

European Anti-dumping Law and China

Piet Eeckhout

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Abstract

The paper examines recent developments in the European Union's anti-dumping policy, as it is applied towards China. It concentrates on recent court cases involving dumping from China and on the basic non-market economy issue. The author essentially argues that the European Union's policy does not take account sufficiently of China's development towards a market economy, and that there are various legal flaws in the way the policy is applied.

Kurzfassung

Das Papier untersucht jüngste Entwicklungen der Anti-Dumping-Politik der Europäischen Union gegenüber China. Es konzentriert sich auf aktuelle EuGH-Fälle, die sich auf Dumping durch China beziehen, und auf das grundlegende Problem der Handelsbeziehungen zu nicht-marktwirtschaftlich organisierten Ländern. Der Autor argumentiert im wesentlichen, daß die Politik der Europäischen Union China's Entwicklung zur Marktwirtschaft nicht ausreichend in Betracht zieht, und zeigt einige rechtliche Mängel in der Anwendung dieser Politik auf.

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I. Introduction

The perspective of the present paper is academic. The author has not been exposed to any practical experience with anti-dumping policy and law. That, however, is not by definition a drawback, in particular in the context of anti-dumping. It is the author's firm conviction that many aspects of anti-dumping policy, if not the policy as such, do not withstand serious scrutiny, whether one considers them from an economic perspective (and there are many critics here) or from a legal perspective (where less criticism may have been voiced which surpasses the level of technicalities). It is mainly from a legal perspective that the following pages address the European Union's anti-dumping action against imports of Chinese products, written as they are by an academic forced to remain at a more or less general level, both by his audience and by his own knowledge.

Within the scope of this paper it is clearly impossible to offer a full analysis of the inherent flaws of anti-dumping policy. Where demonstration is not possible, illustration may assist. The following is a random example, in that it stems from an anti-dumping regulation which the author looked at for other purposes than the issue discussed hereafter. The regulation imposes a definitive anti-dumping duty on imports of urea from Russia into the European Community (hereafter 'the Community'). (1) It renews, in 1995, anti-dumping action first taken in 1987 against imports of urea from Czechoslovakia and the USSR. The Council of Ministers (hereafter 'the Council') decided that it was no longer necessary to take action against imports from the Czech Republic, the Slovak Republic, and the republics from the former Soviet Union, with the exception of Russia. The Council considered that Russian exports continue to harm the Community's urea industry, one of the

fundamental conditions for anti-dumping action: the basic anti-dumping regulation (2) (hereafter 'the basic regulation') provides that anti-dumping duties may only be imposed against dumped imports causing material injury (or a threat thereof) to a Community industry. An outside observer would probably assume that the finding of injury implies that imports of urea from Russia are flooding the Community market, threatening the survival of Community producers. Yet the Council arrives at that finding on the basis of an examination of the market situation in the period 1989-1992 which establishes that:

- the market share of imports of urea from Russia rose from 0.9% (zero point nine) to 2.6% (two point six);
- imports from third countries not included in the investigation dropped;
- the market share held by Community producers rose from 77.5% to 78.5%.

Admittedly, the Community industry was not profitable in the above period; it was subject to some restructuring resulting in lay-offs; and it appeared that the prices of urea from Russia undercut the price of the Community product (but that was contested by importers of urea). None the less, many lawyers will agree that in most systems of tort law a rise in import penetration from 0.9 % to 2.6 %, accompanied by a growing market share occupied by domestic producers, would never be considered as a sufficient causal link between fault (here the Russian dumping) and damage (here the difficulties of the Community industry). Add thereto that Russia is a non-market economy country (for the purposes of anti-dumping at least), which means that the finding of dumping was not based on a comparison between prices for urea in Russia and those for exports of Russian urea to the Community (for dumping is not exporting below cost, but below domestic prices); it was based on a comparison between the price for urea in a third country with a market economy (the so-called 'analogue country', unknown at the time when the investigated exports took place) and the price of Russian exports. In that respect Russian exporters face the same problems as Chinese exporters: they cannot avoid dumping by ensuring that their export prices are equal or superior to their domestic prices. If they want to avoid anti-dumping action they need access to supernatural resources: they have to know at the time of exporting which analogue country the Commission will select in a future anti-dumping investigation, not knowing when such an investigation will take place, if ever. It would almost seem that for exporters from non-market economy countries there is only one genuine guarantee against a finding of dumping: they should not export to the Community.

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The above may be sufficient for setting the parameters of the analysis that follows. There is no attempt at completeness. (3) Anti-dumping law is a large field, in which there is much to be weeded, and the following is merely a small contribution.

The paper first mentions some data on the position of Chinese products in European anti-dumping investigations. It subsequently turns to the recent case-law of the Court of Justice and the Court of First Instance on anti-dumping against China. As will be seen, an analysis of that case-law reveals some of the peculiarities, both of anti-dumping generally and of its application against China. The paper subsequently considers the vital issue in the case of China, *i.e.* its characterization as a non-market economy country.

II. Some data

The share of China in the Community's anti-dumping policy can be briefly illustrated by referring to the Commission's annual reports on the Community's anti-dumping policy:

Table 1:*Investigations initiated in the respective calendar years: share of investigations involving China*

1995	5 out of 16
1994	5 out of 16
1993	4 out of 11
1992	7 out of 19

Table 2:*Provisional duties imposed in the respective calendar years: share of China*

1995	6 out of 11
1994	4 out of 9
1993	5 out of 10
1992	2 out of 6

Table 3:*Definitive duties imposed in the respective calendar years: share of China*

1995	3 out of 6
1994	4 out of 11
1993	5 out of 11
1992	1 out of 10

Those very basic figures make it clear that China is a major "target", "victim", or "object" of the Community's anti-dumping policy.

III. China in recent Court cases

III.A. The Nölle cases

In March 1989 the Council adopted definitive anti-dumping duties on imports of paint brushes from China. (4) Nölle imported such paint brushes into Germany. It brought an action before the Finanzgericht Bremen, which referred to the Court of Justice under Article 177 of the Treaty the question whether the Council's regulation was valid. (5) As indicated above, because China is a non-market economy country the normal value of the brushes had to be calculated on the basis of prices in a market economy country. The basic regulation provided that such a country should be chosen "in an appropriate and not unreasonable manner". (6) In this case Sri Lanka was chosen by the Commission. Nölle submitted that that choice was illegal.

The Court first set out the general principles applying to the choice of an analogue or reference country, and to the type of review which the Court is to exercise in that respect: (7)

"First of all it should be stressed that the aim of Article 2(5) of the basic regulation is to prevent

account being taken of prices and costs in non-market-economy countries, that is to say, which are not the normal result of market forces (7a).

It should also be remembered that the choice of reference country is a matter falling within the discretion enjoyed by the institutions in analysing complex economic situations.

However, the exercise of that discretion is not excluded from review by the Court. The Court has consistently held that in the context of such a review it will verify whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers (7b).

As regards in particular the choice of reference country it is desirable to verify whether the institutions neglected to take account of essential factors for the purpose of establishing the appropriate nature of the country chosen and whether the information contained in the documents in the case were considered with all the care required for the view to be taken that the normal value was determined in an appropriate and not unreasonable manner".

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Although it is clear that the Court will exercise only limited review, it was able to establish, after examining Nölle's arguments, that the choice of Sri Lanka was indeed inappropriate:

1. The Court agreed that Sri Lanka's production of paint brushes was not representative, since it accounted for merely 1.2% of the volume of exports from China to the Community.
2. The Commission and the Council were unable to show that production methods in Sri Lanka were comparable to those in China.
3. The Sri Lankan industry was obliged to import pig bristle, wood for the handles, and the ferrules, whilst China has practically 85% of the world market in pig bristle. In particular, the Court rejected the Commission's argument that the advantages resulting from access to raw materials could not be quantified in a non-market economy country.
4. There appeared to be no real competition in Sri Lanka as regards paint brushes. In particular, prices were higher than those charged by two representative producers in the Community.

The Court concluded that those factors should have made the Commission and the Council doubt whether the choice of Sri Lanka was appropriate and not unreasonable. In addition, Nölle had suggested that Taiwan be chosen as a reference country, but the Commission had not sufficiently examined whether that suggestion was more appropriate than Sri Lanka: (8)

"As regards, in particular, the Taiwanese producers' alleged refusal to cooperate, it should be noted that the letter addressed to the two main producers in Taiwan, produced by the Commission during the hearing, cannot be regarded as a sufficient attempt to obtain information, regard being had to its wording and the extremely short period allowed for reply, which made it practically impossible for the producers in question to cooperate".

The judgment is significant because it shows that, despite the principle of limited review expressed by the Court, it is possible to challenge the choice of an analogue country in court proceedings. The review which the Court did exercise here seemed to go further than the Court's previous approach, and that could only be welcomed at the time.

Anti-dumping cases are now generally heard by the Court of First Instance. In 1995 that Court

delivered its first judgments in that field. It may be noted that in its very first judgment the Court annulled an anti-dumping regulation imposing duties on imports of ball-bearings from Japan. (9) The Court found that several errors were made in the determination of the injury to Community production, and that the proceeding was not concluded within a reasonable period.

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That does not necessarily mean that the Court of First Instance will exercise stricter judicial review on anti-dumping action than the Court of Justice. The other judgments do not appear to suggest that. In particular, the Court refused to grant damages in the second *Nölle* case. (10) After the Court of Justice declared the anti-dumping regulation on imports of paint brushes invalid *Nölle* requested compensation for the damage which it claimed it had suffered, under Articles 178 and 215 of the Treaty. The Court of First Instance adopted a classic approach, by referring to the limited scope for compensation for damage caused by legislative measures. It held, referring to earlier case-law of the Court of Justice, (11) that: (12)

"measures of the Council and the Commission in connection with a proceeding relating to the possible adoption of anti-dumping measures constitute legislative action involving choices of economic policy and that, in accordance with settled case-law, Community liability can be incurred by virtue of such measures only if there has been a sufficiently serious breach of a superior rule of law for the protection of individuals ...".

That is a very severe test, and the Court concluded ultimately that, although the Commission and the Council had breached the principle of care and the principle of good administration by choosing Sri Lanka as a reference country, the breach was not sufficiently serious to give rise to damages.

It is submitted, with due respect, that the Court's approach is flawed. Anti-dumping measures do not constitute legislative action involving choices of economic policy. It is the basic regulation on anti-dumping which is of such a nature. The regulations which apply it are, if anything, administrative in nature. It is true that the basic regulation leaves a margin of discretion to the institutions, but that is not sufficient for characterizing specific anti-dumping measures as legislative. In its very first judgment on anti-dumping the Court dismissed the Council's argument that, as it was itself the author of the basic regulation, it was not obliged to follow its rules in all cases. The Court held: (13)

"The Council, having adopted a general regulation with a view to implementing one of the objectives laid down in Article 113 of the Treaty, cannot derogate from the rules thus laid down in applying those rules to specific cases without interfering with the legislative system of the Community and destroying the equality before the law of those to whom that law applies".

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If specific anti-dumping measures were legislation, then the Council could not be bound by the basic regulation. The Court's approach makes it perfectly clear that specific measures are administrative in nature, and therefore the Court of First Instance should have applied a less stringent test on damages.

III.B. Extramet (14)

This is again a case brought by an importer, not however through a reference under Article 177 of the Treaty but as a direct action for annulment under Article 173 of the Treaty. The applicant, Extramet Industrie SA sought the annulment of Council Regulation (EEC) No 2808/89 of 18 September 1989 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports. (15) Under Article 173(4) of the Treaty "Any natural or legal person may ... institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former". That provision is intended to limit the standing of natural and legal persons to proceedings against acts of the institutions which are of direct and individual concern to them. In the field of anti-dumping, the Court has accepted that "measures imposing anti-dumping duties are liable to be of direct and individual concern to those producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations". (16) However, importers of products subject to anti-dumping duties do not as a rule have standing, since for them the regulations in question are considered to be "measures having general application ... because they apply to objectively determined situations and entail legal effects for categories of persons regarded generally and in the abstract". (17) In principle, therefore, Extramet did not have standing. However, in his Opinion to the case Advocate General Jacobs made a persuasive case for reversing that case-law. He argued, in essence:

"that an undertaking should in principle have standing to challenge an anti-dumping regulation where it is identified, even if only implicitly, by the regulation or where it played an important part in the procedure leading to the adoption of the regulation, at least where its position on the relevant market has been significantly affected". (18)

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The Court did admit the action, but it did not follow the Advocate General's reasoning. It merely held, referring to the old *Plaumann* case, (19) that Extramet was individually concerned by the regulation by reason of certain attributes which were peculiar to it and which differentiated it from all other persons. In particular: (20)

"The applicant has established the existence of a set of factors constituting such a situation which is peculiar to the applicant and which differentiates it, as regards the measure in question, from all other traders. The applicant is the largest importer of the product forming the subject-matter of the anti-dumping measure and, at the same time, the end-user of the product. In addition, its business activities depend to a very large extent on those imports and are seriously affected by the contested regulation in view of the limited number of manufacturers of the product concerned and of the difficulties which it encounters in obtaining supplies from the sole Community producer, which moreover, is its main competitor for the processed product".

The latter sentence echoes the substance of the applicant's complaint. It appeared indeed that Extramet was the largest importer of calcium metal, and that imports constituted its principal source of supply of the product, which Extramet uses to produce, by a redistillation process which it has developed and patented, granules of pure calcium used mainly in the metallurgical industry. In particular, Extramet argued that Péchiney, the sole producer of the product in the Community and its main competitor for the processed product, should not have complained about the dumping because it suffered self-inflicted injury: Extramet stated that Péchiney refused to supply it with calcium metal, that it was therefore compelled to import, and that it had for that reason lodged a complaint with the

competent French authorities alleging abuse of a dominant position.

The Court held that in determining injury the Commission and the Council are under an obligation to consider whether the injury actually derives from dumped imports and must disregard any injury deriving from other factors, in particular from the conduct of Community producers themselves. The Court subsequently stated that the Council had merely referred, in the contested regulation, to the fact that the French authorities had not yet reached a final decision, and that an anti-dumping investigation could not prejudice the outcome of competition proceedings under Articles 85 and 86 of the Treaty. The Court ruled that: (21)

"None of those statements shows that the Community institutions actually considered whether Péchiney itself contributed, by its refusal to sell, to the injury suffered and established that the injury on which they based their conclusions did not derive from the factors mentioned by Extramet. They did not therefore follow the proper procedure in determining the injury."

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The judgment is of crucial importance for the relationship between anti-dumping policy and competition policy. It makes clear that the Community institutions must also examine the effect of anti-dumping action on competition within the Community. Advocate General Jacobs took the view that the effects on competition should be examined in an anti-dumping proceeding, not only in assessing injury but also where the Community interest in taking action is considered. (22)

III.C. Gao Yao (23)

That case was the last in which the Court of Justice delivered a judgment in a direct action by a company against an anti-dumping regulation, before jurisdiction to hear such cases was transferred to the Court of First Instance. (24) Gao Yao (Hong Kong) Hua Fa Industrial Co. Ltd, a company registered in Hong Kong, brought an action for annulment against Council Regulation (EEC) No 3433/91 of 25 November 1991 imposing a definitive anti-dumping duty on imports of gas-fuelled, non-refillable pocket flint lighters originating in Japan, the People's Republic of China, the Republic of Korea and Thailand and definitively collecting the provisional anti-dumping duty. (25) The applicant had acted in the anti-dumping investigation on behalf of Gao Yao Hua Fa Industrial (Guandong, China), of which it was a sales office. It had argued that all the lighters manufactured by Gao Yao China and sold by Gao Yao Hong Kong were exported from Hong Kong, a country with a market economy. The normal value should therefore be calculated on the basis of Hong Kong domestic prices, and not, as was done, by applying the analogue country test (in the present case Thailand was chosen as the analogue country).

The Council again argued that the action was inadmissible. It characterized Gao Yao as a joint venture, and stated that this was a case where the country used as a sales platform (Hong Kong) was not concerned by the investigation or by the contested regulation. The Commission, in support of the Council's objection, took the view that the applicant's involvement in the investigation was of no relevance, because the Commission was not required to check its legal identity in order to collect information from it. The applicant was not directly and individually concerned in the investigation. The determination of a single anti-dumping duty for State-trading countries has the consequence that only the State or the State agency responsible for exporting the product in question is directly and individually concerned by anti-dumping measures.

The Court agreed with the Council and the Commission. (26) It held that the applicant was not concerned by the preliminary measures, since it was a company established in Hong Kong on which anti-dumping duties were not imposed by the Community and which was not the target of the investigation. Moreover, the applicant intervened merely as a channel of transmission in Hong Kong set up to facilitate correspondence between the Commission and Gao Yao China.

It is submitted that the Court's ruling is not convincing. The Court departed from the Opinion of Advocate General Lenz, who took the view that it appeared "unquestionably from the Court's case-law that the Council's approach is wrong". (27) The Advocate General argued that Gao Yao China and Gao Yao Hong Kong were one economic entity, and that they were both affected by the contested regulation.

One indeed fails to see how a company which actually exports to the Community the product subject to an anti-dumping duty is not individually concerned by the relevant regulation, in the light of the existing case-law which grants standing to manufacturing *and* exporting companies.

On the substance, the Advocate General concluded that the action was well-founded in that there had been an infringement of the applicant's right to a fair hearing: it was not given the opportunity to state its views on the issue of trans-shipment through Hong Kong and on the application of Article 2(6) of the basic regulation. (28) It is unfortunate that the Court did not reach the stage of an examination of the substance of the applicant's claims.

III.D. Sinochem (29)

In 1982 the Council imposed definitive anti-dumping duties on imports of oxalic acid from China. (30) In 1987 the Commission initiated a review of those duties, concluded by Commission Decision 88/623/EEC accepting undertakings. (31) The undertaking was given by Sinochem Beijing; the Community institutions viewed that undertaking as covering all exports of oxalic acid from China. In 1990 the Commission received a complaint from DAVSA, again seeking a review. It sent a questionnaire to known exporters (China National Medicine and Health Products Import/Export Corporation and Sinochem Beijing), with a letter informing those exporters that, if they did not provide the information requested, the Commission could base its decision on the "facts available". (32) The former exporter never replied, and Sinochem Beijing informed the Commission that it had not failed to comply with its 1988 undertaking and that, following reform of the Chinese foreign trade system, there were many Chinese exporters that had been independent of Sinochem since 1988, some of which might have exported oxalic acid to the Community at prices below the undertaking price. The Commission subsequently contacted those exporters, but they did not reply to the questionnaire. Only Sinochem replied, but the Commission considered its answers to be very incomplete, and informed Sinochem of its intention of basing its findings on the facts available. Sinochem did not reply.

On 29 May 1991 the Commission imposed provisional duties. (33) Those duties of 20.3% were calculated on the basis of the facts available, *i.e.* the data given in the complaint. On 8 July 1991 Sinochem (Heilongjiang) requested a hearing, which took place on 4 September 1991. The Commission however maintained its position that Sinochem had failed to cooperate. On 25 November 1991 the Council adopted the regulation imposing definitive duties. (34) Sinochem

Heilongjiang then brought an action for the annulment of that regulation.

Again the admissibility was contested. The Commission and the Council advanced two pleas of inadmissibility. The first was that the applicant lacked legal personality, and was only a local branch of Sinochem Beijing. The applicant replied that the Sinochem group had been reorganized as a series of independent companies operating at the provincial level, and that it was an independent exporter. The Court of First Instance accepted the documents submitted by the applicant, and held that, even on assumption that it did not have legal personality under a new Chinese statute: (35)

"it is nevertheless clear that the applicant is a legal person within the meaning of Article 173 of the Treaty since it has been treated as an independent legal entity by the Community institutions during the administrative proceeding. Thus, the Commission corresponded with the applicant extensively and accepted it as an interlocutor at the hearing. That being so, the Council and the Commission cannot maintain that, in the judicial proceedings following the administrative procedure, the applicant is not an independent legal person".

That ruling stands in sharp contrast with the approach of the Court of Justice in *Gao Yao*. It is submitted that *Sinochem* is more persuasive.

In its second plea of inadmissibility the Council argued that the contested regulation was not of individual concern to Sinochem. It took the view that, since a single duty for China as a whole was imposed in the contested regulation, the only entity individually concerned was the State itself or the State bodies or undertakings responsible for exporting the product in question. Even if the applicant were a State organization, it still would not be individually concerned since, by its own admission, it is only a trading company which exports products manufactured by other companies.

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The Court did not accept that plea either. It established that the applicant was deeply involved in the preliminary investigations, and that the Commission received and evaluated its information and arguments. Relying on *Extramet*, (36) the Court decided that the fact that the applicant was the only Chinese undertaking to have participated in the investigation was a factor "which differentiates it, as regards the measure in which the investigation culminated, from all other traders". (37) It would thus seem that the Court applies the test proposed by Advocate General Jacobs in *Extramet*, namely that all undertakings having participated in the investigation have standing. (38) It may be noted that commentators generally agree that in *Extramet* the Court of Justice did not confirm that test. (39)

On the substance, the Court did not accept Sinochem's argument that it was entitled to an individual determination of the anti-dumping margin and duties, based on its own export sales. The Court noted that the applicant's exports constituted only a small proportion of total Chinese exports, and were therefore not representative. The imposition of an individual duty could not be contemplated owing to the risk of circumvention. The issue of individual treatment is however more extensively discussed in the *Climax* judgment, discussed in the next section.

The *Sinochem* judgment contains another interesting passage. One of the issues was the exact definition of the Community industry in the context of findings of injury. The basic regulation indeed provides that: (40)

"The term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like product or to those of them whose collective output of

the product constitutes a major proportion of the total Community production ...".

That issue is obviously of broader interest. The Commission and the Council argued that those terms should be interpreted, not as referring to more than 50 % of the relevant Community industry, but that more than 25 % was sufficient. That means that in their view anti-dumping action can be taken even if only one quarter of the Community industry suffers injury (and, as the above urea decision shows, that does not imply that the Community industry has lost market share). In terms of the rationale for anti-dumping measures, and its inherently janus-faced nature, that conclusion is astonishing. What is even more astonishing is that the Court of First Instance, in one short and terse sentence as short and terse, confirms that interpretation. (41) No reasoning whatsoever is adduced in support of that ruling, which is clearly a vital issue for the whole of the Community's anti-dumping policy.

Perhaps the Court was influenced by the current version of the basic regulation, which was not however applicable at the material time. Article 4(1) of that regulation contains, as regards the terms major proportion, a cross-reference to Article 5(4), on the initiation of complaints, which provides, in rather confusing language:

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"... The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25% of total production of the like product produced by the Community industry".

That provision substantially reproduces Article 5(4) of the Anti-dumping Code. However, with respect to injury the Code does not cross-refer to that provision. Article 4(1) merely refers to domestic producers whose collective output constitutes a major proportion of the total domestic production.

III.E. Climax Paper Converters (42)

Climax is the latest, and perhaps most interesting judgment on dumping from China. It was given on an application for the annulment of Council Regulation (EC) No 3664/93 of 22 December 1993 imposing a definitive anti-dumping duty on imports into the Community of photo albums in bookbound form originating in the People's Republic of China and collecting definitively the provisional anti-dumping duty. (43) The applicant, Climax Paper Converters Ltd, is a company incorporated under Hong Kong law which exports to the Community photo albums in bookbound form manufactured in the district of Baoan, China, in production plants established in agreement with the Chinese authorities. The case therefore again involved a Hong Kong - China joint venture. Climax is the main Chinese exporter of photo albums to the Community. The investigation established that its export share was 62%, and Climax argued in the proceedings that that was a mere estimate which was actually too low.

As in *Gao Yao* and *Sinochem* the Council raised the point of admissibility. It again argued that, since a single duty for China as a whole was imposed in the contested regulation, the only entity directly and individually concerned was the State itself or, possibly, a State organization or company responsible for all, or at least a large majority of, exports in the sector in question. The Court did no

accept those arguments. It pointed out that: (44)

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1. the major part of the dumping practices were alleged to have been carried out by the applicant;
2. the dumping margin was partly established on the basis of the applicant's exports;
3. the applicant was concerned by the preparatory measures: the institutions based themselves on the information supplied by the applicant, which had received a questionnaire, and which was the only exporter to have cooperated in the investigation.

That decision on standing is certainly to be welcomed. The restrictive approach by the Court of Justice in *Gao Yao* is not confirmed and, taking also into account the Court of First Instance's ruling in *Sinochem*, it would appear that that Court is prepared to hear cases involving China in much the same way as other anti-dumping cases, relating to imports from market economy countries.

On the substance Climax' main charge concerned the individual treatment issue. In order to understand that charge one should bear in mind the method which the Commission had employed in its investigation. As noted above, Climax exported 68% of Chinese photo albums included in the investigation. It was the only exporter to cooperate, and accordingly, the dumping margin was calculated on the basis of its export prices. That was done in the following way: Climax' average export prices revealed dumping of 11.5%, but that figure was only partly used to calculate the dumping margin, since for the remaining 32% exports the Commission had to base itself on the facts available. For those exports the dumping margin, of 32.3%, was calculated on the basis of the lowest prices at which Climax exported photo albums to the Community, which were considered to be the relevant facts available. (45) The average dumping margin, ultimately applied to all exports, was 18.6%.

The respective regulations also pointed out that the only way in which individual treatment could be given to exporters in non-market economy countries was by taking account of their individual export prices, but that that method would tend to give rise to distorted, and therefore inappropriate, individual results. In the case of China there was said to be the extreme difficulty of establishing whether a company is really independent of the State. Individual treatment might offer a State the opportunity to circumvent anti-dumping measures by channelling exports through the exporter with the lowest duty.

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Climax argued that the policy of refusing individual treatment was contrary to the letter and the spirit of the basic regulation. (46) Secondly, it maintained that even in the context of that policy the Commission and the Council ought to have granted it individual treatment. It observed that in previous cases concerning products originating in China the policy was applied more fairly. In that respect it referred to two cases, in which individual treatment was granted: polyester yarns, involving a joint venture formed by Chinese and Hong Kong partners, (47) and video tapes, involving joint-venture companies with foreign investment. (48) The applicant further argued that it acted wholly independently from the Chinese State, in that it was entirely free to export goods, to establish its export prices and to transfer its profits to its shareholders. In any event, in the applicant's view, the Community institutions should prove and not merely assume State control.

The Council argued that the basic regulation does not require individual treatment. With regard to

exports from non-market economy countries the imposition of a single duty for the whole of the country was the most appropriate method. The question of an exporter's independence was not the most important factor to be taken into account. An even more important question was the power of the State to regulate foreign trade and to amend the applicable rules.

In that respect the Council advanced some extraordinary arguments. It took the view that the Chinese State can at any moment exercise its control over all economic operators in the People's Republic of China by changing its export policy and that it can direct exports through certain companies. Although State control in the People's Republic of China has lessened somewhat and Chinese exporting companies currently enjoy a degree of independence, the situation of China could not be compared to that of a market economy country, in which totally independent companies exist. In particular: (49)

"The fundamental difference results from the existence in the People's Republic of China of secret laws which are not published, to which foreigners have no access, and which deal in particular with foreign economic relations and foreign trade".

The Council also added that the Community institutions have become more restrictive on the issue of individual treatment. At the hearing the Commission explained that originally it had probably been rather naive as to the nature of the situation in China.

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Perhaps a few comments before looking at the Court's analysis of the issues. It is submitted that the concept of "secret laws" is a *contradictio in terminis*. More important, however, is that the Council's and the Commission's allegations raise a fundamental issue: is the current Chinese economy really that different from market economies, and is there really still extensive State control, or are the institutions basing themselves on conceptions which are perhaps partly nurtured by cultural differences between Asia and Europe? The allegations echo accusations which have been (and are still) (50) regularly made against Japan, where it is also often alleged, particularly in the United States, that the Japanese economy is closed, not so much by formal barriers, but by collusion between industry and government. In any event, the reference to secret laws puts Chinese exporters claiming individual treatment in something of a checkmate position: it is virtually impossible to prove that there are no such secret laws, because that would amount to a *probatio diabolica* (proof of a negative).

The Court held that there is no provision in the basic regulation which prohibits the imposition of a single anti-dumping duty for State-trading countries. It is true that Article 13(2) of the basic regulation provides that anti-dumping regulations shall indicate *inter alia* the name of the supplier, but it adds the words "if practicable". (51) The Court considered that the institutions did not wrongly interpret those terms: (52)

"The fact is that it is not practicable to indicate the name of each supplier if, in order to avoid the risk of circumventing anti-dumping duties, it is necessary to impose a single duty for an entire country. That is particularly so where, in the case of a State-trading country, the Community institutions have examined the situation of the exporters concerned and are not convinced that those exporters are acting independently of the State".

Nor did the Court consider that the disputed policy was contrary to the purpose and spirit of the basic regulation.

The next step in the Court's reasoning was to examine whether in the photo albums case the Community institutions should have granted individual treatment to the applicant. After an extensive examination of the links between the Chinese authorities, the Chinese company and the Hong Kong company the Court concluded "that the relationship between the applicant and the Chinese State must be characterized as rather vague and confused ...". (53) It followed that the applicant had not shown that it was actually independent of the influence of the Chinese authorities.

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It is to be welcomed that the Court did not reject Climax' argument on the basis of the general reasoning advanced by the Council, namely the existence of secret laws and the government's control over the economy. Instead, the Court focuses on the particular circumstances of the case for accepting non-individual treatment. That means that in future investigations the institutions will have to decide on a case-by-case basis. One must however also note that the burden of proof of independence rests with the applicant.

Of course, individual treatment in the sense described above is only partial. As long as China is characterized as a non-market economy country the normal value part of the equation normal value - export prices will continue to be calculated on the basis of prices in an analogue country with a market economy. It is to that fundamental issue that the next section turns.

IV. The non-market economy issue

IV.A. Origins

Article 2(7) of the basic regulation provides that in the case of imports from non-market economy countries, and, in particular, those to which Regulation No 519/94 applies, (54) normal value shall be calculated in a market economy country. The legal origin of that provision, incorporating the so-called reference or analogue country test, lies in a Note *ad* Article VI(1) of the GATT, which provides (at paragraph 2):

"It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability ..., and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate". (55)

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It is to be emphasized that the Note speaks of countries with a (substantially) *complete* trade monopoly and with *comprehensive* price-fixing, and that a *strict* comparison with domestic prices *may* not always be appropriate. Yet this provision serves a basis for excluding, in the Community's anti-dumping policy, a range of countries from the application of the standard normal value rules.

IV.B. Ramifications

The ramifications of the analogue country test could hardly be underestimated. They stem from what a commentator has called "the inherent unsuitability of the anti-dumping mechanism itself as applied to non-market economies". (56) The inherent problems in anti-dumping generally of comparing prices on different markets are compounded in the case of non-market economies: How to select an analogue market economy country? What is the basis for the analogy: should it be the level of development of the countries concerned, or the respective production processes, or the comparability of the products, or the comparability of the respective industries? What if the non-market economy country has a comparative advantage, for example due to privileged access to raw materials? How to obtain the cooperation by producers in an analogue country? And there are many more questions.

The possible ramifications of the analogue country test are illustrated by glancing through the Commission's most recent report on the Community's anti-dumping policy, concerning 1995. (57) Looking at the 1995 cases involving China in which provisional anti-dumping measures were imposed one notices that in 3 out of 6 cases the USA was chosen as an analogue country, and Japan was selected in one other case. In the two remaining cases Thailand and Korea were chosen. It is clear at face value that countries such as the United States and Japan are not at a similar level of development as China, and that to take the domestic prices in those countries as a benchmark for the normal value in China might be somewhat artificial.

IV.C. Lawfulness?

The practice of calculating normal value on the basis of prices in an analogue country with a market economy is based, as explained above, on a Note *ad* Article VI of the GATT. It is arguable that China no longer corresponds to the description of a non-market economy country in that Note. However, the Community's basic regulation does not itself define non-market economy countries, and the corresponding provisions apply to China by virtue of an express reference to the general regulation on imports from China. (58) The conclusion is thus that under the current version of the basic regulation it is not possible to defend the position that China no longer comes within the non-market economy category.

A number of issues are however looming behind what may seem, at least *prima facie*, an unavoidable conclusion. The GATT is binding on the Community. In principle, therefore, the Community is required to respect the GATT rules, but the questions which arise are (1) whether such respect is also required in the case of imports from China, which is not yet a GATT/WTO member and (2) whether the Community could be compelled to such respect. Those questions are treated here in reverse order, because the answer to the second may partly determine the answer to the first.

Since China is not yet a GATT/WTO member it cannot itself invoke the provisions of the GATT against the Community. (59) Chinese exporters suffering from anti-dumping action, or the importers of their products into the Community, could however make an attempt to rely on the GATT in court proceedings against anti-dumping duties. In contrast with exporters importers do not as a rule have standing to bring annulment actions against anti-dumping regulations directly before the Court of First Instance, as was noted above, (60) but they are able to contest the validity of such regulations in proceedings before the competent domestic courts in much the same way as in a direct action. (61) That brings up the question of the effect of the GATT in European Community law. (62) Up to now, the European Court of Justice has consistently held that the GATT does not have direct effect, and that it can therefore not be relied upon, neither in direct proceedings nor on a preliminary reference. (63) However, the Court has not excluded all types of internal effect. It is clear that Community legal instruments, where they are based on the GATT rules, have to be interpreted consistently with the

General Agreement. The basic anti-dumping regulation is no doubt such an instrument, based as it is on Article VI of the GATT and on the Anti-dumping Code. It should therefore be interpreted in the light of and in conformity with the GATT provisions on anti-dumping. In the case of the characterization of China as a non-market economy country that may not be of much avail: as noted above the basic regulation is clear on the point of such characterization, and even if it is not in that respect in conformity with the GATT the tool of consistent interpretation is of no use because it can only be employed where provisions are open to interpretation. However, that is not the end of the story. The Court has gone even further in giving effect to GATT. In *Nakajima*, (64) an anti-dumping case, it decided that, since the basic regulation was adopted in implementation of the GATT, the legality of that regulation could be reviewed on the basis of GATT. That ruling was confirmed in the banana case. (65) Review of legality obviously goes further than consistent interpretation. For the present issue the application of such review would mean that, if the characterization of China as a non-market economy country were not in conformity with the GATT, the rules on calculating normal value for products originating in market economy countries would also have to be applied in cases where dumping from China is alleged.

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But China is not yet a GATT member. That basic fact led Advocate General Lenz to conclude, in his Opinion in *Gao Yao*, (66) that in cases involving dumping from China exporters cannot rely in court proceedings on the GATT rules. Again that seems an unescapable conclusion, *prima facie*. There are none the less two lines of argument which could be conjectured in an attempt to overcome also that hurdle.

The first is that the above review of legality, including the test of GATT consistency, is possible in all cases where the basic regulation is applied, including those covering imports from non-members of the GATT. The basis for that argument could be that the basic regulation is one single legal instrument, adopted so as to give effect to GATT rules, and that it should therefore comply with those rules, in all cases in which it is applied. To bring the argument one step further: if the Community institutions seek to derogate from GATT rules in anti-dumping cases involving imports from China, then there should be a special anti-dumping regulation for imports from China. The argument could also be considered from a different angle: Community importers of dumped products (and it is they who pay the duties) could legitimately expect that the basic regulation complies with the GATT, in view of the Court's case-law and in view of the fact that the basic regulation is expressly based on GATT.

The second line of argument picks up a point just mentioned: are the Community institutions entitled to derogate from GATT rules in anti-dumping cases involving China? Could there be a special anti-dumping regulation for imports from China? Is it not open to debate whether the GATT rules on anti-dumping, which are essentially aimed at legally circumscribing recourse to anti-dumping by GATT members, have to be applied by those members in all cases, and not just in cases involving imports from other GATT members?

Of course, the straightest route towards invoking GATT rules in anti-dumping cases involving China is for that country to become a GATT member. However, it appears that there is pressure in the accession negotiations for the adoption of a special clause allowing the non-market economy anti-dumping rules to continue to be applied. (67)

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V. No conclusions

In a field where there are many weeds, and where there is no agreement between observers and the garden man as to what are weeds and what are flowers, it is not possible to draw firm conclusions on the basis of a limited analysis in the nature of the present paper. One word none the less on the crucial issue of China's characterization as a non-market economy country. It is of vital importance in the context of China's accession to the WTO. The current rate of utilisation of anti-dumping against China in the Community (and elsewhere) demonstrate that the developed world regards the anti-dumping instrument as the main instrument of protection against imports from China. Its potential should not be underestimated, and neither should its impact on traders in the Community. In recent months the trading sector has voiced criticism in a number of cases involving China. (68) The solution on anti-dumping in China's accession negotiations will obviously be of enormous impact on the terms of trade with China.

Endnotes

(*) This paper has been previously presented at the 'Conference on the Legal Aspects of Trade with China' in Ghent, 16-17 December 1996. All views personal.

(1) Council Regulation (EC) No 477/95 of 16 January 1995 amending the definitive anti-dumping measures applying to imports into the Community of urea originating in the former USSR and terminating the anti-dumping measures applying to imports into the Community of urea originating in the former Czechoslovakia, OJ 1995 L 49, p. 1.

(2) Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ 1996 L 56, p. 1.

(3) For an earlier analysis see E. Vermulst and F. Graafsma, "A Decade of European Community Anti-Dumping Law and Practice Applicable to Imports from China", *Journal of World Trade* (1992), No 3, pp. 5-60.

(4) Council Regulation (EEC) No 725/89 of 20 March 1989 imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports, OJ 1989 L 79, p. 24.

(5) Case C-16/90 *Nölle* [1991] ECR I-5163.

(6) Article 2(5) of the former version of the basic regulation, Council Regulation (EEC) No 2423/88, OJ 1988 L 209, p. 1. The language was slightly changed in the current version of the basic regulation (see note 4 above): "An appropriate market economy third country shall be selected in a not unreasonable manner ..." (Art. 2(7)).

(7) At paragraphs 10 to 13 of the judgment.

(7a) See the judgment in Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport v Commission and Council* [1990] ECR I-2945.

(7b) Judgments in Case 240/84 *NTN Toyo Bearing Company Limited and Others v Council* [1987]

ECR 1809 and Case 258/84 *Nippon Seiko KK v Council* [1987] ECR 1923.

(8) At paragraph 34.

(9) Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko v Council*, judgment of 2 May 1995.

(10) Case T-167/94 *Nölle v Council and Commission* [1995] ECR II-2589. See also Case T-168/94 *Blackspur and Others v Council and Commission* [1995] ECR II-2627.

(11) Case C-122/86 *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon and Others v Commission and Council* [1989] ECR 3959.

(12) See paragraph 51 of the judgment.

(13) Case 113/77 *NTN Toyo Bearing Company v Council* [1979] ECR 1185, paragraph 21.

(14) Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501 (admissibility); [1992] ECR I-3813 (substance).

(15) OJ 1989 L 271, p. 1.

(16) Joined Cases 239/82 and 275/82 *Allied Corporation v Commission* [1984] ECR 1005, paragraph 12.

(17) Case 307/81 *Alusuisse v Council and Commission* [1982] ECR 3463, paragraph 9.

(18) See paragraph 68 of the Opinion (first judgment cited above).

(19) Case 25/62 *Plaumann v Commission* [1963] ECR 95.

(20) See paragraph 17 of the first judgment.

(21) At paragraph 19 of the judgment.

(22) On the Community interest see the new provisions in Article 21 of the current version of the basic regulation.

(23) Case C-75/92 *Gao Yao v Council* [1994] ECR I-3141.

(24) See Council Decision 94/149 of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJ 1994 L 66, p. 29.

(25) OJ 1991 L 326, p. 1.0.

(26) See paragraphs 26 to 32 of the judgment.

(27) See paragraph 37 of the Opinion.

(28) See paragraphs 43 to 55 of the Opinion. Article 2(6) provided: "Where a product is not imported directly from the country of origin but is exported to the Community from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the

domestic market of either the country of export or the country of origin. The latter basis might be appropriate, *inter alia*, where the product is merely transshipped through the country of export, where such products are not produced in the country of export or where no comparable price for it exists in the country of export" (compare with Article 1(3) of the current version of the basic regulation).

(29) Case T-161/94 *Sinochem Heilongjiang v Council*, judgment of 11 July 1996.

(30) Council Regulation (EEC) No 1283/82 of 17 May 1982, OJ 1982 L 148, p. 37.

(31) OJ 1988 L 343, p. 34.

(32) See Article 7(7)(b) of the basic regulation, which provided that: "In cases in which any interested party or any third country refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation, preliminary or final findings, affirmative or negative, may be made on the basis of the facts available. ..." (see Article 18 of the current version of the basic regulation, which is more detailed on non-cooperation).

(33) Commission Regulation (EEC) No 1472/91, OJ 1991 L 38, p. 62.

(34) Council Regulation (EEC) No 3434/91 imposing a definitive anti-dumping duty on imports of oxalic acid originating in India or the People's Republic of China (OJ 1991 L 326, p. 6).

(35) See paragraph 34.

(36) Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501.

(37) See paragraph 48 of the judgment.

(38) See text at note 18 above.

(39) Cf. Advocate General Lenz in *Gao Yao*, cited above note 23, paragraph 40 of the Opinion.

(40) See Article 4(5) of Regulation 2423/88, cited above note 6.

(41) The Court states: "As the parties maintained at the hearing, the expression 'major proportion' should be interpreted not as a proportion of 50% or more, but rather as 25% or more" (paragraph 89).

(42) Case T-155/94, *Climax Paper Converters Ltd v Council*, judgment of 18 September 1996.

(43) OJ 1993 L 333, p. 67.

(44) See paragraphs 47 to 52.

(45) See note 32 above.

(46) Compare with the analysis by Advocate General VerLoren van Themaat in Joined Cases 239 and 275/82 *Allied Corporation v Commission* [1984] ECR 1005, at 1041-1042, where he argued that anti-dumping measures are intrinsically individual, with the exception however of cases involving non-market economy countries.

(47) See Commission Regulation (EEC) No 2904/91 of 27 September 1991 imposing a provisional anti-dumping duty on imports of certain polyester yarns (man-made staple fibres) originating in Taiwan, Indonesia, India, the People's Republic of China and Turkey and terminating the

anti-dumping proceeding in respect of imports of those yarns originating in the Republic of Korea (OJ 1991 L 267, p. 7).

(48) See Council Regulation (EEC) No 3091/91 of 21 October 1991 imposing a definitive anti-dumping duty on imports of video tapes in cassettes originating in the People's Republic of China and definitively collecting the provisional duty (OJ 1991 L 193, p. 2).

(49) See paragraph 84 of the judgment.

(50) See the US-Japan dispute on consumer photographic film and paper, currently submitted to a WTO Panel (WT/DS44, see <http://www.wto.org/wto/dispute/bulletin.htm>, p. 2).

(51) See Article 14(2) of the current version of the basic regulation, which refers to "if possible".

(52) See paragraph 94 of the judgment.

(53) See paragraph 106.

(54) Council Regulation (EC) No 519/94 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, OJ 1994 L 67, p. 1. That regulation contains the general rules on imports from *inter alia* China.

(55) See on that Note GATT, *Analytical Index*, 6th ed. (GATT, 1994), pp. 209-210; F.G. Jacobs, "Anti-dumping procedures with regard to imports from Eastern Europe", in M. Maresceau (ed), *The Political and Legal Framework of Trade Relations between the European Community and Eastern Europe* (Martinus Nijhoff 1989), pp. 294-297; M. Maresceau and E. Montaguti, "The relations between the European Union and Central and Eastern Europe: A Legal Appraisal", *CMLRev* (1995), at 1349.

(56) Jacobs, *op. cit.* note 55, at 305.

(57) Fourteenth Annual Report from the Commission to the European Parliament on the Community's Anti-dumping and Anti-subsidy Activities, COM(96) 146 final.

(58) See note 54 above.

(59) I leave aside here the issue whether it is possible for China to resume its original status as a GATT Contracting Party.

(60) See text at note 17 above.

(61) *Nölle* is an example.

(62) See P. Eeckhout, "The domestic legal status of the WTO Agreement - Interconnecting legal systems", *Common Market Law Review* (1997), pp. 11-58.

(63) See in particular Case C-280/93 *Germany v Council* (bananas) [1994] ECR I-4973, paragraphs 103 to 112.

(64) Case C-69/89 *Nakajima v Council* [1991] ECR I-2069.

(65) Cited above note 63.

(66) Cited above note 23, paragraph 73 of the Opinion.

(67) See L. Wang and E. Vermulst, "China and the WTO: A Negotiating History", *International Trade Law and Regulation* (1996), at 169.

(68) See *e.g.* *Agence Europe*, No 6868, 6 December 1996, p. 15; "Nederlandse groothandel hekelt dumpingbeleid EU", *De Telegraaf*, 27 November 1996, p. 25.

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