not Taiwan is relevant. The definitive regulation thus mentions a reason of a 'procedural nature' for rejecting Taiwan. Recital 16 states:

Therefore we would appreciate if you would communicate to us for diy and professional paint brushes separately (specify flat or round, sizes 3/4", 1", 1", 2", 3", 4", thickness, length out, strength,

47 — Third paragraph of recital 16 to the definitive regulation.

natural or synthetic bristles and synthetic or wooden handle) your selling prices ex factory on your domestic market (on a monthly average) during the period 1.07.1987 to 30.09.1988 and provide us with several invoices over this period as well as the proof that you are selling with profit on your home market. What is the share of your sellings in your home market compared to your exports, separately for diy and professional and for flat and round paint brushes.

Please send us also a detailed cost of production sheet per piece for flat and round paint brushes of the previous mentioned sizes for 1987 and 1988. Tell us also if you import certain of your raw materials or/and if you let them be manufactured elsewhere. Tell us also the percentage of import duty for the imported raw materials as well as for paint brushes (duties and quantitative restrictions).

It should be stressed that all information you deem to be confidential will be treated accordingly.

Please mentioned [sic] information not later than 15 December 1988.'

31. The Commission, when questioned about this at the hearing, did not state whether these messages were accompanied by any written or oral explanation, but they were not answered. Notwithstanding the extremely short period allowed for reply (five to six working days), no reminder was sent. Nor was Nölle informed that the two firms consulted had not replied, so that it had no opportunity to propose, if it so desired, any other firms (in its written observations of 22 November and 15 December 1988, Nölle had submitted the prices quoted by at least five other firms in Taiwan).

In these circumstances I take the view that these requests sent by the Commission to the two largest Taiwanese producers are inadequate from the point of view of explanations and the time-limit for reply. In the absence of any further explanation they were likely to create confusion in the minds of the firms addressed as to the nature of the investigation (they might even regard them as announcing or preparing for a dumping investigation relating to brushes originating in Taiwan). The absence of such an explanation is all the more serious because the Commission, which is called upon to seek the voluntary collaboration of firms from third countries, asked the firms concerned to supply data (invoices, production costs, origin of raw materials, 'proof' that they were selling at a profit) which they might certainly regard as confidential. Even if the firms questioned had not demurred at these objections, the time-limit for reply unilaterally (not to say rudely) imposed on them was so brief as to discourage them. Finally the Commission

was very quick to terminate its efforts to obtain information about the Taiwanese market (no reminder and no attempt to contact other firms).

It therefore seems to me that the institutions did not give themselves the opportunity to make an appropriate appraisal, with knowledge of the facts, of the alternative suggested by Nölle.[48]

3.2.3. *Summary regarding the choice of reference country*

32. The foregoing considerations lead me to conclude that the Council has not sufficiently justified its decision to choose Sri Lanka as a reference country for determining the normal value of the products subject to the dumping investigation. The material before the Court does not show sufficiently clearly whether the choice of Sri Lanka, the country suggested as a reference country by the Community producers who had lodged the complaint, was appropriate. The Council's choice of Sri Lanka could be regarded as acceptable only if it could be shown that Taiwan, the country suggested by Nölle, did not offer a real alternative. The institutions have not been able to show that, since they did not consider the data relating to Taiwan with the necessary care.

48 — The fact that the Commission had based the provisional anti-dumping duty on Article 10(6) of the basic regulation and so had given the Council a strict time-limit for adopting the definitive regulation (see Article 11(5) of the basic regulation) cannot justify the Council's attitude. It may be seen from other regulations that in such circumstances the Council has taken the trouble to investigate alternative reference countries. See for example Council Regulation (EEC) No 541/91 of 4 March 1991 imposing a definitive anti-dumping duty on imports of barium chloride originating in the People's Republic of China (OJ 1991 L 60, p. 1), particularly recitals 11 and 12.

4. The problem of injury

33. Nölle maintains that the Commission and the Council wrongly took the view that exports of Chinese brushes to the Community were 'causing or threatening to cause material injury to an established Community industry' as required by Article 4 of the basic regulation. In that connection it puts forward essentially three arguments.

4.1. *Injury for like products?*

34. In the *first* place Nölle maintains that, contrary to the requirement laid down in Article 4(2)(b) of the basic regulation, Chinese brushes and brushes manufactured in the Community cannot be regarded as 'like products'. For the purposes of the basic regulation 'like product' means:

'... a product which is identical, i. e., 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'.[49]

Nölle points out that the pig bristle incorporated in Chinese brushes is of a quality inferior to that incorporated in brushes

49 — Article 2(12) of the basic regulation.

manufactured in the Community (in particular in Germany): for example, in the Community the pig bristle is cooked not once, but twice, and is also graded according to length, which guarantees a much higher quality of the final product.

35. It seems very questionable to me whether the quality differences pointed out by Nölle are sufficient to regard the two types of brushes as different products. In this connection the definitive regulation puts forward the following considerations:

'... There are several types of paintbrush: the high-quality type for professional use and the lower-quality type for non-professionals. The imports originating in China mainly compete in the second category, for which the Commission effected the comparison.

The Commission looked at brushes from a number of producers or importers in terms of a variety of factors: the type and weight of bristle, the cooking process, the quality and preparation of the bristles, the quality and shape of handle, the finish of the product, including the ferrule and glue, and the overall strength of the brush. It found no crucial difference between the comparable Chinese and Community products in respect of the purpose for which they were intended. The Commission found that these were like products ...' [50]

50 — Second and third paragraphs of recital 23 to the definitive regulation.

It seems to me that the features mentioned by Nölle are not such as to call in question that finding of the Commission. Moreover the Commission rightly observed that in the comparison between prices of the Chinese product and those of the Community product, the definitive regulation corrected the (Chinese) lower prices by a factor of 20% 'to allow for the slightly rougher quality of the Chinese product'. [51] The anti-dumping duty was therefore set at a level well below the dumping margin so as to take into account the quality of the Chinese product, the types of products and the different prices considered. [52]

4.2. *Imprecise nature of determination of injury*

36. In the *second* place Nölle challenged recital 22 to the statement of reasons on which the definitive regulation, which states as follows:

'It was found during the investigation that 92% of the Chinese exports went to five Community countries, Germany, Ireland, the United Kingdom, France and Italy, but with an overwhelming concentration on the German, Irish and United Kingdom markets. Accordingly the assessment of injury was centred mainly, though not exclusively, on these three countries.'

In that connection Nölle refers to recital 11 to the definitive regulation, from which it appears that the Commission investigation

51 — Recital 26 to the definitive regulation.

52 — First paragraph of recital 36 to the definitive regulation.

related only to a number of firms in the United Kingdom and Germany. It therefore thinks that the determination of injury relating to the Irish, French and Italian markets was not founded on fact.

37. Nölle's argument does not convince me. The list set out in recital 11 shows the firms in the places in which the Commission made an investigation. It may be seen from the last paragraph of recital 11 that the Commission also received detailed written submissions 'from most of the producers concerned' (including perhaps Irish, French or Italian producers [53]). Although admittedly as regards obtaining data from individual firms the Commission addressed only British and German firms, that does not mean that, in investigating whether an established Community industry had suffered or risked suffering injury, the Commission did not make use of more general data such as statistics making it possible to deduce the trend of imports of Chinese brushes, of prices for imported and Community brushes, of closures of firms and of employment in the sector in question (see for example the second and third paragraphs of recital 24 and recitals 26, 27 and 31 to the definitive regulation). Moreover, except as regards the trend of production in Germany and of imports of Chinese brushes by German producers (which I shall mention in greater detail later), Nölle did not provide any information showing that the determination of injury effected in the definitive regulation was incorrect.

53 — It may be seen from recital 5 to Decision 87/104/EEC, moreover, that during the original investigation there were also checks at the premises of two Irish producers.

4.3. *Imports by German producers*

38. In the *third* place Nölle claimed that, in considering the injury, the Commission and the Council were wrong to take the German producers' situation into account. It starts by referring to Article 4(5) of the basic regulation which, in its opinion did not, in these proceedings, authorize the Community institutions to take account of any injury suffered by producers who were themselves importing the product under investigation. For purposes of the determination of injury the expression 'Community industry' is defined in that provision as:

'. . . the Community producers as a whole of the like product or those of them whose collective output of the products constitutes a major proportion of those products except that:

when producers . . . are themselves importers of the allegedly dumped . . . product the term "Community industry" may be interpreted as referring to the rest of the producers . . . '.

In the recent judgment in Case C-156/87 *Gestetner Holdings* v *Council and Commission*,[54] the Council stated with regard to that provision:

'Those provisions show that it is for the institutions, in the exercise of their discretion, to determine whether they should exclude from the "Community industry" producers which are . . . themselves importers of the dumped product. The discretion must be exercised on a case-by-case basis, by reference to all the relevant facts (paragraph 43 of the grounds of judgment).

It is therefore established that the institutions have a discretion in this respect, though that does not prevent that discretion from being subject to review by the Court.

4.3.1. *Arguments of the parties*

39. Nölle's argument relates substantially to the recitals to the definitive regulation concerning the causal connection between the dumping practices established and the injury which they caused. According to the institutions, the volume of Chinese exports showed a marked growth during the period covered by the investigation[55] and imports of brushes from China considerably increased their market share.[56] These imports were sold at prices on average more than 70% lower than the prices charged by the Community industry.[57] According to the definitive regulation all these factors depressed the general level of prices on the Community market, leading to a severe fall in the Community producers' market share which led in turn to substantial capacity cuts and the closure of businesses.[58]

The Council states in the definitive regulation[59] that in examining the causal link between the effects and the Chinese imports at dumping prices the Commission considered whether other factors might have been responsible for the injury to the Community industry. One of these factors might have been the fact that 'the Community producers themselves had bought considerable quantities of Chinese brushes from independent importers in order to sell them at a profit and thus be able to finance their own production'.[60]

The following explanation seems desirable for an understanding of my subsequent observations. As the Commission stated at the hearing, the expression 'independent importers' appearing in the last quotation does not refer to importers of Chinese brushes (including Nölle) who opposed the imposition of an anti-dumping duty, but to traditional importers into Germany of Chinese pig bristle. Apart from pig bristle, these importers also import disposable brushes from China but supply them *exclusively* to the German producers, who then offer them for sale. In my further observations I shall refer to this second category as traditional importers.

54 — Judgment in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR 781.

55 — Recital 24 to the definitive regulation.

56 — Recital 25 to the definitive regulation.

57 — Recital 26 to the definitive regulation.

58 — Recital 27.

59 — Recital 29.

60 — First paragraph of recital 30.

40. The institutions came to the conclusion that the sale of Chinese products by the German producers was not of such a nature as to explain the injury caused to the Community industry or, in other words, as to break the causal link between the anti-dumping practices and the injury established. In fact the definitive regulation provides:

'As regards the sale of Chinese products by Community producers themselves, the Commission has established, on the basis of the facts available, that the volume of such sales varied appreciably during the period of the investigation depending on the Member State and the company concerned. With the exception of a small number of firms which have ceased production, however, Community producers started selling Chinese paintbrushes alongside their own products solely in order to prevent their traditional markets from being taken over by suppliers offering imported goods only. The Commission's finding was that Community producers did not in general import Chinese products of their own volition but did so only in self-defence against unfair competition. Nor did the Commission's investigations reveal any abuses; the Community producers resold the Chinese paintbrushes at a modest mark-up at as high a price as the market would bear, but without excessive profit, and only to the extent necessary to ensure the sale of their own products'. [61]

61 — Last paragraph of recital 30 to the basic regulation.

41. In its written observations and at the hearing, Nölle strenuously contested that passage in the contested regulation. It called attention to two facts which it had already pointed out to the Commission during the administrative proceedings and the correctness of which was not challenged at the hearing: first, the fact that in Germany slightly more than two-thirds of brushes imported from China are sold by German producers; and secondly the fact that an important German producer (namely Schabert) even concluded a cooperation agreement with a Chinese firm for the production of brushes in China. Nölle takes the view that in these circumstances it cannot reasonably be claimed that German producers did not themselves take the initiative in importing or that they suffered material injury *as a result* of the imports effected by the independent importers (including Nölle), who were responsible for only a third of the imports of brushes and who, in 1987, represented in Germany a market volume of some DM 2 300 000 as compared with a total volume of some DM 150 000 000; in other words their market share was not even 2%.

42. The question raised by Nölle, as I understand it, is whether the Community institutions could use their discretion under Article 4(5) of the basic regulation in such a way that they could reasonably include in the Community production which had suffered injury the producers who were importing themselves (or through the intermediary of traditional importers who were supplying them exclusively) the products

which were the subject of the dumping practices. In fact such producers, Nölle claims, were themselves responsible for the injury to Community production.

It appears from the foregoing quotation from the definitive regulation that the Council on the other hand thinks that the injury recorded is not attributable to the imports of the Community producers themselves, in spite of the fact that they sold the imported brushes at a normal profit. The Council refers in this respect to the defensive nature of the imports in question, which were not effected on the producers' own initiative but solely because that was necessary to defend themselves against unfair competition.

4.3.2. *Assessment of the arguments*

43. In this connection I must consider whether the institutions made a proper use of their discretion, regard being had to the facts before the Court, the Court's case-law and the Council's decision-making practice. From the case-law it may be seen that the Court's appraisal of this matter is always closely linked to the specific characteristics and circumstances of the facts of each case and that the Court applies relatively strict criteria. The following examples will give an illustration.

44. In the judgments in *TEC* v *Council* and *Silver Seiko* v *Council*[62] the Court took the view that where only a few models (in that case of electronic typewriters), all of them at the lower end of the range, were imported by Community manufacturers to fill gaps which at that time existed in their range of products[63] and where the total volume of such imports was always 'relatively low', such imports must be regarded as not having contributed to the injury suffered by the Community industry and that there was therefore no reason to exclude such manufacturers from the determination of injury.[64]

In the judgment in *Gestetner Holdings* v *Council and Commission*,[65] the Court approved the Council's decision to include in the Community industry two groups of Community producers who were themselves importing certain models of the products at issue (in that case photocopiers). As regards the first group the Court based its decision on the Council's finding that the Community producers had themselves attempted to market a full range of photocopiers but had failed because of the depressed market prices following the imports which had been dumped.[66] Moreover in the contested regulation the Council had emphasized the very low volume of imports by the firms concerned in relation to total imports of all the machines

62 — Judgments in Joined Cases 260/85 and 106/86 *TEC* v *Council* [1988] ECR 5855 and Joined Cases 273/85 and 107/86 *Silver Seiko* v *Council* [1988] ECR 5927.

63 — Moreover Advocate General Sir Gordon Slynn had observed that the models imported did not compete with the models which the Community importers manufactured themselves (see his Opinion, [1988] ECR 5906).

64 — See paragraph 47 of the judgment in *TEC* v *Council* and paragraph 39 of the judgment in *Silver Seiko* v *Council*.

65 — Already cited, note 54.

66 — See paragraph 47 of the grounds of judgment.

produced (some 4%).[67] As regards the second group, the Court pointed out *inter alia* that even though it was not possible to speak of self-protection, the volume of the producer's imports was to be regarded as minimal (1%) in comparison with its production within the Community, that these imports were only temporary and were intended to enable the producer to market the products in question itself.[68]

The low volume of imports by Community producers, their temporary nature and the aim of completing a production range or marketing a complete range of products seem therefore to be the criteria adopted by the Court.

45. It also appears from the institutions' decision-making practice that the assessment made is closely linked to the specific circumstances. That emerges from a number of decisions in which the Community producers who were themselves importing the product dumped were excluded from Community production.[69] That also emerges from the decisions on whether such imports could be regarded as self-protection measures on the part of the Community producers. Thus in Decision 87/66/EEC[70] the Community producers' defence to the effect that they had proceeded to import the products in question as a measure of self-defence was regarded by the Council as valid, regard being had in particular to the finding that the producers were forced to effect such imports to defend their position in extremely difficult market conditions.[71] On the other hand the self-protection argument was not accepted in Regulation No 535/87,[72] in which the Council found that the imports were effected rather in the context of internal production difficulties.[73]

46. As regards the problem of the sale of Chinese products by the Community producers themselves, the regulation now under consideration points out that the volume of such sales varied appreciably depending on the Member State and the company concerned. It does not give actual figures. As has already become apparent, the Commission's finding that 'Community producers did not in general import Chinese products of their own volition but did so only in self-defence against unfair competition', particularly 'in order to prevent their traditional markets from being taken over by suppliers offering imported goods only'[74] plays a crucial part in the Council's decision, in so far as it decided nevertheless

67 — See recital 71 to Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (OJ 1987 L 54, p. 12).

68 — See paragraphs 57 and 59 of the grounds of judgment and recitals 61, 64 and 65 to Regulation (EEC) No 535/87.

69 — See for example Commission Regulation (EEC) No 2812/85 of 7 October 1985 imposing a provisional anti-dumping duty on imports of electronic typewriters manufactured by Nakajima All Co. Ltd, originating in Japan (OJ 1985 L 266, p. 5), and Commission Decision of 18 February 1985 terminating the anti-dumping proceeding concerning imports of certain footware with fixed ice-skates, originating in Czechoslovakia, Yugoslavia, Romania and Hungary (OJ 1985 L 52, p.48).

70 — Decision of 19 January 1987 accepting undertakings given in connection with imports of binder twine originating in Brazil and Mexico and terminating the investigations (OJ 1987 L 34, p.55).

71 — See recital 28 to the decision.

72 — Already cited, note 67.

73 — See recital 64 to the decision.

74 — See the passage in the definitive regulation already cited, paragraph 40.

to take into account, for determining the injury, Community producers selling Chinese brushes themselves.

If that recital is compared with the factors mentioned by Nölle, and not disputed, according to which the German producers sell two-thirds of the brushes imported into Germany from China, a serious doubt arises as to whether on this point, at least as far as the situation in Germany is concerned, the definitive regulation is sufficiently in accord with the case-law of the Court which I have mentioned (or with the Council's own decision-making practice). Can such large-scale imports, marketed by the German producers, still be regarded as self-protection measures in view of the volume and (regard being had to the growing and persistent demand for disposable brushes) of the long-term nature of such imports as well as of the fact that the products imported were sold 'at as high a price as the market would bear',[75] in other words at the highest profit, and when it is clear from the figures available that these producers dominate the German market (as regards both brushes for professional use manufactured in the Community and imported disposable brushes)?

I have the impression that in these circumstances and by reason in particular of the fact that the German producers were exclusively supplied by the traditional importers, a practice which began by way of self-protection seems to constitute rather an attempt to reserve the German market in imported disposable brushes for the traditional channels of distribution at the expense of the independent importers (such as Nölle) not belonging to the category of traditional importers. I do not say that is the case, but I do find that there is in this regard a defect in the statement of the reasons on which the definitive regulation was based.

47. The said statement of reasons in the definitive regulation, in relation to the scale of imports of Chinese brushes marketed by the German producers, also raises doubts on other points. In fact recital 27 to the definitive regulation states that the 'flood of dumped imports' depressed the general level of prices on the Community market and that, from 1984 to 1988, selling prices were virtually static (despite the fact that production costs in the Community increased). It is not clear whether and to what extent sales of do-it-yourself brushes, which had been constantly growing since the end of the 1970s and which, in Germany, were mostly sold through the medium of the German producers themselves, made their own contribution to this price stagnation. The same is true of the statement in the second paragraph of recital 27 to the effect that Community producers' 'market share' fell. If that is intended to refer to a fall in sales of brushes manufactured in the Community against sales of brushes manufactured in China, I can understand it. But if it refers to the share of the whole market (that is, the share of sales of national brushes *and* imported brushes) belonging to the German producers, it by

75 — See the passage in the definitive regulation already cited, paragraph 40.

no means appeared that it fell. The data supplied by Nölle, which have not been challenged, show on the other hand that in 1987 the independent importers had, in Germany, a market share which did not reach 2% (see paragraph 41 above).

48. On the basis of the foregoing, my opinion is that, regard being had to the evidence before the Court, the Council has not substantiated in the definitive regulation the essential finding that the German producers imported the Chinese products only for self-protection and that consequently the Council has not been able to show that these producers could be taken into account in determining the injury caused to a Community industry.

The question remains whether this defect in the statement of reasons is such as to affect the validity of the definitive regulation. A negative answer would be possible only if it were established that even leaving the German producers out of account for the determination of injury, the Council would still have been able to find that there was a material injury or threat of injury to an established Community industry. The data at the Court's disposal do not make it possible to give an answer. Moreover it is not for the Court but for the institutions (which alone have the necessary figures and data) to make that assessment. In this case I can only state that they have not done so either in the definitive regulation or in the written or oral procedure before the Court. In these circumstances the defect in the statement of reasons must entail the invalidity of the contested regulation.

5. Conclusion

49. In consequence my opinion is that (i) the Community institutions have not shown sufficiently that in calculating the normal value they were able to rely on the prices which were charged on the internal market of Sri Lanka; and (ii) as regards the injury caused to an established Community industry the definitive regulation contains an insufficient statement of the reasons upon which it is based. I therefore invite the Court to rule that the definitive regulation is invalid.