22 March 1990

EEC - REGULATION ON IMPORTS OF PARTS AND COMPONENTS

*Report by the Panel adopted on 16 May 1990**
(L/6657 - 37S/132)

I. INTRODUCTION

1.1 In a communication dated 29 July 1988 and circulated in document L/6381 Japan requested bilateral consultations with the EEC under Article XXIII:1 of the General Agreement on Tariffs and Trade (hereinafter referred to as "the General Agreement") regarding Council Regulation (EEC) No. 1761/81 of 22 June 1987[1] and measures taken by the EEC under this Regulation with respect to certain products produced or assembled in the EEC by companies related to Japanese companies. In a communication dated 6 October 1988 and circulated in document L/6410 Japan informed the CONTRACTING PARTIES that consultations on this matter had taken place between Japan and the EEC on 16 September 1988 but that these consultations had not led to a mutually satisfactory resolution. Japan, therefore, requested the Council to establish a panel to examine this matter under Article XXIII of the General Agreement.

1.2 At its meeting on 19 and 20 October 1988 the Council agreed to establish a panel in the dispute referred to the CONTRACTING PARTIES by Japan in document L/6410 and authorized the Chairman of the Council to draw up the terms of reference of this Panel and to designate its Chairman and members in consultation with the parties to the dispute (C/M/226). At the same meeting, the delegations of Australia, Canada, Hong Kong, Korea, Mexico, Thailand, Singapore and the United States reserved their right to make a submission to the Panel.

1.3 In document C/165, dated 9 May 1989, the Chairman of the Council informed the CONTRACTING PARTIES of the terms of reference of the Panel:

> "To examine, in the light of the relevant provisions of the General Agreement, the matter referred to the CONTRACTING PARTIES by Japan in document L/6410 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2 of the General Agreement."

These terms of reference were accompanied by the following understanding between the parties to the dispute:

> "It is the understanding of the parties to the dispute that the standard terms of reference do not preclude any party from arguing before the Panel that Article VI of the GATT should be interpreted in light of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (BISD 265/171), nor do they preclude other parties from arguing differently."

In the same document the Chairman of the Council informed the CONTRACTING PARTIES that the composition of the Panel was as follows:

Chairman: Mr. Joseph A. Greenwald

Members: Mr. Timothy Groser
Mr. Christopher Thomas

[1]Official Journal of the European Communities (O.J.) 1987, No. L 167 (26 June 1987), p.9. This Regulation entered into force on 27 June 1987.

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1.4 The Panel met with the parties to the dispute on 27 and 28 July and on 19 and 20 October 1989. The Panel received written submissions from the following interested contracting parties: Australia, Canada, Hong Kong, Korea, Singapore and the United States. The Panel heard the delegations of Australia, Hong Kong and Korea at its meeting in July 1989 and it heard the delegation of Canada at its meeting in October 1989. The Panel submitted its Report to the parties to the dispute on 2 March 1990.

II. Factual aspects

2.1 The matter referred to the CONTRACTING PARTIES by Japan in document L/6410 concerned Council Regulation (EEC) No. 1761/87 of 22 June 1987 and its application. This Regulation amended Council Regulation (EEC) No. 2176/84 on protection against dumped or subsidized imports from countries not members of the European Economic Community.[1] This amendment consisted of the addition of a new paragraph 10 to Article 13 of this Regulation.[2] On 11 July 1988 the EEC Council adopted Regulation (EEC) No. 2423/88[3] which replaced Council Regulation (EEC) No. 2176/84, as amended. The provisions of Council Regulation (EEC) No. 1761/87 were incorporated into Regulation (EEC) No. 2423/88 in Article 13:10.[4]

2.2 The preamble of Council Regulation (EEC) No. 1761/87 contained a number of considerations explaining the background and objective of the amendment. Thus, the third recital of the preamble indicated that:

> "… experience gained from the implementation of Regulation (EEC) No. 2176/84 has shown that assembly in the Community of products whose importation in a finished state is subject to anti-dumping duty may give rise to certain difficulties".

According to the fourth recital, assembly or production in the EEC of such products was in particular considered likely to lead to circumvention of the anti-dumping duty where (i) the assembly or production was carried out by a party related or associated to any of the manufacturers whose exports of the like product were subject to an anti-dumping duty and (ii) the value of the parts or materials used in the assembly or production operation and originating in the country of origin of the product subject to an anti-dumping duty exceeded the value of all other parts or materials used. The preamble further stated that:

> "… in order to prevent circumvention, it is necessary to provide for the collection of an anti-dumping duty on products thus assembled or produced".

2.3 Article 13:10 of Council Regulation (EEC) No. 2423/88 provides that certain measures may be taken if the following conditions are met:

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

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[1] O.J. 1984, No. L 201 (30 July 1984), p.1.

[2] Article 13 of Council Regulation (EEC) No. 2176/84 and of its successor, Council Regulation (EEC) No. 2423/88 is entitled "General provisions on duties".

[3] O.J. 1988, No. L 209 (2 August 1988), p.1. This Regulation entered into force on 5 August 1988.

[4] O.J. 1988, No. L 209 (2 August 1988), p.13.

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- the assembly or production operation was started or substantially increased after the opening of the anti-dumping investigation;

- the value of parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty exceeds the value of all parts or materials used by at least 50 per cent.

  In applying this provision, account shall be taken of the circumstances of each case and, inter alia, of the variable costs incurred in the assembly or production operation and of the research and development carried out and the technology applied within the Community".

If the above-mentioned conditions are met, Article 13:10(a) provides that:

> "Definitive anti-dumping duties may be imposed, by way of derogation from the second sentence of paragraph 4(a), on products that are introduced into the commerce of the Community after having been assembled or produced in the Community ..."

2.4 Article 13:10(c) governs the determination of the rate of the duty which, under Article 13:10(a), may be imposed on products assembled or produced in the EEC:

> "The rate of the anti-dumping duty shall be that applicable to the manufacturer in the country of origin of the like product subject to an anti-dumping duty to which the party in the Community carrying out the assembly or production is related or associated. The amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete product on the c.i.f. value of the parts or materials imported; it shall not exceed that required to prevent circumvention of the anti-dumping duty."

2.5 The last sub-paragraph of Article 13:10(a) provides that, if duties are applied under this provision on products produced or assembled in the EEC,

> "...the Council shall, at the same time, decide that parts or materials suitable for use in the assembly or production of such products and originating in the country of exportation of the product subject to the anti-dumping duty can only be considered to be in free circulation insofar as they will not be used in an assembly or production operation as specified in the first sub-paragraph."

2.6 Regarding the procedure for the "introduction into the commerce" of the EEC of the products subject to duties under Article 13:10(a), Article 13:10(b) provides that:

> "Products thus assembled or produced shall be declared to the competent authorities before leaving the assembly or production plant for their introduction into the commerce of the Community. For the purposes of levying an anti-dumping duty, this declaration shall be considered to be equivalent to the declaration referred to in Article 2 of Directive 79/695/EEC."

2.7 Finally, Article 13:10(d) provides that:

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

2.8 During the period June 1987-October 1988 the EEC opened investigations under Article 13:10 with respect to the assembly or production in the EEC of five products: electronic typewriters, electronic weighing scales, hydraulic excavators, plain paper photocopiers and ball bearings. Information on

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these investigations is given in Annex I. Investigations under Article 13:10 were opened in December 1988 with respect to serial impact dot matrix printers and in July 1989 with respect to video cassette recorders.

III. MAIN ARGUMENTS

General

3.1 Japan considered that Article 13:10 of Council Regulation (EEC) No. 2423/88 and the measures taken by the EEC pursuant to this provision (imposition of duties on products assembled or produced in the EEC and acceptance of undertakings) were inconsistent with Article VI and violated Articles I, II, III and X of the General Agreement. Article 13:10 and the measures taken thereunder could not be justified under Article XX(d) of the General Agreement. Consequently, the enactment of this provision of the EEC anti-dumping Regulation and the application of measures pursuant to this provision constituted a prima facie nullification and impairment of benefits accruing to Japan under the General Agreement. Japan requested the Panel to recommend to the Council that it request the EEC to withdraw Article 13:10 of the Council Regulation (EEC) No. 2324/88 and to revoke the measures taken under this provision.

3.2 The EEC considered that duties applied pursuant to Article 13:10 of Council Regulation (EEC) No. 2423/88 were not inconsistent with Article III of the General Agreement because such duties were not internal charges within the meaning of Article III. These duties were also not inconsistent with Article X of the General Agreement because the provisions under which they were applied were fully transparent. Insofar as duties imposed under Article 13:10 were inconsistent with Articles I, II and VI of the General Agreement, such inconsistency was justifiable under Article XX(d).

Terms of Reference of the Panel

3.3 Japan was of the view that the Panel should give due consideration to the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("the Anti-Dumping Code") which laid down rules for the interpretation and implementation of Article VI of the General Agreement and to which both Japan and the EEC were Parties. Japan explained the necessity to take into consideration the provisions of the Anti-Dumping Code by pointing out that the EEC had notified the provisions now appearing in Article 13:10 of Council Regulation (EEC) No. 2423/88 to the Committee on Anti-Dumping Practices as an amendment to its anti-dumping legislation.

3.4 The EEC agreed that Article VI of the General Agreement had to be interpreted in light of the provisions of the Anti-Dumping Code. As one of the participants in the negotiations which had led to the conclusion of the first Anti-Dumping Code in 1967 and to its revision in 1979, the EEC attached great importance to the observance of provisions of the Code by all Parties to the Code. However, the question before the Panel was whether the provisions of Article 13:10 of Council Regulation (EEC) No. 2423/88 and the measures taken pursuant to these provisions could be justified under Article XX(d) of the General Agreement. The question of circumvention of anti-dumping duties through assembly operations in an importing country had never been envisaged when the Anti-Dumping Code was drafted and was, consequently, not addressed in the Code.

General observations by the parties to the dispute

3.5 Japan noted that since the early 1980s there had been a sharp increase in the number of anti-dumping investigations opened by the EEC of imports from Japan. In applying its anti-dumping legislation, the EEC had developed new methodologies which, when applied to the structures and trading

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patterns of Japanese companies, created artificial dumping margins.[1] Japan reserved its rights to raise these and other aspects of the anti-dumping Regulation of the EEC before the appropriate GATT bodies.

3.6 Japan pointed out that since 1980 there had been a steady increase of Japanese direct investments in manufacturing operations in the EEC and in other countries. The increased direct investment in the EEC had been caused by a number of factors such as the necessity to locate production facilities closer to the markets where the production was sold, the appreciation of the yen, the wish to avoid trade restrictive measures such as those resulting from the arbitrary findings of dumping by the EEC authorities and the apprehension concerning the effects of the completion of the EEC's internal market. Direct Japanese investment in the EEC had in general been welcomed by host countries in the EEC because it had created local employment and led to increased local value added. This investment had also been the result of efforts by Japan and the EEC to promote industrial co-operation.

3.7 Japan made the following observations on the provisions in Article 13:10 of Council Regulation (EEC) No. 2423/88. The text of this Article was brief and much was left to the interpretation of the provisions in this Article on a case-by-case basis. The "related or associated party" criterion in Article 13:10(a) meant that EEC producers were not subject to this provision even if they were engaged in assembly operations and used parts of Japanese origin.[2] Thus, this Article discriminated against affiliates of Japanese companies. The criterion of a "substantial increase" of assembly operations following the opening of an anti-dumping investigation implied that "circumvention" could be found even where the investment in the EEC had been made prior to the opening of the original anti-dumping investigation.[3] The third criterion in Article 13:10(a), relating to the value of parts used in the assembly process and originating in the country of export of the finished product in comparison with the value of all parts used, had turned out to be the most important factor in investigations under this Article.

3.8 Regarding the last sub-paragraph of Article 13:10(a), Japan considered that the effect of this provision was that imported parts, which would otherwise be in free circulation after having been customs cleared, were denied free circulation in the EEC and were considered to be introduced into the commerce of the EEC at the time when the assembled product left the factory in the EEC. Thus, these parts were treated as if the assembly plant were located in a free-trade zone. In reality, however, none of the factories subject to investigation under Article 13:10 had been located in free-trade zones and in all cases imported parts and components had been delivered to these factories after payment of normal customs duties. The procedure laid down in Article 13:10(b) for the collection of duties on products assembled or produced in the EEC was a completely new procedure which imposed serious administrative burdens on the companies involved. In this context, Article 13:10 used the concept of "introduced into the commerce" of the EEC in a different sense from the meaning of this concept in Article VI

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[1]Japan referred in this respect to the methodology used by the EEC in the comparison of normal values with export prices based on an asymmetrical deduction of costs, the determination of constructed values including unrealistic profits and the calculation of dumping margins based on a comparison between a weighted average of domestic prices with export prices established on a transaction-by-transaction basis.

[2]Japan pointed out in this context that in some cases the producers who had filed petitions for imposition of duties under Article 13:10 had included firms with EEC capital which were related to Japanese companies, e.g. Rank Xerox Ltd. in the case of the investigations of plain paper photocopiers. Council Regulation (EEC) No. 3205/88 of 17 October 1988 extending the anti-dumping duty imposed by Regulation (EEC) No. 535/87 to certain plain paper photocopiers assembled in the Community, O.J. 1988, No. L 284 (19 October 1988), p.37. Thus, even among "related parties" there was a certain discrimination based on the degree of Japanese ownership.

[3]See, e.g., Council Regulation (EEC) No. 3205/88 of 17 October 1988, ibid., pp.37-38, paragraph 11.

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of the General Agreement. Article VI referred to situations where products were "introduced into the commerce of another country", while Article 13:10 concerned the introduction into the commerce of the EEC of products manufactured in the EEC.

3.9 Regarding the provisions of Article 13:10(c) of Council Regulation (EEC) No. 2423/88 on the calculation of the rate of the duties on products assembled in the EEC, Japan considered that the formula used to calculate this rate discriminated against parts or materials imported from the country of export of the finished product subject to anti-dumping duties. Although the rate of these duties was determined on the basis of the anti-dumping duty applicable to exports of individual exporters, the duties were imposed not only on parts exported by those exporters but on all imported parts or materials from the country in question. Furthermore, Article 13:10 did not provide for the possibility of a decrease of the amount of duties to be paid in cases where a decrease occurred in the proportion of parts imported from the country of export of the finished product subject to anti-dumping duties.

3.10 With respect to the procedural provisions in Article 13:10, Japan pointed out that there was no reference to the contents and procedure for the acceptance of undertakings. Hence, there was no transparency. Moreover, this Article did not provide for the possibility of refunds and administrative reviews in cases where dumping margins had changed.

3.11 Japan pointed to the following specific aspects of the investigations carried out so far under Article 13:10 of Council Regulation (EEC) No. 2423/88. The investigations had been opened upon receipt of petitions from industries producing finished products rather than from industries producing parts of such finished products.[1] As shown by the questionnaire used by the EEC Commission in investigations under Article 13:10, such investigations focused not on whether dumping and injury occurred, but on the proportion of the value of parts used in the assembly process and originating in the country of export of the finished product subject to anti-dumping duties. In four of the six proceedings initiated so far, the investigation periods had included periods preceding the adoption of Council Regulation (EEC) No. 1761/87.[2] The EEC Commission had established weighted averages of the proportions of the value of imported parts and materials originating in Japan. As a result, duties could be imposed even where towards the end of the investigation period the value of parts used in the assembly process and originating in Japan represented less than 60 per cent of the total value of all parts used.

3.12 Japan noted that according to the explanation given by the EEC, the purpose of Article 13:10 of Council Regulation (EEC) No. 2423/88 was to prevent an exporter whose products were subject to anti-dumping duties when exported to the EEC, from "circumventing" or "evading" those duties by establishing an assembly plant within the EEC. However, this explanation was not sufficient because the term "circumvention" had not been defined by the EEC. The provisions of Article 13:10 deviated

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[1]Japan noted that, in the case of the investigation of plain paper photocopiers, one of the complainants included Rank Xerox, a company which produced finished products using parts imported from Japan and which was related to Fuji Xerox Co. Ltd. See Council Regulation (EEC) No. 3205/88, O.J. No. L 284 (19 October 1988), p.37, paragraph 8.

[2]The reference periods in these six investigations were as follows:

electronic typewriters:	1 January 1987-31 July 1987
electronic weighing scales:	1 January 1987-31 July 1987
hydraulic excavators:	1 January 1987-30 September 1987
plain paper photocopiers:	1 April 1987-31 January 1988
ball bearings:	1 December 1987-31 May 1988
serial impact dot matrix printers:	1 July 1988-31 December 1988

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from the normal framework for anti-dumping measures in that under these provisions regulatory measures could be taken with respect to foreign investment in the EEC and imports into the EEC of parts or components without any regard to whether or not there was dumping. That the objective of Article 13:10 was fundamentally different from the objective of normal anti-dumping measures was illustrated by the provision in the second sub-paragraph of Article 13:10(a) that, in considering the possible application of duties on products assembled within the EEC, account had to be taken, inter alia, of the variable costs incurred in the assembly operation, the research and development carried out and the technology applied within the EEC. Such factors were irrelevant to the question of whether dumping took place and indicated that this Article was being used for industrial policy purposes.

3.13 Japan also argued in this connection that Article 13:10 entailed discrimination between foreign-capitalized companies and domestic-capitalized companies whereas normal anti-dumping measures provided equal competitive conditions for domestic and foreign companies. Discrimination between producers of finished products in the EEC resulted from this provision because under Article 13:10 complainants were free to use imported parts while the defendants were not.[1] Moreover, in practice Article 13:10 served as an instrument to promote industries producing parts in the EEC. Although parts industries in Japan were well developed and internationally competitive, their exports to the EEC were restricted as a result of the measures taken under Article 13:10. This applied in particular in cases where proceedings under Article 13:10 led to the acceptance of undertakings which provided for an increase of the percentage of parts procured locally. Furthermore, manufacturers in the EEC related to Japanese companies often needed to transfer technology to local manufacturers of parts supplied by these manufacturers and this also helped to promote parts industries in the EEC.

3.14 Japan considered that the measures imposed under Article 13:10 of Council Regulation (EEC) No. 2423/88 imposed a very great burden on the companies subject to such measures. Firstly, the amount of the duties which had been imposed so far had been considerable.[2] Secondly, a company which wanted to avoid being subjected to an anti-circumvention duty or which wanted its offer of an undertaking to be accepted had to purchase at least 40 per cent of the value of all parts used in the production or assembly process from non-Japanese sources and had to increase the proportion of parts purchased from EEC sources. Thus, such a company would increase the proportion of parts procured locally even where this was not consistent with economic considerations. Given that the industries in the EEC producing mechanical and electronic parts were not as well developed as in Japan, such a company was faced with increased costs for the purchase of locally produced parts. It also had to transfer technology to local parts suppliers or run the risk of a deterioration of the quality of parts used in its production process and it had to cope with delay in the delivery of the locally procured parts. Thirdly, the investigation process under Article 13:10 also imposed a burden on the companies investigated, especially as to the information which had to be provided regarding the origin of parts and components used in the production process in the EEC.

3.15 Japan also considered that Article 13:10 of Council Regulation (EEC) No. 2423/88 entailed restrictions on trade in parts and components imported from Japan. The imposition of duties under this provision had substantially the same effect as in the case where such duties were imposed directly on the imports of parts and components. Furthermore, a decrease of parts imported from Japan would occur as a result of efforts of companies engaged in assembly operations in the EEC to increase the proportion of parts originating in other countries. In Japan parts and components were generally

[1]Japan pointed out in this respect that only foreign capitalized companies were defendants in proceedings under Article 13:10.

[2]In the case of electronic typewriters the duties per unit assembled in the EEC varied between 21,82 and 56,14 ECU; in the case of electronic weighing scales the duty imposed was 65,63 ECU per unit assembled, and in the case of plain paper photocopiers the duties varied between 28 and 225 ECU.

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produced by companies which were not producing the finished products. These companies had not been subject to the investigations in the EEC resulting in the imposition of definitive anti-dumping duties on imports of finished products or to subsequent investigations under Article 13:10. Nevertheless, measures taken under Article 13:10 resulted in a restriction on exports of parts and components of these companies without there being any opportunity for these companies to defend themselves. In this respect Japan pointed out that under Article 13:10 parts manufactured by companies other than those whose exports of finished products were subject to definitive anti-dumping duties were treated unfavourably in the calculation of whether the value of parts or materials used in the assembly process and originating in the country of export of the finished product subject to definitive anti-dumping duties exceeded the value of all other parts or materials by more than 50 per cent and in the determination of the amount of duties to be imposed.

3.16 Japan was of the view that there was a lack of transparency in the implementation of Article 13:10 which resulted from the fact that the EEC had not promulgated specific rules on important aspects of this provision such as the methodology for determining the country of origin of the parts or materials used in the assembly process and the contents and procedures for the acceptance of undertakings. The lack of clarity regarding the rules to determine the origin of parts or materials would lead Japanese companies engaged in production operations in the EEC to purchase at least 45 to 50 per cent of their parts from non-Japanese suppliers in order to ensure that they would attain the 40 per cent threshold. Furthermore, direct investment in the EEC concerning products not yet subject to anti-dumping duties when imported could be found to constitute "circumvention" when, following anti-dumping investigations on the imported finished products, the local production in the EEC was increased. This created an incentive for companies to increase the proportion of parts procured locally even before an anti-dumping duty investigation had been initiated. Thus, the uncertainty at the time when the investment was made regarding possible future measures under Article 13:10 effectively required such companies to raise the level of local content of their production operations.

3.17 The EEC provided the following explanation of the background of the adoption of the amendment now appearing in Article 13:10 of Council Regulation (EEC) No. 2423/88. In the mid-1980s the EEC had imposed anti-dumping duties on imports of certain products of Japanese origin. A common characteristic of these products was that they were technically sophisticated and produced and distributed by well-known Japanese multinational companies with large financial resources at their disposal. Following the imposition of these duties, the domestic industries concerned in the EEC had complained that the duties were ineffective because, despite the application of these duties, domestic producers were still compelled to compete with prices of the dumped products in the EEC which remained stationary or which in some cases even declined. Producers in the EEC had explained this situation by pointing to the fact that the cost of assembling the products in question by a "screwdriver" process was relatively low in relation to the value of these products; as a result, the exporters in question had chosen to export the parts of the finished products to the EEC or to third countries for subsequent assembly. These assembled products were then introduced into the commerce of the EEC, thereby circumventing the duties imposed on the finished products when imported directly from Japan. These views had been advanced in particular with respect to three products the imports of which had been subject to anti-dumping duties for some time (hydraulic excavators, electronic weighing scales and electronic typewriters) and with respect to plain paper photocopiers which had been the subject of an investigation opened in August 1985 and on which definitive anti-dumping duties had been imposed in February 1987. The EEC authorities had been aware of similar allegations by domestic producers in other countries, notably in Canada and the United States.

3.18 The EEC further noted that a Report of the Committee on External Economic Relations of the European Parliament, adopted on 3 July 1986, had recommended inter alia that anti-dumping duties be imposed on the component parts of finished products found to have been dumped in order to prevent circumvention of duties on imports of such products through the establishment of assembly facilities

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within the EEC.[1] In light of the views expressed by domestic producers and the European Parliament, the EEC Commission had examined the allegation that the anti-dumping measures applied by the EEC were being circumvented by producers who had started assembly operations in the EEC. This examination confirmed that there had been a considerable decline of imports of the finished products in question following the imposition of definitive anti-dumping duties. This decline of imports of the finished products had coincided with a dramatic increase of the imports of components of these products destined for assembly in the EEC by subsidiaries of the exporters of the products subject to anti-dumping duties. This increase of imports of components had been all the more striking because in most cases such components had not previously been imported into the EEC. In addition, the EEC authorities had found an increase, for most exporters from zero, in the volume of these finished products assembled in the EEC from the imported components. At the same time, press reports had suggested the likelihood of further increases of assembly operations in the EEC and of imports of relevant components. In some instances these reports had indicated that the main reason for the establishment of assembly plants in the EEC was to avoid the payment of anti-dumping duties. Finally, it had been found in the course of the examination by the EEC authorities that, contrary to what had been expected, no perceptible increase had occurred of the price of the finished products introduced into the commerce of the EEC and that, in certain instances, prices had been even lower than those established in the anti-dumping duty investigations which had led to the imposition of the anti-dumping duties. It had thus become evident that exporters who had been found to have dumped and thereby caused injury to domestic industries in the EEC were able to continue to sell the products in question in the EEC without taking account of the anti-dumping duties by merely transferring a limited part of the assembly process to the EEC.

3.19 The EEC provided the Panel with statistics on the value of plain paper photocopiers and electronic typewriters imported directly from Japan and the volume of these products assembled in the EEC by companies related to Japanese producers. These data, covering the period 1981-1988, showed that in these cases, as in a number of other cases, direct imports of the finished products from Japan had declined dramatically following the imposition of anti-dumping duties and that imports had been replaced progressively by sales of identical products assembled in the EEC and containing a preponderance of parts imported from Japan. The obvious result of the increase of this type of assembly operations had been the erosion of the payment of anti-dumping duties and, thus, of the guarantee which such payment provided concerning the costs and prices of the products concerned.

3.20 The EEC argued that the imposition of anti-dumping duties guaranteed a cost increase for the importer which was intended to eliminate the injurious effect of the dumping. Without this guarantee, an exporter could vary prices in the Community at will. Thus, the continued effectiveness of this guarantee was essential for the EEC to prevent the recurrence of injurious dumping. Circumvention of the payment of the duty would nullify this guarantee. It was thus the maintenance of this guarantee which was of primary concern to the EEC and which had led to the adoption of anti-circumvention measures by the EEC. The need for such action had also been felt by some of the main trading partners of the EEC, and in particular by the United States. The EEC had, however, recognized that any action to deal with this problem of circumvention would have to be subject to specific constraints. Thus, it had been considered to be of paramount importance that any measures taken to deal with this problem should be in conformity with the obligations of the EEC under the General Agreement and that, consequently, such measures should be confined to those strictly necessary to deal with the circumvention of the anti-dumping duties. The EEC had also taken into consideration the need to avoid acting in an arbitrary manner and the need to provide interested parties, in particular exporters and parties carrying out assembly operations in the EEC, an opportunity to refute any allegations of circumvention made

[1]A resolution including this recommendation had been adopted by the European Parliament on 6 October 1988.

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against them. Furthermore, the EEC had considered it desirable to ensure, as far as possible, that any measures taken should be the least disruptive of trade and that such measures should not impede genuine inward investment in the EEC. Finally, it had been considered necessary to ensure that measures could be applied without undue delay in order to remedy as quickly as possible the injury caused by the dumped imports. In light of these considerations, the EEC Commission had examined various conceivable courses of action. This examination had led to the conclusion that within the framework of the General Agreement Article VI and Article XX(d) constituted the only relevant provisions regarding the application of measures against circumvention of anti-dumping duties through importation of components and subsequent assembly in the EEC. After considering possible ways of dealing with the problem of circumvention of anti-dumping duties under Article VI of the General Agreement[*], the EEC had come to the conclusion that the only appropriate legal basis under the General Agreement on which it could base measures against circumvention was Article XX(d).

3.21 The EEC considered that the practice of application of Article 13:10 demonstrated that measures had been taken under this provision only when the existence of circumvention was indisputable. In the cases investigated so far the value of parts or materials used in the assembly operations in the EEC and originating in the country of export of the finished product had invariably accounted for more than 70 per cent and in most cases more than 80 per cent of the total value of the parts or materials used in these operations. Where duties had initially been applied to products assembled in the EEC, undertakings had been offered by the companies concerned which had been accepted by the EEC Commission. As of July 1989 no extended anti-dumping duty was being collected on products assembled in the EEC.

3.22 The EEC explained that the imposition of duties under Article 13:10(a) required a derogation from the second sentence of Article 13:4(a)[1] because Directive 79/623/EEC[2] required that normal customs duties (including anti-dumping duties) be paid when goods were "released for free circulation" in the EEC, which normally occurred when goods were imported into the EEC. Under Article 13:10, however, the payment of duties imposed to prevent circumvention of anti-dumping duties took place when products were "introduced into the commerce" of the EEC. Since this inevitably occurred at a stage different from importation, a derogation from the second sentence of Article 13:4(a) was necessary.

3.23 Regarding the meaning of the expression "introduced into the commerce of the Community" in Article 13:10(a) and the difference between this concept and the concept of "release for free circulation in the Community" in Article 2:1 of Council Regulation (EEC) No. 2423/88, the EEC pointed out that "release for free circulation in the Community" was a term used in the EEC customs legislation in order to realize a principle laid down in Article 10 of the EEC Treaty. Under this principle, goods imported from third countries were to be considered to be on an equal footing with goods originating in the EEC ("in free circulation") if import formalities had been complied with and any customs duties which were payable had been levied. When goods were assembled in the EEC under circumstances which indicated that anti-dumping duties had been circumvented, goods could, as a matter of fact, be considered to have been released without all customs duties payable, including anti-dumping duties, having been levied. This situation called for redress and, therefore, the levying of anti-dumping duties

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[*]Infra, paragraphs 3.86-3.89

[1]The second sentence of Article 13:4(a) provides that the obligation to pay anti-dumping or countervailing duties is incurred in accordance with Directive 79/623/EEC.

[2]Council Directive 79/623/EEC of 25 June 1979 on the harmonization of provisions paid down by law, regulation or administrative action relating to customs debt. O.J. 1979, No. L 179 (17 July 1979), p.31. Part A of Title I of this Directive provides how a customs debt is incurred on importation.

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was considered to be postponed until the moment where the assembled goods were "introduced into the commerce of the Community". The concept of postponement of the collection of the customs duties payable was emphasized by the legal fiction that the imported parts and materials in question could only be considered to be in free circulation insofar as they would not be used in an assembly or production operation as specified in the first sub-paragraph of Article 13:10(a).

3.24 In response to a question by the Panel, the EEC confirmed that Article 13:10 was applicable only when a definitive anti-dumping duty was in force and did not apply to cases in which imports were subject to price undertakings.

3.25 Regarding the last sub-paragraph of Article 13:10(a), the EEC explained that in practice the EEC authorities first conducted an investigation to determine whether the circumstances necessary for the imposition of duties under Article 13:10 existed. If this investigation led to the conclusion that parts or materials had been used in the assembly or production in the EEC of a product under circumstances which constituted circumvention, the EEC Council, when establishing that an anti- circumvention duty should be imposed, would at the same time decide that parts or materials suitable for use in the assembly or production of the product concerned and originating in the country of exportation of the product subject to the original anti-dumping duty could only be considered to be in free circulation insofar as they would not be used in an assembly or production operation which fulfilled the criteria for circumvention. Thus, effectively a legal fiction was created. This procedure ensured that only the parts or materials used in the assembly process and imported from the country in question would be affected by the anti-circumvention duty, while all other imported parts or materials would be in free circulation in the EEC once they had been customs-cleared and the normal customs duties had been paid. This procedure had been devised because goods in free circulation should normally not be subject to import duties of any kind. Consequently, the parts in question could not be deemed to be in free circulation in the EEC until introduced into the commerce of the EEC as part of the assembled product subject to the anti-circumvention duty. The procedure foreseen in the last sub-paragraph of Article 13:10(a) applied only to parts or materials imported after the EEC Council had imposed duties on products assembled or produced in the EEC.

3.26 Regarding Article 13:10(b), the EEC explained that the "declaration" referred to in that paragraph was made on the same entry form or document (Single Administrative Document) as used for the customs clearance of imported products. With respect to the second sentence of this paragraph, the EEC explained that under Article 2 of Directive 79/695/EEC[1] the obligation to pay customs duties was created by the declaration referred to therein. Since duties imposed under Article 13:10(a) had to be collected in the same manner as normal customs duties, it had been necessary to provide that the declaration made when goods were introduced into the commerce of the EEC after having been assembled in the EEC was the equivalent of the declaration provided for in Directive 79/695/EEC regarding the importation and release for free circulation of products in the EEC.

3.27 Regarding the provisions in Article 13:10(c) concerning the calculation of the rate of the duty on products assembled in the EEC, the EEC explained that the use of the word "proportional" in this paragraph was intended to have the result that only a certain proportion of the normal anti-dumping duty applicable to finished products imported into the EEC would be collected as anti-circumvention duty. This proportion was calculated by multiplying the rate of the anti-dumping duty applicable to

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[1]Council Directive 79/695/EEC of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation, O.J. 1979, No. L 205 (13 August 1979), p.19.
This might lead to the conclusion that an anti-circumvention duty at a level lower than that described above would be sufficient to prevent circumvention. Such a situation had, however, not yet been encountered and accordingly, no detailed methodology had been established in this respect.

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the exporter concerned by the proportion of the finished product assembled in the EEC represented by the parts imported from the country of export of the finished product. This methodology had the desired effect that no anti-circumvention duty would be imposed on any value added during the assembly operation of the finished product or on the value of any parts or materials imported from any country other than the country of export of the finished product subject to definitive anti-dumping duties. Regarding the requirement in Article 13:10(c) that the rate of the duty on products produced or assembled in the EEC "shall not exceed that required to prevent circumvention of the anti-dumping duty", the EEC explained that when taking decisions regarding the amount of duty required to prevent circumvention of the original definitive anti-dumping duty all relevant factors had to be taken into account; the EEC considered that such relevant factors included levels of research and development and technology applied within the EEC.

3.28 The EEC explained that the provisions of Article 13:10 of Council Regulation (EEC) No. 2423/88 applied only to assembly operations carried out within the EEC and were not applicable to the assembly of products in third countries. When finished products, subject to anti-dumping duties, were assembled in third countries and exported to the EEC, the EEC would apply its normal rules of origin[1] applicable to imports from third countries to determine whether the finished product in question originated in the country of export of the finished product subject to anti-dumping duties.[2]

Arguments concerning the consistency of Article 13:10 of Council Regulation (EEC) No. 2423/88 and of measures applied under this provision with the General Agreement

(i) Articles VI, I and II

3.29 Japan noted that Article 13:10(a) of Council Regulation (EEC) No. 2423/88 described the duties which could be applied pursuant to this provision as "definitive anti-dumping duties". In bilateral consultations and in discussions in the Committee on Anti-Dumping Practices the EEC had confirmed that these duties were of the same nature as anti-dumping duties.[3] It was, therefore, necessary to first analyse the duties under Article 13:10 in light of the requirements of Article VI of the General Agreement.

3.30 Japan argued that, in view of the fact that Article VI:1 of the General Agreement defined dumping as a situation in which "products of one country are introduced into the commerce of another country" at prices less than the normal value of such products, it was clear that the duties imposed under Article 13:10 could not be considered to be consistent with Article VI:1 if one considered that these duties were imposed on finished products introduced into the commerce of the EEC after having been assembled in the EEC. Consequently, the only way in which the duties imposed under Article 13:10 could possibly be interpreted as anti-dumping duties within the meaning of Article VI was by assuming that these duties were levied on the imported parts used in the assembly of the finished products in the EEC. If one analyzed these duties as anti-dumping duties on imported parts, it was evident that these anti-dumping duties were imposed in violation of the basic requirements of Article VI of the General Agreement. Firstly, a violation of Article VI:2 and 6(a) resulted from the fact that these duties were applied in the absence of an investigation of whether the imported parts were dumped and causing injury to a domestic industry in the EEC. Secondly, the amount of the anti-dumping duty applied pursuant to Article 13:10 on imported parts was not based on any margin of dumping established with respect

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[1]Council Regulation (EEC) No. 802/68 on the common definition of the concept of origin of goods O.J. 1968, No. L 148 (28 June 1968), p.1

[2]The EEC noted that such a case had recently arisen regarding certain photocopiers assembled in the United States.

[3]Japan referred in this context to document ADP/W/174.

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to such parts. Thirdly, Article 13:10 did not contain a provision for a possible refund of anti-dumping duties on imported parts.[1] Japan further pointed out that Article 1 of the Anti-Dumping Code provided that:

> "The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated ... and conducted in accordance with the provisions of this Code."

It was, therefore, clear that anti-dumping duties were allowed exclusively under the circumstances laid down in Article VI of the General Agreement. Duties imposed under Article 13:10, if considered as duties on imported parts, were not in conformity with Article VI of the General Agreement and could, therefore, not be justified as anti-dumping duties.

3.31 Japan argued that, given that the duties imposed pursuant to Article 13:10 could not be considered to have a legal basis in Article VI of the General Agreement, it was necessary to examine whether such duties were in conformity with other provisions of the General Agreement. These duties could be characterized either as internal charges or as customs duties. Because the nature of the duties was ambiguous, it was difficult to identify exactly and definitively whether these duties were internal charges or customs duties. While there were substantial arguments in favour of regarding these duties as internal charges, Japan considered that these duties were inconsistent with the General Agreement in either case.

3.32 Japan pointed out that Article 13:10 of Council Regulation (EEC) No. 2423/88 provided for the imposition of duties on products produced or assembled in the EEC on the basis of the proportion of parts imported from Japan used in the production or assembly of such products. As such, these duties could be seen as a special type of customs duties levied on parts imported from Japan. Support for this view could be found in the fact that under Article 13:10 parts imported from Japan were denied free circulation in the EEC even after normal customs duties had been paid on imports of such parts. If one considered the duties imposed under Article 13:10 as customs duties on imported parts, these duties violated Article I:1 of the General Agreement because they were imposed only on parts imported from Japan; thus, discrimination occurred between parts originating in Japan and like products of third countries. Moreover, almost all parts originating in Japan on the importation of which duties had been levied under Article 13:10 were products for which the EEC customs tariff was bound. Thus, the imposition of duties on these parts was also inconsistent with Article II:1(b) of the General Agreement.

3.33 The EEC argued that of the Articles of the General Agreement referred to by Japan, Articles I, II and VI related to customs duties, border taxes and equivalent levies at the border, while Article III related to internal taxes. Under the General Agreement a measure was either a duty, i.e. a charge of any kind imposed on or in connection with importation, or an internal tax. These categories were mutually exclusive and could not apply to the same measure. The same logic applied to the relationship between Articles I, II and VI on the one hand and Article III on the other.

3.34 The EEC considered that duties imposed under Article 13:10 of Council Regulation (EEC) No. 2423/88 were customs duties. In support of this view it pointed to the following facts. Firstly, the purpose of these duties was to eliminate circumvention of anti-dumping duties on imported finished products; consequently, these duties were applied "in connection with importation". Secondly, the

[1]Japan provided the Panel with information on a case in which a request for a refund of duties applied under Article 13:10 had been rejected by the EEC Commission.

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nature of these duties was identical to the nature of the anti-dumping duties they were intended to enforce.[1] Thirdly, duties imposed under Article 13:10 of Council Regulation (EEC) No. 2423/88 were collected by the customs authorities in EEC member States under procedures identical to the procedures for the collection of customs duties on goods imported into the EEC from third countries. Finally, duties collected under this provision formed part of the own resources of the EEC in the same way as customs duties on imports from third countries whereas taxes normally formed part of the revenue of the member States.

3.35 The EEC also argued in this connection that anti-circumvention duties were imposed not on imported parts or materials but on the finished product assembled or produced in the EEC. Such duties could only be imposed if an anti-dumping duty was in force on imports of the finished product in question; anti-circumvention duties were merely constituting an extension of such anti-dumping duties to cover the like product assembled in the EEC. The obligation to pay such extended duties was created through a customs declaration which had to be made when the product assembled in the EEC was introduced into the commerce of the EEC. That the duties applied under Article 13:10 of Council Regulation (EEC) No. 2423/88 were duties imposed "in connection with importation" was also underlined by the provision in Article 13:10 that parts or materials imported from the country of export of the finished product subject to anti-dumping duties and imported for assembly in the EEC by a related party could not be considered as being in free circulation in the EEC until the finished assembled product was introduced into the commerce of the EEC. Given that the anti- circumvention duties imposed under Article 13:10 constituted customs duties within the meaning of Article I of the General Agreement, there could be no question of any violation of Article III and the question of whether these measures involved the least possible degree of inconsistency with provisions of the General Agreement had to be evaluated by examining these measures in light of Articles I, II and VI of the General Agreement.

3.36 The EEC argued that duties applied under Article 13:10 of Council Regulation (EEC) No. 2423/88 were intended to eliminate circumvention of anti-dumping duties. Whether such duties were called anti-circumvention duties, extended anti-dumping duties or normal anti-dumping duties was merely a question of semantics. Nevertheless, the duties which were circumvented were definitive anti-dumping duties and this was the reason why any duties imposed to enforce the collection of the circumvented duties could logically also be termed definitive anti-dumping duties.

3.37 Regarding the status under Article VI of the General Agreement of measures applied under Article 13:10 of Council Regulation (EEC) No. 2423/88, the EEC argued that, while normal anti-dumping investigations had to be carried out in full conformity with Article VI, non-compliance with regulations imposing definitive anti-dumping duties following such investigations was a separate and additional issue arising after the application of Article VI and from behaviour not covered by Article VI. This issue of non-compliance was specifically dealt with by Article XX(d) of the General Agreement. Furthermore, where consistency with Article VI was possible, in particular with respect to procedural aspects of measures under Article 13:10, the EEC had ensured such consistency by providing that the provisions of Council Regulation (EEC) No. 2423/88 "concerning investigation, procedure and undertakings" applied mutatis mutandis to all questions arising under Article 13:10[*].

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[1]The EEC considered that support for the view that enforcement measures have the same nature as the measures they aim to enforce could be found in the reasoning of the Panel Report in the dispute regarding measures by the EEC on animal feed proteins, BISD 25S/49.

[*]See infra, paragraphs 3.86-3.89 for the views of the EEC on the reasons why measures under Article VI could not adequately deal with the problem of "circumvention" of anti-dumping duties.

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3.38 Regarding Article I, the EEC pointed out that Article VI specifically provided for an exception to the most-favoured-nation principle of Article I. Since anti-dumping duties were limited in scope, measures taken under Article XX(d) should not have a scope which was any broader and which would result in an extension of the exception under Article VI to the most-favoured-nation concept in Article I. The restrictive nature of the provisions of Article 13:10 ensured that duties imposed under that provision would not entail such an extension. As long as the discrimination caused by the measures to prevent circumvention of anti-dumping duties was proportionate to the discrimination caused by the normal anti-dumping duties, the anti-circumvention measures did not involve any discrimination which would be unjustifiable under Article XX(d). Japan was incorrect in considering any discrimination as unjustifiable within the meaning of Article XX. If one was enforcing measures which were lawfully discriminatory, such as anti-dumping duties, one could not be denied the right to be similarly discriminatory to the extent necessary for the enforcement of such lawfully discriminatory measures.

3.39 Regarding Article II of the General Agreement, the EEC argued that anti-dumping duties imposed under Article VI were invariably additional to ordinary customs duties. Consequently, anti-circumvention measures were also additional to ordinary customs duties. As long as these anti-circumvention measures were proportionate to the normal anti-dumping duties which they were designed to enforce, there was no extension of the exception to Article II provided for by Article VI.

(ii) Article III

3.40 Japan argued that it was also possible to regard duties provided for in Article 13:10 of Council Regulation (EEC) No. 2423/88 as internal charges if one considered the following aspects of the duties applied under Article 13:10. Article 13:10 provided for the imposition of duties:

> "... on products that are introduced into the commerce of the Community after having been assembled or produced in the Community ..."

Article 13:10(b) provided that:

> "Products thus assembled or produced shall be declared to the competent authorities before leaving the assembly or production plant for their introduction into the commerce of the Community."

Thus, the express language of Article 13:10 indicated that the duties imposed under this provision could be considered to be internal charges on finished products assembled within the EEC. However, according to Article 13:10(c), the rate of duty applied to such finished products depended upon the value of the imported parts or materials contained in the product assembled within the EEC. While duties were formally imposed upon products produced or assembled within the EEC (i.e. on domestic products) these duties were indirectly imposed on imported parts and were used to afford protection to domestic production. Japan pointed out that the interpretation of the duties imposed pursuant to Article 13:10 of Council Regulation (EEC) No. 2423/88 as internal charges on imported parts was consistent with the reasoning of the Panel established in the dispute concerning the Belgian family allowances.[1] In this connection Japan referred to the following passage of the Report of this Panel:

> "After examining the legal provisions regarding the methods of collection of that charge, the Panel came to the conclusion that the 7.5 per cent levy was collected only on products purchased by public bodies for their own use and not on imports as such, and that the levy was charged, not at the time of importation, but when the purchase price was paid by the public body. In those circumstances, it would appear that the levy was to be treated as an 'internal charge' within

[1]BISD 1S/59

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> the meaning of paragraph 2 of Article III of the General Agreement, and not as an import charge within the meaning of paragraph 2 of Article II."[1]

Duties applied pursuant to article 13:10 of Council Regulation (EEC) No. 2423/88 were, in effect, imposed only on parts or materials purchased by certain manufacturers located within the EEC for their own use. Furthermore, these duties were imposed at the time when the finished products incorporating the imported parts or materials left the factory and not at the time of importation of the parts or materials. Thus, it was consistent with past GATT practice, as evidenced by the Panel Report on the Belgian Family Allowances, to consider these duties as internal charges. Japan further noted that customs authorities collected not only customs duties but also collected internal charges in some cases; thus, duties collected by customs authorities were not necessarily customs duties.

3.41 Japan noted that Article III:1 of the General Agreement provided that:

> "The contracting parties recognize that internal taxes and other internal charges ... should not be applied to imported or domestic products so as to afford protection to domestic production ( )."

Article III:2 provided that:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal changes to imported or domestic products in a manner contrary to the principles set forth in paragraph 1. ( )".

The duties applied by the EEC pursuant to Article 13:10 of Council Regulation (EEC) No. 2423/88 could be considered internal charges which were levied directly on finished domestic products and indirectly on imported parts. As internal charges on the domestic finished products these duties were inconsistent with Article III:1 of the General Agreement in that they constituted direct charges on domestic products designed to afford protection to domestic production. As internal charges applied indirectly on imported parts or materials, these duties were inconsistent with Article III:2 of the General Agreement.

3.42 Japan considered that, if one regarded the duties applied under Article 13:10 as internal charges, they were inconsistent not only with Article III:1 and 2 but also with Article I:1 and III:4 of the General Agreement. These charges violated the principle of Most-Favoured-Nation treatment laid down in Article I:1 in that they were imposed on a discriminatory basis on parts imported from a specific country. Furthermore, Article 13:10(a) provided that the value of parts or materials used in the assembly operation and originating in the country of export of the finished product subject to duty must exceed the value of all parts of materials used by at least 50 per cent; this criterion for the application of duties was inconsistent with Article I:1 of the General Agreement because it meant that parts imported from a specific country received less favourable treatment than parts imported from third countries. This criterion was also inconsistent with Article III:4 of the General Agreement which provided that:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

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[1] Ibid., p.60

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The inconsistency of this criterion with Article III:4 resulted from the fact that it entailed a treatment of parts imported from a specific country which was less favourable than the treatment of domestically produced parts.

3.43 The EEC argued that measures applied under Article 13:10 of Council Regulation (EEC) No. 2423/88 were not internal measures within the meaning of Article III of the General Agreement. If, however, the Panel were to take a different view, it would have to disregard the arguments made by Japan relating to Articles I, II and VI of the General Agreement. If these measures were to be considered under Article III, the relevant question would be whether they involved the least possible degree of inconsistency with this Article. In this respect the EEC made the following observations. Insofar as there was any inconsistency with Article III:1 and 2, as a result of the fact that the allegedly internal measures discriminated against imports, such discrimination against imports was necessary and justifiable under Article XX(d) because these measures were intended to secure compliance with anti-dumping duties, which by their very nature involved discrimination against imports. Japan also appeared to argue that measures under Article 13:10 were discriminatory within the meaning of Article III insofar as duties were levied only on products assembled by companies which had a relationship with exporters of the finished product subject to anti-dumping duties and not on all purchasers of the parts imported for assembly or for other purposes. To the extent that there was any discrimination in this area, such discrimination only resulted from the necessity under Article XX(d) not to go further than what was necessary to eliminate circumvention of anti-dumping duties which by definition were similarly discriminatory. In addition, since only parties subject to an anti-dumping duty could circumvent such a duty, anti-circumvention measures could normally only be applied where the relevant assembly operation was carried out on behalf of such parties, i.e. by parties related to or associated with the exporter subject to duty.

3.44 To illustrate this latter point, the EEC made a distinction between three types of importation of parts. Firstly, importation of parts took place for replacement purposes or for use in the production of finished products the importation of which was not subject to anti-dumping duties. In these cases there was generally no question of circumvention of anti-dumping duties and no duties could be imposed under Article 13:10 in these cases. Secondly, parts could be imported by or on behalf of parties related to or associated with exporters whose exports of the finished product were subject to anti-dumping duties. If all relevant criteria of Article 13:10 were met, circumvention of anti-dumping duties could be established in such cases and duties could be imposed under Article 13:10. Finally, parts could be imported by importers and assemblers who were unrelated to exporters whose products were subject to anti-dumping duties. From a corporate standpoint these companies were in a position which was very different from that of related assemblers. Since only parties subject to an anti-dumping duty could circumvent such a duty, anti-circumvention measures could normally only be applied where the relevant assembly operation was carried out on behalf of such parties, i.e. by parties related to or associated with the exporters whose products were subject to anti-dumping duties. The situation would be different if the party carrying out assembly operations was not really independent but, for example, merely a sub-contractor of the exporter. The logical implication of the argument of Japan was that anti-circumvention duties should be imposed on parties engaged in assembly operations of a finished product irrespective of the relationship of such parties with exporters whose exports of the like product were subject to anti-dumping duties. Interestingly, in bilateral discussions between Japan and the EEC prior to the adoption of Council Regulation (EEC) No. 1761/87 in June 1987 the possibility to apply anti-circumvention duties in this manner had been discussed and rejected by Japan.

3.45 The EEC argued that measures taken under Article 13:10 of Council Regulation (EEC) did not involve any local content requirements and were not inconsistent with Article III:4 and 5. The text of Article 13:10 did not contain any reference to a local content requirement. Under this provision, a finding that circumvention of anti-dumping duties had taken place could not be made if more than 40 per cent of the value of all parts or materials used in the assembly process of the product in question

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did not originate in the country of export of the like product the importation of which was subject to anti-dumping duties. The specific origin of parts which did not originate in the country of export of the finished product subject to anti-dumping duties was irrelevant for the purpose of determining whether circumvention occurred. The EEC had never imposed duties under Article 13:10 on the ground that 40 per cent or more of the parts or materials used in an assembly process did not originate in the EEC. In the nineteen cases in which investigations under Article 13:10 had been terminated without imposition of duties, the value of parts originating in the EEC and the value of parts in third countries other than Japan had been considered together to arrive at a total percentage of the value of parts used of non-Japanese origin. The proportion of parts originating in the EEC and parts originating in third countries other than Japan had varied from case to case. In some cases more than 40 per cent of the value of all parts used in the assembly operation had been of EEC origin while in other cases the percentage of the value of all parts used accounted for by parts originating in the EEC had been less than 40 per cent. In any event, the distinction between parts originating in the EEC and parts originating in third countries other than Japan had not played any rôle in investigations under Article 13:10.

3.46 Japan considered that the undertakings accepted by the EEC in the context of proceedings under Article 13:10 of Council Regulation (EEC) No. 2423/88 violated Articles I and III of the General Agreement. Such undertakings were an integral part of the application of Article 13:10 and compliance with such undertakings was legally enforceable.[1] All proceedings under Article 13:10 initiated so far had been concluded by undertakings or, where initially duties had been imposed, those duties had subsequently been replaced by undertakings.[2] The contents of such undertakings was suggested by the EEC itself.[3] Undertakings under Article 13:10 were enforceable because companies which offered undertakings assumed that duties would be imposed under Article 13:10 if such undertakings were not respected. Given that the terms of reference of the Panel referred explicitly to the 'application' of Article 13:10 and that undertakings constituted an integral part of the application of this provision, it was appropriate for the Panel to examine the undertakings accepted by the EEC in the context of proceedings under Article 13:10.

3.47 Japan argued that the requirements imposed by the EEC regarding the contents of undertakings under Article 13:10 were inconsistent with the General Agreement for the following reasons. Firstly, the requirement to undertake to increase the value of parts or materials used in the assembly operation of non-Japanese origin was inconsistent with Article I:1 of the General Agreement because it resulted in a treatment of parts imported from Japan which was less favourable than the treatment of parts imported from third countries. Secondly, this requirement also violated Article III:4 of the General Agreement because it resulted in a less favourable treatment of imported parts than of domestically produced parts. Thirdly, the requirement to increase the value of parts or materials of EEC origin was inconsistent with Articles III:4 and 5 of the General Agreement in that a specific proportion of the parts used was required to be purchased from domestic suppliers in the EEC.

3.48 Japan provided the Panel with a copy of a standard format which it claimed was used by the EEC Commission for the presentation of undertakings by companies involved in investigations under Article 13:10, and presented a specific example of such an undertaking. It also provided information on two specific cases in which offers of undertakings had initially been refused by the EEC Commission. From letters written by the EEC Commission to the companies in question it was evident that the

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[1]Japan referred in this context to the Panel Report on the administration of the Canadian Foreign Investment Review Act which had concluded that undertakings to purchase Canadian goods were covered by Article III:4 of the General Agreement because they were legally enforceable. BISD 30S/140, 158.

[2]See Annex I.

[3] Infra, paragraph 3.48.

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Commission's initial refusal to accept these offers had been based on the fact that the offers did not provide for a commitment to use a proportion of parts of EEC origin deemed satisfactory by the Commission. It was significant that when revised offers of undertakings from these companies had eventually been accepted, these undertakings had contained a commitment to procure more than 40 per cent of parts used in the assembly operation from EEC sources. In general, for an undertaking to be accepted by the EEC Commission, companies involved in investigations under Article 13:10 were required (i) to maintain the level of non-Japanese parts used in the assembly operation at more than 40 per cent; (ii) to increase the proportion of parts used of EEC origin; (iii) to reach within a certain period of time the proportion of parts originating in countries other than Japan and the proportion of parts originating in the EEC if these proportions had fallen upon the start of the production of a new model, and (iv) to provide the Commission on a regular basis with relevant information. The requirements for the acceptance of undertakings were thus stricter than the conditions of application of duties under Article 13:10. These requirements led to discrimination not only against Japan but against any third country, in particular as a result of the condition that there be an increase of the proportion of parts procured from EEC sources. Japan considered that the conditions for the acceptance of undertakings under Article 13:10 amounted, in effect, to a local content requirement.

3.49 The EEC doubted that the issues raised by Japan regarding the acceptance of undertakings in investigations under Article 13:10 of Council Regulation (EEC) No. 2423/88 fell within the terms of reference of the Panel. Under the rules of the General Agreement and the Anti-Dumping Code acceptance of undertakings was not mandatory but left to the discretion of individual contracting parties. The EEC was practically the only contracting party which frequently accepted undertakings in the context of anti-dumping investigations. The practice of the EEC in this respect went beyond what was prescribed by the General Agreement and the Anti-Dumping code. Undertakings might be suggested by the EEC to exporters. However, if undertakings were formally offered by an exporter or by a company carrying out an assembly operation in the EEC, this was a unilateral decision of the party in question. In all investigations under Article 13:10 in which offers of undertakings had been made the companies concerned had been large multinational firms assisted by well experienced lawyers. Even if one assumed arguendo that these firms had, in fact, offered undertakings which went beyond what was necessary to eliminate the circumvention of anti-dumping duties, this would not mean that a "requirement" within the meaning of Article III had been imposed on these companies. In this connection Japan had referred to the Report of the Panel in the dispute between the United States and Canada regarding the Canadian Foreign Investment Review Act which had taken the view that certain undertakings might fall within the meaning of the term "requirement" in Article III:4 of the General Agreement in view of the fact that these undertakings were legally enforceable.[1] However, under Article 13:10 duties could not be imposed on the ground that a party engaged in assembly operations who had made an undertaking did not procure a certain percentage of the parts used in such operations from EEC sources.

3.50 Regarding the cases in which investigations under Article 13:10 of Council Regulation (EEC) No. 2423/88 had resulted in the acceptance of undertakings, the EEC pointed out that the companies concerned had been those found to have practised highly injurious dumping and to have circumvented the anti-dumping duties which had been the result of their unfair trading practices. In view of this some consideration had been given in the first anti-circumvention investigations (four out of thirty-five) to the question of how sourcing could be moved from Japan not only to third countries but also to the EEC. This had been done in order to avoid difficulties in establishing which parts were in reality of non-Japanese origin; the EEC had never intended to exclude imports of parts which genuinely originated in third countries. It might be that a consequence of this early approach had been that certain Japanese companies had undertaken to maintain a specific level of EEC content in their sourcing of

[1]BISD 30S/140

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parts. However, no offer of an undertaking had ever been refused solely on the ground that the offer did not provide for sufficient local sourcing. Following these initial cases, the EEC had changed its approach somewhat in order to avoid any ambiguity regarding its policy with respect to undertakings and in some cases where doubts had persisted the original undertakings had been amended. If in subsequent cases Japanese companies had undertaken to maintain certain levels of EEC content this had been done because of normal commercial considerations as could be seen from the fact that the content of each undertaking varied from company to company. It depended entirely on the individual company concerned whether EEC content was specifically provided for or not in an undertaking, and the percentage of parts procured in the EEC was not a factor in considering whether undertakings offered were satisfactory.

3.51 The EEC pointed out that in approximately 50 per cent of the undertakings which had been accepted in proceedings under Article 13:10 of Council Regulation (EEC) No. 2423/88 no reference to a specific level of parts of EEC origin existed. As regards the other cases, the companies in question had not been under any constraints regarding the contents of the undertaking. What mattered was only that at least 40 per cent of the value of parts used in the assembly process was of non-Japanese origin. If parties carrying out assembly operations in the EEC who had given undertakings wished to change the composition of the parts ratio an amendment was possible.

3.52 The EEC provided to the Panel a copy of a note addressed by the EEC in April 1989 to the Japanese authorities in which the EEC had explained that the attainment of a certain level of local content was not a criterion taken into consideration in investigations under Article 13:10. The text of this note made clear the concerns of the EEC regarding a possible misinterpretation by Japanese companies of the criteria for the acceptance of undertakings and indicated that what was required was that at least 40 per cent of the value of parts used in the assembly process in the EEC was accounted for by parts originating in any country inside or outside the EEC, except the country of export of the finished product subject to anti-dumping duties.

(iii) Article X

3.53 Japan considered that Article 13:10 of Council Regulation (EEC) No. 2423/88 and the measures taken under this provision lacked transparency and thereby violated Article X:1 and X:3 of the General Agreement, in particular in respect of the criteria for the acceptance of offers of undertakings and the methodology for determining the origin of parts used in assembly operations within the EEC. The EEC had not made public the criteria used in the consideration of offers of undertakings in proceedings under Article 13:10. While the conditions under which duties could be imposed were defined in the text of Article 13:10, the only available information regarding the conditions under which the EEC would consider undertakings acceptable consisted of letters and oral explanations by the EEC officials to companies involved in proceedings under this Article. From this information it could be concluded that the conditions for the acceptance of undertakings were stricter than the conditions for the imposition of duties.

3.54 Japan pointed out that the issue of the determination of the origin of parts or materials used in assembly operations in the EEC had led to difficulties, in particular in cases where parts were used which were manufactured in the EEC or in third countries other than Japan and which contained sub-components imported from Japan. It was only after an investigation under Article 13:10 was started that companies engaged in assembly operations within the EEC were in a position to ascertain how the EEC Commission would determine the origin of the parts used in these operations. Problems had also arisen because of the fact that in some cases the EEC had denied the validity of certificates of origin which had been issued in its Member States for the parts used by companies in assembly operations. The determination of the origin of the parts entailed a heavy administrative burden on the companies concerned which were required to provide detailed information on the origin of parts

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procured from suppliers, information which was often difficult to obtain. Furthermore, in determining the value of parts of Japanese origin, the EEC had used the free-into-factory price of parts used in assembly plants in the EEC, which meant that customs duties paid on parts imported from Japan were included in the value of these parts. Finally, in practice there existed the possibility of changes in the criteria to determine origin. For example, the method used to determine origin in the investigation of electronic typewriters differed from the method used to determine origin in the photocopiers case, even though Article X:3 of the General Agreement required that such rules be administered in a uniform and reasonable manner. Furthermore, on 3 February 1989 the EEC Commission had adopted Regulation (EEC) No. 288/89 on the determination of the origin of integrated circuits.[1] Under the rules set forth in this Regulation many semi-conductors produced in the EEC by companies related to Japanese companies were treated as being of Japanese origin whereas under the previously applicable rules such semi-conductors had been treated as being of EEC origin. This had led to problems for certain Japanese producers in the EEC of electronic typewriters and plain paper photocopiers who had given undertakings on the assumption that such semi-conductors would be treated as being of EEC origin.

3.55 The EEC was of the view that the arguments of Japan regarding the inconsistency of Article 13:10 of Council Regulation (EEC) No. 2423/88 and measures taken under this provision with Article X of the General Agreement were unfounded. Article 13:10 provided for precise rules which were relatively easily understood and applied. In addition, it provided for full procedural rights for interested parties involved in investigations. Regarding the question of the determination of origin raised by Japan, the EEC pointed out that the EEC rules of origin had been laid down in Council Regulation (EEC) No. 802/68 and in implementing Regulations. Stable and foreseeable provisions regarding criteria to determine the origin of goods were important for international trade and for this reason an International Convention on the Simplification and Harmonization of Customs Procedures had been concluded in 1973 in Kyoto.[2] It was noteworthy that, while the EEC and many of its trading partners had accepted a framework of rules of origin laid down in this Convention and had undertaken to apply this framework, Japan had never accepted the framework established by this Convention even though it had in the proceedings before this Panel and on other recent occasions argued in favour of more precise internationally agreed rules of origin.

(iv) Article XX(d)

3.56 Japan argued that Article 13:10 of Council Regulation (EEC) No. 2423/88 and the measures taken under this provision, which it considered were inconsistent with Articles I, II, III, VI and X of the General Agreement, could not be justified under Article XX(d). Article XX was applicable where a contracting party applied measures inconsistent with other provisions of the General Agreement.[3] It was, therefore, necessary to first establish how Article 13:10 and its application violated other provisions of the General Agreement before one could examine Article XX(d) as a possible legal basis of these measures. Past GATT practice indicated that the responsibility to demonstrate that the conditions of application of Article XX(d) were met rested with the contracting party which invoked this provision.[4] It was, consequently, the responsibility of the EEC to explain what in this case were the "laws or regulation ... not inconsistent with the provisions of this Agreement" and how Article 13:10

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[1]O.J. 1989, No. L 33 (4 February 1989), p.23.

[2]International Convention on the Simplification and Harmonization of Customs Procedures, done in Kyoto, 13 March 1973, entered into force on 25 September 1974.

[3]Japan referred in this respect to the Panel Report on section 337 of the United States Tariff Act of 1930, as amended, L/6439, paragraphs 3.10 and 5.9.

[4]Japan referred in this connection to the Panel Report on the administration of the Canadian Foreign Investment Review Act, BISD 30S/140, paragraph 5.20.

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and the measures applied thereunder could be justified as being "necessary to secure compliance" with such "laws or regulations".

3.57 Japan argued that anti-dumping measures taken under Article VI of the General Agreement were derogations from fundamental obligations laid down in Articles I and II of the General Agreement. As such, the rules in Article VI on the application of anti-dumping measures needed to be interpreted narrowly. Under Article VI anti-dumping measures could be taken only under precisely defined circumstances. Further rules on the implementation of Article VI had been laid down in the Anti-Dumping Code. The rules in Article VI and in the Anti-Dumping Code would be undermined if contracting parties resorted to Article XX(d) to justify unilateral departures from these rules under the pretext that action was necessary to prevent "circumvention" of anti-dumping measures. Given that Article VI provided for a limited exception to general obligations under the General Agreement, measures taken under Article XX(d) for the alleged purpose of prevention of "circumvention" of anti-dumping measures had to be examined carefully in order to determine whether an exception going beyond what was permitted under Article VI was necessary.

3.58 Japan considered that the General Agreement permitted trade restrictive measures only in exceptional circumstances. The mere existence of economic injury was not a sufficient ground under the General Agreement to impose trade restrictive measures. On the contrary, the General Agreement prohibited such measures except in certain specific cases. If an exporter shifted his commercial operations from operations in respect of which trade restrictive measures were provided for (e.g. the export of products at dumped prices) to other operations such as direct investment in a foreign country, for which the General Agreement did not provide for the possibility to take trade restrictive measures, the mere fact that the local production by the exporter in the foreign country might have a negative effect on domestic producers in that country could not be a justification to extend the application of restrictive measures taken with respect to the dumped exports to the local production in the importing country because such local production and the importation of parts for use in local production did not constitute dumping.

3.59 Japan further argued that, while the EEC had used the terms "circumvention" and "evasion" to justify the amendment to its anti-dumping Regulation, these terms appeared nowhere in the General Agreement or in the Anti-Dumping Code. These terms had negative connotations and suggested a deceptive behaviour. It was necessary to clarify whether these terms referred to specific situations in respect of which the General Agreement allowed for the application of trade restrictive measures or whether they simply referred to actions which were considered undesirable by EEC industries. The EEC had explained the term "circumvention" by pointing out that in a number of instances exporters whose exports of finished products to the EEC were subject to anti-dumping duties had established "screwdriver" assembly facilities in the EEC and that in such operations only a limited part of the assembly process had been transferred to the EEC. This allegation was unfounded. Data on the nature of the operations of Japanese producers in the EEC of electronic typewriters, plain paper photocopiers and dot matrix printers showed that the production process carried out by these producers in the EEC was substantially identical to the production process of these products in Japan and that the value added in the EEC by these producers was substantial. It was, therefore, not correct to characterize these operations as "screwdriver" assembly operations.

3.60 With respect to the argument of the EEC that anti-circumvention measures had been necessary because domestic industries in the EEC had continued to suffer injury even after the imposition of definitive anti-dumping duties, Japan also argued that the EEC had not provided sufficient factual evidence of injury caused by what the EEC perceived as "circumvention". Reference had been made by the EEC to increases in local production and decreases in the volume of exports of finished products by certain Japanese companies as evidence of "circumvention" and to prices of products assembled in the EEC as evidence of injury to domestic producers; these two elements, however, were not

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sufficient to determine the existence of a real problem of "circumvention" or of injury to domestic industries caused by such "circumvention". The EEC assumed a direct causal relationship between the initiation of an anti-dumping duty investigation on finished products and the increase in the volume of such products assembled in the EEC. However, there were other factors explaining the expansion of such assembly operations, such as the sharp rise of the Japanese yen, policies of EEC member States to encourage foreign direct investment and the accelerating pace of the internationalization of corporate activities.

3.61 Japan further pointed out that, while the EEC had argued that there had been no perceptible increase of the prices of finished products assembled in the EEC and that in certain cases these prices had even been lower than the prices established in the investigations which had led to the application of definitive anti-dumping duties, Article 13:10 did not provide for any examination of prices at which products assembled in the EEC were sold. The EEC had also not provided any factual evidence in support of this allegation and in one case a Japanese company engaged in assembly operations in the EEC had increased the prices at which it sold finished products in the EEC. Furthermore, in order to show the existence of injury to domestic industries as a result of the alleged circumvention, it was necessary to consider not only prices; other economic indicators also needed to be taken into account. The EEC had, however, not provided any factual evidence that injury to its domestic industries could be established on the basis of such other economic factors.

3.62 Japan considered that, if one assumed arguendo that there were situations in which exporters wished to avoid the effects of anti-dumping duties on finished products by exporting parts of such products at dumped prices for local assembly in the importing country, contracting parties were obliged to first try to deal with such situations by applying measures which were in conformity with Article VI of the General Agreement. The EEC had argued that the conduct of anti-dumping investigations on imported parts would not be an appropriate way of dealing with problems of "circumvention" of anti-dumping duties through assembly operations in view of the large number of such parts which would have to be investigated. This argument was, however, not sufficient to demonstrate that adequate measures against such "circumvention" could not be taken under Article VI. If assembly operations were really limited to the type of "screwdriver" assembly described by the EEC, the number of sub-assemblies imported for final assembly was necessarily small. For example, in the case of electronic typewriters the final assembly involved four to seven sub-assemblies; anti-dumping investigations could be carried out with respect to each of these sub-assemblies. Furthermore, in case of alleged "circumvention" of anti-dumping duties through "screwdriver" assembly operations, only those parts supplied by exporters whose exports of finished products were subject to definitive anti-dumping duties to related companies carrying out the assembly operation needed to be investigated which meant that the number of transactions which had to be investigated was limited. The invocation of Article XX(d) to justify measures to prevent "circumvention" of anti-dumping measures presupposed that such measures could not be taken under Article VI of the General Agreement. The EEC had not demonstrated that normal anti-dumping investigations under Article VI could not adequately deal with this problem.

3.63 Japan considered that measures necessary to secure compliance with anti-dumping laws or regulations could be based on Article XX(d) where such measures could not be taken under Article VI of the General Agreement. For measures to be justifiable under Article XX(d) the following conditions had to be met. Firstly, the "laws or regulations" with which compliance was sought had to be "not inconsistent" with the General Agreement. Secondly, the measures in respect of which Article XX(d) was invoked had to be "necessary to secure compliance with those "laws or regulations". Thirdly, measures taken under Article XX(d) were subject to the requirement that they were not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade ...".

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3.64 Regarding the term "laws or regulations" in Article XX(d), Japan considered that in this case these "laws or regulations" presumably were the relevant parts of Council Regulation (EEC) No. 2423/88[1] and the individual Regulations imposing definitive anti-dumping duties on the finished products in respect of which the EEC had applied Article 13:10 of Council Regulation (EEC) No. 2423/88. Japan doubted that this general anti-dumping Regulation of the EEC and the Regulations imposing definitive anti-dumping duties in specific cases could be considered to be "not inconsistent with the provisions of this Agreement" in view of the fact that the methodology applied by the EEC in its anti-dumping investigations led to artificial margins of dumping.

3.65 Japan was of the view that, even if one assumed that the EEC anti-dumping Regulation and the individual Regulations imposing definitive anti-dumping duties were "laws or regulations ... not inconsistent with the provisions of this Agreement", Article 13:10 of Council Regulation (EEC) No. 2423/88 and the measures based on that provision could not be regarded as "measures necessary to secure compliance" with those Regulations. "Compliance" with those Regulations would mean that anti-dumping duties levied were properly paid. It was, however, clear that Article 13:10 did not purport to ensure that anti-dumping duties would be paid properly. Rather, this Article provided for the imposition of duties on locally assembled finished products or imported parts of finished products on which anti-dumping duties could not normally be imposed under the provisions of Council Regulation (EEC) No. 2423/88. Thus, Article 13:10 and the measures based on this Article were irrelevant to the question of the "compliance" with Council Regulation (EEC) No. 2423/88 or with the individual Regulations imposing definitive anti-dumping duties in specific cases.

3.66 Japan argued in this context that the objective of anti-dumping measures, as defined in Article VI:2 of the General Agreement, was "to offset or prevent dumping" by means of the imposition of an anti-dumping duty (or acceptance of a price undertaking) on imported products found to have been dumped and causing or threatening material injury to a domestic industry. It was important to consider how Article 13:10 of Council Regulation (EEC) No. 2423/88 related to this objective. Under this Article duties could be imposed on products assembled in the EEC on the basis of criteria which were entirely unrelated to the issue of whether dumping was being offset or prevented and whether compliance with anti-dumping duties was being secured.

3.67 Japan further argued in this connection that in order to show that measures under Article 13:10 were "necessary to secure compliance" with Regulations imposing anti-dumping duties, the EEC had to demonstrate that the situation which had necessitated the imposition of the original definitive anti-dumping duties continued to exist. Thus, there had to be evidence of a continuation of dumping and injury caused by such dumping. Of particular importance in this context was the existence of a causal relationship between any margins of dumping established with respect to imported parts and any alleged injury to the domestic industry producing finished products. In the absence of dumping of the imported parts, there could be no justification for the imposition of anti-dumping duties. In this respect Japan disagreed with the view of the EEC that "circumvention" of anti-dumping duties by assembly could occur without the parts imported for use in the assembly being dumped. Furthermore, if there was no injury to the domestic industry producing the finished products, or if no causal relationship existed between such injury and the import of dumped parts there would also be no justification for the imposition of anti-dumping duties. If one examined the measures taken by the EEC in light of these considerations it was clear that, since the application of Article 13:10 of Council Regulation (EEC) No. 2423/88 did not involve investigations of whether dumping and injury existed, these measures could not be regarded as "necessary to secure compliance" with Council Regulation (EEC) No. 2423/88 or with individual Regulations imposing definitive anti-dumping duties in specific cases.

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[1]Or its predecessor, Council Regulation (EEC) No. 2176/84.

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3.68 Japan considered that Article XX(d) allowed only for limited and conditional exceptions to other provisions of the General Agreement and did not permit departures from basic requirements of those provisions. In cases where Article XX(d) was involved to justify measures allegedly necessary to secure compliance with anti-dumping duties, contracting parties were still obliged to respect the three basic requirements of Article VI and to determine the existence of dumping, injury to a domestic industry and a causal relationship between the dumping and injury. If Article XX(d) were interpreted to permit departures form these fundamental obligations laid down in Article VI, the result would be that the stringent conditions imposed by this Article and intended to prevent a protectionist abuse of anti-dumping measures would be rendered meaningless. In this light, one could envisage a situation where Article XX(d) might have permitted, for instance, a procedural departure which would not render the other Articles of the General Agreement meaningless. Such procedural departures could include dispensing with the requirement for a full-fledged investigation to determine the existence of dumping and injury, but total disregard for their determination would seem to go beyond what might be permissible under Article XX(d).

3.69 Japan considered that the measures taken by the EEC under Article 13:10 of Council Regulation (EEC) No. 2423/88 involved discrimination within the meaning of Article I:1 of the General Agreement against parts imported from Japan. This discrimination was a form of "arbitrary or unjustifiable discrimination" proscribed by the opening paragraph of Article XX. Furthermore, given the conditions for the acceptance of undertakings in proceedings under Article 13:10 and the lack of transparency surrounding the implementation of this provision, it could be concluded that that measures under Article 13:10 constituted "a disguised restriction on international trade", and as such were inconsistent with the opening paragraph of Article XX of the General Agreement.

3.70 The EEC considered that recourse to Article XX(d) of the General Agreement was a serious matter which should only be taken as a last resort and not as a means of escaping obligations under the General agreement with insufficient justification. Consequently, before Article XX(d) was invoked, it was necessary to ensure that no adequate measures could be taken under other provisions of the General Agreement. Furthermore, it was necessary to fully satisfy the requirements of Article XX(d). This meant, firstly, that the "laws or regulations" with which compliance was being secured had to be "not inconsistent" with the General Agreement; secondly, that the measures in respect of which Article XX(d) was invoked were "necessary to secure compliance" with those laws or regulations, and, thirdly, that the measures in question were "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". In the case of Article 13:10 of Council Regulation (EEC) No. 2423/88 and measures applied pursuant to this provision these conditions were fulfilled to the letter.

3.71 The EEC considered that in the case before the Panel the "laws or regulations" referred to in Article XX(d) were, firstly, EEC Regulations imposing definitive anti-dumping duties in specific cases, and, secondly, the provisions of Council Regulation (EEC) No. 2423/88 on which such Regulations were based. The "measures" referred to in Article XX(d) were Council Regulation (EEC) No. 1761/87 of 22 June 1987 (subsequently incorporated in Article 13:10 of Council Regulation (EEC) No. 2423/88) and Regulations and Decisions implementing Article 13:10 in specific cases. The above-mentioned "laws or regulations" were in full conformity with the General Agreement and thus covered by Article XX(d). Anti-dumping duties were applied under these "laws or regulations" only after it had been established after formal investigations that the products subject to investigation were being dumped and causing injury to a domestic industry. In no case was the amount of duty imposed greater than the margin of dumping established. The amount of the duty was frequently less than the margin of dumping where such lesser amount was considered sufficient to remove the injury to the domestic industry even though the application of such a lesser duty was not required under Article VI of the General Agreement. In any event, the conformity with the General Agreement of either Council Regulation (EEC) No. 2423/88 or Regulations imposing definitive anti-dumping duties in particular

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cases had never been formally contested in a dispute settlement procedure in the GATT. This question was, therefore, not covered by the terms of reference of the Panel.

3.72 Regarding the requirement in Article XX(d) that measures taken under this provision be "necessary to secure compliance" with "laws or regulations", the EEC considered that this requirement involved the following elements in the context of this dispute. Firstly, there had to be a problem of non-compliance with anti-dumping duties. Secondly, it had to be shown that the measures taken under Article XX(d) were necessary to deal with this problem of non-compliance which meant that it had to be shown that (1) no alternative measures could be taken which were consistent with the General Agreement, (2) the measures taken were not disproportionate, and (3) the measures involved the least possible degree of inconsistency with other provisions of the General Agreement.

3.73 The EEC considered that circumvention of anti-dumping duties on finished products through importation of parts and subsequent assembly of such parts could constitute non-compliance within the meaning of Article XX(d). The view expressed by Japan that compliance with anti-dumping duty laws or regulations was ensured merely by the payment of anti-dumping duties on imported finished products was an unreasonably restrictive interpretation of the term "compliance" in Article XX(d). In order to determine to what extent a measure had been complied with, its objective had to be understood. The objective of anti-dumping legislation and anti-dumping measures was not to generate fiscal revenue. This objective was two-fold. Firstly, to offset or prevent dumping by the imposition of an anti-dumping duty (or by acceptance of a price undertaking) on imported products found to have been dumped and causing injury. Secondly, to guarantee to the contracting parties to the General Agreement that they could rely on one of the principles underlying the concessions made to other contracting parties in the area of tariff and non-tariff measures, i.e. the right to take effective action if domestic industries were injured or threatened with injury as a result of unfair trading practices. These objectives would be clearly endangered if anti-dumping measures imposed after formal investigations carried out in conformity with Article VI were circumvented. Consequently, contracting parties must be entitled to ensure that anti-dumping measures were not being undermined by circumvention and that an important part of the GATT was not rendered ineffective. The alternative would be the destruction of the disciplines established by Article VI of the General Agreement and the collapse of the balance of rights and obligations created by the GATT.

3.74 The EEC considered that the right to take action to prevent circumvention of anti-dumping measures was clearly recognized in the footnote to Article 16:1 of the Anti-Dumping Code which permitted action in the context of anti-dumping proceedings under relevant provisions of the General Agreement other than Article VI as interpreted by the Anti-Dumping Code. In the view of the EEC, the only provision of the General Agreement which could fall in the category covered by this footnote was Article XX(d).

3.75 The EEC considered that the interpretation of circumvention of anti-dumping duties as non-compliance was also supported by a widely recognized principle of customs and taxation laws and practices that activities leading to the circumvention of validly imposed duties or taxes were actionable. However a strict analogy between the rules governing international trade and rules of customs and taxation laws was not possible. The interpretation of customs and taxation laws necessarily had to be narrower than the interpretation of rules of the General Agreement which, as treaty rules, had to be interpreted in light of their purposes. That circumvention of anti-dumping duties could constitute non-compliance within the meaning of Article XX(d) was confirmed by the French text of Article XX(d) which referred to measures "nécessaires pour assurer l'application des lois et règlements ...". Thus, "securing compliance" with laws and regulations in reality meant securing the application of such laws and regulations. There could be no doubt that, in present day circumstances, one of the main priorities of any legislator in attempting to secure the application of laws or regulations was not only to ensure that measures provided for under such laws or regulations

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were implemented in the narrowest sense but also that the compliance with such measures was not undermined by circumvention.

3.76 The EEC noted that in its submission to the Panel[1] the United States had come to essentially the same conclusion regarding the necessity of measures to prevent circumvention of anti-dumping duties. The only difference between the approach of the EEC and the approach of the United States to this problem was that the EEC considered that the right to take measures against circumvention of anti-dumping duties was specifically derived from Article XX(d), while the United States was of the view that this right was enshrined in the overall framework of Article VI, Article XX(d) and the interpretative history of these provisions. It was interesting that, whether it was Article VI, Article XX(d), general principles or all three which constituted the legal basis of measures against circumvention of anti-dumping duties, the provisions enacted by the EEC and the United States to deal with this problem were similar and concerned with exactly the same phenomenon. Accordingly, if the Panel were to adopt the approach of the United States and consider that the provisions of Article 13:10 of Council Regulation (EEC) No. 2423/88 were justified under Article VI and Article XX(d), or under any general principle of the General Agreement, the EEC would not disagree with such an approach.

3.77 The EEC further explained that, once it had been concluded that circumvention of anti-dumping duties could constitute non-compliance with such anti-dumping duties within the meaning of Article XX(d), the relevant question was how to define the circumstances under which such circumvention could be considered actionable. It had been recognized that circumvention of anti-dumping duties was not necessarily illegal and that it was necessary to distinguish between actionable circumvention and normal legitimate trading practices. The General Agreement did not expressly deal with this issue and there was no internationally agreed definition of what constituted actionable circumvention. After a careful examination of all legal and economic aspects of this question, the EEC had concluded that circumvention of anti-dumping duties could be considered actionable if the following four conditions were met: firstly, circumvention was actionable if there was non-payment of anti-dumping duties. In the case of assembly operations in the EEC involving finished products the importation of which was subject to anti-dumping duties there was a total non-payment of anti-dumping duties in each case. Secondly, there had to be a relationship between the party carrying out the assembly operation in the EEC and the exporter whose exports of finished products to the EEC were subject to definitive anti-dumping duties. Thirdly, for circumvention to be actionable, there had to be a link between the timing of the assembly operation in the EEC and anti-dumping investigations carried out by the EEC. The necessity of this link explained why Article 13:10 included a requirement that the assembly operation in the EEC must have started or substantially increased after the initiation of the original anti-dumping investigation. Absent this condition, measures against circumvention would affect parties who had been engaged in assembly operations in the EEC for a long time and who had not adapted their operations following the initiation of anti-dumping investigations.

3.78 The EEC explained that a fourth criterion to determine the existence of actionable circumvention was that there had to be a certain superficiality of the nature of the assembly operations carried out. In particular, such assembly operations had to be not more than a shallow reflection of the exporter's activities. The extent to which this was the case was best analyzed by comparing normal production and export activities with the assembly operations in question. Assembly operations merely constituted a shallow reflection of the exporting producer's activities when the exporter had simply transferred a limited part of the production process, i.e. the final assembly phase of a finished product, to the EEC, where such assembly took place mainly from parts imported from the country of export of the finished product in question and where neither research and development nor innovative technology was being

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[1]Infra, paragraphs 4.34-4.41.

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transferred to the EEC. This explained why Article 13:10 of Council Regulation (EEC) No. 2423/88 provided that measures could be taken under this provision only when there was a preponderance of parts used in the assembly process in the EEC originating in the country of export of the finished product in question and that, in considering the necessity of such measures, account should be taken of the research and development and technology applied in the EEC.

3.79 Regarding the last of the above-mentioned criteria to determine the existence of actionable circumvention, the EEC considered that the information provided to the Panel by Japan with respect to the nature of the assembly process in the EEC of certain products manufactured by subsidiaries of Japanese companies did not contradict the conclusion of the EEC that in these cases only assembly operations of minimal commercial significance had been transferred to the EEC. These data confirmed that as regards the products which had been investigated so far under Article 13:10 of Council (EEC) No. 2423/88 the operations carried out in the EEC had involved the simple assembly of finished products from a preponderance of parts imported from Japan; in some cases all parts used in the assembly process had been imported from Japan.

3.80 The EEC further argued that in defining what constituted actionable circumvention, it had realized that, in order to conform with the general principles of the General Agreement and the provisions of Article XX(d) as interpreted by recent GATT Panels, the criteria to determine actionable circumvention had to be restrictive, objective and transparent.

3.81 Regarding the restrictive nature of the criteria of Article 13:10 of Council Regulation (EEC) No. 2423/88, the EEC pointed out that, since only parties subject to anti-dumping duties could circumvent such duties, measures against circumvention had to be limited to assembly operations carried out by or on behalf of such parties, i.e. essentially operations by their subsidiaries in the EEC. In addition, the amount of any anti-circumvention duty had to be limited to an amount required to prevent circumvention of the anti-dumping duty, which implied that this amount had to be proportional to the value of the imported parts used in the assembly operation in the EEC.

3.82 Regarding the objective nature of the criteria to determine when assembly operations constituted actionable circumvention, the EEC argued that Article VI of the General Agreement was based on objective criteria and did not provide for an examination of intent; the same approach had to be taken when defining actionable circumvention. This explained why the EEC, in evaluating the nature of assembly operations, relied on purely objective and easily verifiable criteria, such as the value of the parts used in the assembly operation, and not on subjective notions such as value added which might be artificially fixed to realize a particular profit in the country of assembly depending on the corporate requirements of the exporting company.

3.83 The EEC considered that Article 13:10 of Council Regulation (EEC) No. 2423/88 provided for maximum transparency and predictability in an area of considerable complexity by establishing a specific parts value instead of relying on a vaguer case-by-case approach which inevitably would result in less legal certainty.

3.84 The EEC disagreed with the view of Japan that, in order to demonstrate that anti-circumvention measures were necessary to secure compliance with anti-dumping duties, it was necessary to show a continuation of dumping and consequent injury to a domestic industry. The logical implication of this argument, if applied to normal anti-dumping duties, was that dumping and injury would have to be established for each individual shipment before anti-dumping duties could be collected. However, findings of dumping and injury were based on facts established during a certain investigation period. If during this period the conditions of Article VI were met, the collection of normal anti-dumping duties was justified without there being any time limitation. In the EEC duties would in principle remain in force for a period of five years. If during this period a change of circumstances occurred, the

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exporter had the opportunity to demonstrate in an administrative review proceeding that dumping or injury no longer existed. The onus of proof clearly lay with the exporter in these circumstances. As long as such proof of a change of circumstances had not been provided with respect to the conditions of application of normal anti-dumping duties all measures relating to the enforcement of such anti-dumping duties within the meaning of Article XX(d), i.e. all measures "necessary to secure compliance" with such duties, were fully justified. An importer who refused to pay anti-dumping duties would expose himself to certain enforcement measures, such as the impounding of goods, selling of assets, etc. For such enforcement measures to occur it was not necessary to conduct a new investigation of dumping and injury. Mere non-payment of the duties was sufficient ground to trigger the enforcement procedures.

3.85 The EEC considered that the same reasoning applied where the measures to "secure compliance" with anti-dumping duties were anti-circumvention measures within the meaning of Article XX(d). In this case there was also no need to carry out a new investigation of dumping and injury. Non-compliance with the anti-dumping duties was sufficient ground to take anti-circumvention measures, on the condition that such measures complied with the other requirements of Article XX(d). Once it had been established that a deviation from a provision of the General Agreement was necessary because there was no reasonable alternative available, it could not be demanded that the same provision be respected in detail. The conditions of application of enforcement measures could not be identical to the conditions of application of the measures to be enforced. Thus, the conditions of application of anti-circumvention measures under Article XX(d) must be allowed to be different in nature from the conditions of application of anti-dumping measures under Article VI of the General Agreement, as long as such measures under Article XX(d) were not broader in scope than what was necessary to enforce anti-dumping duties. This was clearly the case for measures taken under Article 13:10 of Council Regulation (EEC) No. 2423/88. The duties under this Article were neither higher nor more discriminatory than the anti-dumping duties they enforced. Such duties were effectively imposed on the same company which was affected by the original anti-dumping duties and served the same function as these anti-dumping duties, namely to provide protection against unfair trade practices consisting of the introduction of products of one country into the commerce of another country without payment of the anti-dumping duty which was payable on the importation of the same product.

3.86 The EEC considered that the measures provided for in Article 13:10 of Council Regulation (EEC) No. 2423/88 were clearly "necessary" within the meaning of Article XX(d) of the General Agreement because there was no reasonable alternative available under other provisions of the General Agreement. In this connection the EEC made the following observations on possible approaches based on Article VI to the problem of circumvention of anti-dumping duties. One way to deal with the problem of circumvention might have been to carry out anti-dumping investigations of imported components. This might be a conceivable solution in case of a product containing a small number of parts, e.g. ball bearings. However, for the great majority of products likely to be affected by anti-circumvention investigations such an approach would be both unrealistic and impractical in view of the large number of components. For example, there were approximately 1,000 individual components of a photocopier. Anti-dumping investigations of such a number of parts would impose a great burden on the parties to such investigations. In addition, if duties were to be imposed on major components, this would not necessarily facilitate matters, since in most instances these components were in the form of sub-assemblies and could easily be broken down into some or all of their constituent parts and exported in that form. Any anti-dumping duty imposed on major components could thus easily be avoided.

3.87 The EEC considered that there were two additional reasons why the conduct of anti-dumping investigations of components was not an appropriate method of dealing with problems of circumvention of duties on finished products. Firstly, if an investigation of components resulted in affirmative findings of dumping and injury caused thereby, duties would be imposed on all parts imported from the country concerned and not merely on those parts destined for use in assembly operations resulting in the

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circumvention of anti-dumping duties on the finished product. Such a result would go beyond what was necessary to prevent circumvention because the duties on the imported parts would affect companies in the EEC carrying out assembly operations which had no relationship with the exporters whose products were subject to anti-dumping duties as well as independent purchasers of spare parts and manufacturers or assemblers of products different from the product subject to anti-dumping duties but in the production of which some parts were used which were identical to the parts used in the production of the finished product subject to anti-dumping duties. Secondly, the calculation of a dumping margin for a finished product was inevitably based on figures different from those which were relevant in an investigation of parts on such a product. The cause of the dumping of the finished product was not necessarily the dumping of its constituent parts. Accordingly, a finding of dumping (and injury) with respect to the finished product did not automatically imply that its parts were also dumped. On the contrary, it was quite conceivable that, if the finished product was dumped, the imported parts were not being dumped or causing injury to domestic producers, if any, of such parts. Whether or not the individual parts were dumped and causing injury to a variety of parts manufacturers was unrelated to the question of whether circumvention of anti-dumping duties on a finished product occurred as a result of the assembly of that product from imported components.

3.88 The EEC pointed out in this context that, in addition to the possibility of carrying out anti-dumping investigations of components imported for further assembly, another possible approach to take action under Article VI of the General Agreement against circumvention of anti-dumping duties which it had considered was to regard the imported components as being "like" the finished products subject to definitive anti-dumping duties. This, however, would have entailed an extension of the interpretation of the term "like product" which had been opposed for many years in GATT.

3.89 The EEC further pointed out that it had also considered whether Article VI allowed for specific measures to prevent circumvention of anti-dumping duties. It had come to the conclusion that, while Article VI entitled contracting parties to take protective measures where it was established that dumping had caused injury to a domestic industry, the issue of non-compliance with regulations imposing anti-dumping duties was a separate issue arising after measures under Article VI had been taken and from behaviour which was not explicitly addressed in Article VI.

3.90 The EEC considered that the measures provided for in Article 13:10 of Council Regulation (EEC) No. 2423/88 were not disproportionate and were the least trade restrictive. They applied only in the most restrictive circumstances, i.e. only to products assembled by or on behalf of an exporter subject to anti-dumping duties and left unaffected the imports of parts from countries other than the country of export of the finished product subject to a definitive anti-dumping duty and the imports of parts for purposes other than assembly by a related party. In this context, Japan appeared to argue that a distinction should be made between parts sourced from independent suppliers in Japan and parts supplied by the exporters of the finished products subject to anti-dumping duties. This argument was irrelevant for the following reasons. Firstly, producers or exporters in Japan of finished products did not normally manufacture component parts but purchased such parts from independent suppliers or sub-contractors for use in assembly operations both in Japan and in the EEC. This was a typical feature of production processes of certain products in Japan and elsewhere. Secondly, the question of in-house or out-house sourcing of components was irrelevant in normal anti-dumping investigations and there was no reason why it should be considered relevant in the context of anti-circumvention investigations. Finally, if one made the distinction suggested by Japan, the independent suppliers of parts in Japan could directly supply parts to parties carrying out assembly operations in the EEC and related to the exporters of the finished product, thereby circumventing the anti-circumvention legislation. For these reasons, the relationship between the supplier of the parts and the party carrying out the assembly process was irrelevant in determining whether assembly of a finished product in the EEC constituted circumvention of anti-dumping duties. Only the relationship between the party carrying

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out the assembly process and the exporter of the finished product subject to anti-dumping duties was relevant.

3.91 Regarding the third aspect of the requirement in Article XX(d) that measures taken under this provision be "necessary" to secure compliance with laws and regulations, i.e. that such measures should involve the least possible degree of inconsistency with other provisions of the General Agreement, the EEC considered that this condition was satisfied in the case of measures applied under Article 13:10 of Council Regulation (EEC) No. 2423/88.[1]

3.92 With respect to the requirement of Article XX of the General Agreement that measures taken under this Article should not entail arbitrary or unjustifiable discrimination, the EEC argued that, since the discrimination involved in the measures taken under Article 13:10 of Council Regulation (EEC) No. 2423/88 was proportionate to the discrimination caused by normal anti-dumping duties, there was no arbitrary or unjustifiable discrimination within the meaning of Article XX. Regarding the requirement that measures under Article XX should not entail a disguised restriction on international trade, the EEC argued that it was neither the intention nor the result of the provisions of Article 13:10 to restrict import of parts from any source. What was intended was the prevention of circumvention of the payment of anti-dumping duties by companies switching from the export of finished products subject to anti-dumping duties to the assembly within the EEC of the same product, with a preponderance of parts imported from the country of export of the finished product, by or on behalf of the exporter concerned.

3.93 Regarding the interpretation by the EEC of the term "compliance" in Article XX(d), Japan made the following observations. It disagreed with the views of the EEC on the two-fold purpose of Article VI of the General Agreement. The only objective of anti-dumping measures under this Article was "to offset or prevent dumping". There was no general principle in the General Agreement permitting contracting parties to take effective action against "unfair trading practices". Action was allowed under the General Agreement only in specific circumstances defined in the relevant provisions of the General Agreement. The General Agreement would be endangered if contracting parties were allowed to take "effective action" against unilaterally determined "unfair trading practices". There was no principle in the General Agreement condoning unilateral retributive action in the field of tariff or non-tariff measures. Under the General Agreement any grievance should be addressed in accordance with Article II:5 (for tariff concessions) or Articles XXII and XXIII which contained procedures to redress any violation of the rights of any contracting party.

3.94 Regarding the term "circumvention" as used by the EEC, Japan argued that this concept did not refer to the existence of dumping and injury caused by such dumping and could therefore not be seen as "non-compliance" with anti-dumping duties, the purpose of which was to off-set or prevent dumping. Non-compliance with anti-dumping duties could occur when imports of products which were found to be dumped and causing injury were substantially continued without payment of anti-dumping duties. Thus, the concept of "non-compliance" within the meaning of Article XX(d) and the concept of "circumvention" used by the EEC had to be distinguished clearly.

3.95 Regarding the concept of "actionable circumvention", Japan considered that the criteria mentioned by the EEC to define this concept did not make it possible to determine whether dumping took place. Furthermore, in the application of Article 13:10 of Council Regulation (EEC) No. 2423/88, the EEC had ignored these criteria. While the EEC had argued that "actionable circumvention" was characterized by the fact that assembly operations constituted merely a shallow reflection of exporters' activities in practice, the EEC had taken measures under Article 13:10 with respect to normal investments in the

[1] Supra, paragraphs 3.38-39, 3.43-45, 3.49-52 and 3.55.

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EEC which involved production processes almost identical to those of Japanese exporters. In some cases investments in the EEC had involved production processes which were even more complex than those in Japan. Such investments were certainly not "shallow reflections" of the exporters' activities.

3.96 Japan also pointed out that, while the EEC had argued that the United States had come to essentially the same conclusion as the EEC regarding the need for measures against circumvention of anti-dumping duties, in fact the term "circumvention" was used by the United States in a different sense. The United States had taken the view that circumvention of anti-dumping duties could occur when exporters shifted assembly operations of minimal or no commercial significance to the country of importation. The EEC, however, considered that circumvention of anti-dumping duties could take place even if the production process at the assembly plant in the importing country was identical to the production process of the like product in the importing country. There were also important differences between the provisions on circumvention of anti-dumping duties in the anti-dumping legislation of the United States and Article 13:10 of Council Regulation (EEC) No. 2423/88. The legislation of the United States provided for the possibility to apply duties on imported parts and components while the EEC applied anti-circumvention duties on the products assembled or produced in the EEC. In addition, in determining whether assembly of a product in the United States constituted circumvention of anti-dumping duties, the United States considered value added as one of the criteria. This criterion played no rôle in investigations under Article 13:10 of Council Regulation (EEC) No. 2423/88.

3.97 On the view of the EEC that measures under Article 13:10 were not disproportionate and applied only under restrictive conditions, Japan argued that the question of the proportionality of these measures had to be examined in light of the objective of anti-dumping measures, i.e. "to offset or prevent dumping". Since the measures under Article 13:10 were not related to this objective, there was no basis for the view that these measures were not disproportionate. The concept of "least degree of inconsistency" with provisions of the General Agreement, which had been referred to by the EEC, had been used by the Panel established in the dispute between the EEC and the United States regarding section 337 of the United States Tariff Act of 1930. The Report of this Panel stated that:

> "... in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[1]

The EEC, however, had argued that as long as the anti-circumvention measures were proportionate to the discrimination caused by the normal anti-dumping duties which they were intended to enforce, such measures were "necessary" within the meaning of Article XX(d). This interpretation of the concept of "least degree of inconsistency" with provisions of the General Agreement was inconsistent with the Panel Report on section 337 of the United States Tariff Act of 1930.

3.98 With respect to the argument of the EEC that to treat finished products and components as "like products" for the purpose of investigations under Article VI of the General Agreement, would entail an extension of the concept of "like product", Japan pointed out that under Article 13:10 of Council Regulation (EEC) No. 2423/88 duties were in effect imposed on imported parts used in the production of finished products without there being any investigation of whether such imported parts were being dumped. Thus, measures under Article 13:10 in effect involved a treatment of finished products and components as "like products" and entailed an extension of the definition of the term "like product".

3.99 In response to the view of Japan that the problem of circumvention addressed in Article 13:10 of Council Regulation (EEC) No. 2423/88 did not constitute "non-compliance" within the meaning

[1]L/6439, paragraph 5.26

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of Article XX(d) of the General Agreement, the EEC argued that in contesting the second objective of Article VI Japan ignored the very purpose of this Article, i.e. the creation of a guarantee to contracting parties that they could take effective action against unfair trading practices. If this guarantee were undermined, the delicate balance of rights and obligations underlying the General Agreement would be seriously put into danger. Japan had argued in this context that where this balance was endangered it was not for contracting parties to take unilateral action, but that the alternative and proper recourse was to invoke Articles XXII and XXIII of the General Agreement. However, these Articles were applicable only to disputes between contracting parties and did not apply to unfair trading practices of individual exporters or to non-compliance with measures imposed in response to such unfair practices. This issue of non-compliance could only be dealt with within the framework of Article XX(d) which specifically dealt with such behaviour. If circumvention of legitimate commercial policy measures was not considered to fall within the scope of Article XX(d), contracting parties would be defenceless in the face of unfair trading practices and could not rely on Article VI for effective action while at the same time they would be obliged to adhere to other obligations under the General Agreement.

3.100 Regarding the observations made by Japan on the criteria used by the EEC to define the concept of "actionable circumvention", the EEC considered that the criteria which it had adopted were in line with economic reality. It was evident that a product for which the research, development and design had taken place in an exporting country and which was assembled in the EEC by the same exporting company with a preponderance of the same parts was to all intents and purposes the same product as the product subject to anti-dumping duties upon importation into the EEC. It was misleading to suggest that in such cases there were no differences between the assembly operations on the EEC and the production processes in Japan. What was produced in Japan was not only the result of an assembly operation using parts sourced in Japan but of research, development, design and technological innovation which were carried out only in Japan. In the instances in which the EEC had concluded that circumvention of anti-dumping duties had occurred, only the assembly operation had been transferred to the EEC. It was therefore undeniable that the objective of such assembly operations in the EEC was to recreate a product identical to that which had previously been exported to the EEC. However, the use in the assembly operation of a preponderant proportion of parts originating in the country of export of the finished product subject to anti-dumping duties was only one of the criteria to determine whether actionable circumvention occurred.

IV. ARGUMENTS OF INTERESTED CONTRACTING PARTIES

4.1 Australia considered that the duties provided for in Article 13:10 of Council Regulation (EEC) No. 2423/88 were not in fact anti-dumping duties as had been claimed by the EEC. The manner in which these charges were imposed and the point at which they were imposed made it clear that they were internal charges within the meaning of Article III. The Report of the Panel in the dispute concerning Belgian Family Allowances had clarified the criteria to distinguish between internal charges and charges on imports as such.[1] In the case before the Panel, the internal charges were imposed on the finished product when it entered the commerce of the EEC. However, these charges were only imposed on the basis that a specified proportion of the value of the parts and materials used in the finished product were imported from a particular country by a particular manufacturer or assembler in the EEC. No charges were levied on the imported components at the point of importation. Therefore, the charges being levied in this case clearly met the criteria for internal charges within the meaning of Article III:2 as defined in the Belgian Family Allowances Report, i.e. the charges were not imposed on the parts and materials at the time of importation and were not imposed on all such imports but only on those imports in particular specified end uses.

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[1]BISD 1S/60

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4.2 Australia considered that, as internal charges within the meaning of Article III of the General Agreement, the duties provided for in Article 13:10 of Council Regulation (EEC) No. 2423/88 were clearly contrary to the provisions of Article III:2. Such duties were imposed only on finished products which contained a particular proportion of imported components. No equivalent charge was applied on the like domestic product, i.e., the same finished product containing only components produced within the EEC or the components themselves when they were produced in the EEC. The manner in which these charges were applied was also discriminatory between import sources and therefore contrary to Article I:1 of the General Agreement. Where the producer or assembler in the EEC was related to or associated with, for example, a Japanese company, against the products of which there had been an anti-dumping finding, charges would be applied to products containing at least the specified proportion of components imported from any company in Japan. The same charges were not imposed, however, if the imported components used in the same product were obtained from any source other than Japan.

4.3 Regarding the view of the EEC that Article 13:10 of Council Regulation (EEC) No. 2423/88 was consistent with Article XX(d) of the General Agreement, Australia considered that the essential question was whether the measures provided for in Article 13:10 could be considered "necessary" within the meaning of Article XX(d). As indicated by the Report of the Panel in the dispute concerning the Canadian Foreign Investment Review Act, the onus was on the contracting party invoking Article XX(d) to demonstrate that measures were necessary within the meaning of this provision.[1] The EEC had made no attempt to establish that the measures provided for in the amendment to its anti-dumping legislation were in fact necessary to avoid circumvention of its anti-dumping legislation. The EEC had claimed that, if at least 60 per cent of the value of parts and components were imported from a particular source (against which dumping of a finished product had been proved), dumping of the components could be taken as given without further investigation or proof and the charges were levied on that basis. The EEC already had in place anti-dumping legislation which could have been used to prevent dumping of components where such dumping could be established. However, it had chosen not to use the existing provisions of its legislation to attempt to properly establish that components were in fact being dumped. On that basis the measures provided for in the amendment to the EEC anti-dumping legislation could not be considered "necessary" within the meaning of Article XX of the General Agreement. In the recent Panel Report on section 337 of the United States Tariff Act of 1930 the EEC had argued that:

> "A contracting party could not make something 'necessary' by merely writing its legislation in such a way that one type of enforcement measure was applicable to imported goods in otherwise similar situations."[2]

In the present case, the amendments adopted by the EEC had clearly been written to differentiate between products assembled or manufactured within the EEC and containing certain imported components and those containing only domestic components in similar situations. The enforcement measure was only applicable to the product containing the imported components and not to that containing only components from domestic sources. In its Report, this Panel had concluded that contracting parties were not allowed to:

> "... introduce GATT inconsistencies that are not necessary simply by making them part of a scheme which contained elements that are necessary. In the view of the Panel, what has to be

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[1]BISD 30S/140, paragraph 5.20.
[2]L/6439, paragraph 3.60

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> justified as 'necessary' under Article XX(d) is each of the inconsistencies within another GATT Article found to exist ..."[1]

It was worth noting that the EEC had been strongly in favour of the adoption of this Report and presumably therefore accepted the reasoning underlying the Panel's conclusions. Yet in this present case the EEC had taken a directly contrary position and claimed that the amendments to its anti-dumping legislation, which were clearly inconsistent with Articles I and III:2 of the General Agreement, were necessary for the enforcement of its legitimate anti-dumping provisions.

4.4 Australia further argued that, if the Panel would decide that the charges levied under Article 13:10 of Council Regulation (EEC) No. 2423/88 could be considered anti-dumping duties rather than internal charges, these anti-dumping duties were nevertheless still being imposed contrary to the provisions of Article VI of the General Agreement and the Anti-Dumping Code. Article VI and the Anti-Dumping Code both required that certain facts be established before anti-dumping duties could be imposed.[2] In this case the provisions of Article 13:10 of Council Regulation (EEC) No. 2423/88 did not require it to be established that imported components were being sold at less than their normal value in the exporting country nor that they were causing or threatening material injury to an established domestic industry. Article 1 of the Anti-Dumping Code provided that:

> "The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated and conducted in accordance with the provisions of this Code."

The amendments to the EEC anti-dumping legislation did not require investigations of whether dumping of the "like product" occurred. Such investigations were necessary for the measures to be in accordance with the provisions of Article 2 of the Anti-Dumping Code.

4.5 Canada pointed out that the question of circumvention of anti-dumping duties had attracted increasing attention and sparked considerable debate among contracting parties in recent years. On the one hand, certain importing countries were concerned that anti-dumping measures were being rendered impotent through the circumvention activities of exporting sources. On the other hand there was considerable concern about the unilateral implementation of anti-circumvention measures and the lack of internationally agreed rules. Canada was fully aware of the potential for circumvention of anti-dumping measures and it was, consequently, sympathetic to the valid concerns governments might have regarding the circumvention of anti-dumping measures. As Canada understood it, Japan was not contesting the right to maintain anti-circumvention regulations but was questioning the measures taken by the EEC in light of the provisions of the General Agreement. Canada was concerned that measures adopted for anti-circumvention purposes would not, in their own right, lead to trade or investment distortions. The terms of reference of the Panel called for an examination of the matter raised by Japan in light of the relevant provisions of the General Agreement. The fact that there were no internationally agreed rules about circumvention presented a challenge to the Panel. Canada wished to avoid a situation in which the GATT Council, in taking a decision to adopt the findings and conclusions of this Panel, would thereby foreclose the necessity for contracting parties to develop agreed rules relating to the issue of the circumvention of anti-dumping findings.

4.6 Canada considered that, given the limited number of proceedings opened by the EEC under its anti-circumvention legislation, an appropriate course of action for the Panel would be to examine each

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[1] Ibid., paragraph 5.27.

[2] Australia referred in this respect to the Report of the Panel on Complaints on Swedish Anti-Dumping Duties, BISD 3S/81, paragraph 15.

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case in which the EEC had applied its legislation to determine if the obligations for the use of Article XX(d) had been met. In doing so, the Panel would not be obliged to come to a conclusion about the EEC anti-circumvention legislation per se and could limit itself to the application of this legislation in specific circumstances. A precedent for such an approach could be found in the Panel Report on the dispute between Canada and the United States on Automotive Spring Assemblies.[1] This dispute had involved, inter alia, Article XX(d). The Panel had considered whether the conclusions it had drawn from an examination of the specific automotive spring assemblies case could be generalized regarding the use of section 337 of the United States Tariff Act of 1930 in cases of patent infringement. The Panel had decided that the conclusion that Article XX(d) applied and that section 337 was an appropriate vehicle to enforce United States patent law would, in principle, apply to many cases of alleged patent infringement. The Panel had noted, however, that the substance of patent infringement cases could vary considerably and had not excluded the strong possibility that there might be cases where its conclusion would not apply. Canada considered it appropriate for the Panel to draw conclusions regarding whether or not the EEC was justified in invoking Article XX(d) to defend its anti- circumvention measures in specific cases. This would avoid the necessity of reaching a conclusion on the EEC anti-circumvention legislation in and of itself. Multilateral negotiations were necessary to establish the appropriate framework against which the EEC anti-circumvention legislation could be measured.

4.7 Canada considered that the debate regarding circumvention focused to a large extent on the definition of what constituted circumvention and on the definition of measures appropriate to deal with circumvention. Regarding the definition of circumvention, Canada was of the view that circumvention only occurred where the importation of parts and components of dumped goods was such that this undermined an existing injurious dumping finding on the final product. This required, firstly, evidence that the dumping of the assembled product was being shifted to the importation of parts and components which were being exported at dumped prices. Secondly, the importation of the parts or components must also contribute to the injurious effects of the dumping of the assembled "like product". In other words, circumvention existed only if a clear causality could be shown between the imposition of anti-dumping duties and the subsequent increased importation of dumped parts and components for the assembled product, and the continued injury to the domestic producers of the assembled "like product". In such cases, there might be justification for the extension of anti-dumping duties to the dumped parts and components originating in the subject country. Article 13:10 of Council Regulation (EEC) No. 2423/88 established criteria used by the EEC to determine whether circumvention was occurring and whether measures had to be taken to prevent this circumvention. Because the EEC had invoked Article XX(d), it was incumbent on the EEC to provide evidence that each of the cases where anti-dumping duties had been extended did indeed involve actual circumvention and not merely a presumption of circumvention on the ground that the criteria of Article 13:10 had been met. In other words, the EEC should show that the criteria defined in its legislation were necessary to prove that circumvention was occurring.

4.8 Regarding the question of measures to deal with circumvention of anti-dumping duties, Canada argued that Article VI of the General Agreement and the Anti-Dumping Code set out rights and obligations with respect to the circumstances and conditions under which anti-dumping duties could be applied. In normal circumstances where the import of allegedly dumped parts and components was causing or threatening to cause injury to domestic producers of parts, a measure consistent with the General Agreement was available by means of a separate anti-dumping investigation into parts as prescribed under Article VI and the Anti-Dumping Code. This, however, might not adequately deal with situations where the injury caused by imported parts was being felt by domestic producers of end products, rather than by domestic producers of parts. In such cases the need for and scope of

[1]BISD 30S/107.

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anti-circumvention measures had to be assessed carefully as anti-dumping practices were already an exception to the basic principles of the General Agreement of national treatment and most-favoured-nation treatment and contracting parties had recognized that anti-dumping practices should be narrowly construed so as not to constitute an unjustifiable impediment to international trade. Canada did not rule out, however, the possibility of situations involving circumvention of anti-dumping findings not covered by existing rules. In addition, the problem of circumvention of such anti-dumping findings could generally be considered to fall within the meaning of the concept of the enforcement of rules relating to customs and governments had the right to ensure that their laws and regulations were being enforced. Consequently, Canada did not, in principle, preclude the invocation of Article XX(d) in cases where it was necessary for a government to prevent circumvention of an anti-dumping finding consistent with Article VI of the General Agreement.

4.9 Canada considered that in such circumstances it was incumbent upon the party invoking Article XX(d) to provide evidence that it met all three criteria specified in Article XX(d) in order to justify otherwise GATT inconsistent measures. These criteria were (i) that the "laws or regulations" with which compliance was being secured were "not inconsistent" with the General Agreement, (ii) that the measures in question were "necessary to secure compliance" with those laws or regulations, and (iii) that the measures were "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". Canada considered that since it might not be necessary in all situations to go beyond the existing rules of the General Agreement to deal with the circumvention of anti-dumping findings, it was necessary to examine the particular cases for which the EEC was invoking Article XX(d) to determine whether the particular actions taken by the EEC to prevent circumvention were in accordance with the criteria of Article XX(d).

4.10 Regarding the first of the three above-mentioned conditions of application of Article XX(d), Canada argued that it was essential to distinguish between the adoption and enforcement of measures to secure compliance with laws and regulations and the laws or regulations with which compliance was considered necessary. The EEC was entitled to take action against injurious dumped goods; it had exercised this right, for example, in applying anti-dumping duties to electronic typewriters and electronic scales exported from Japan. Since these types of action were not the object of Japan's request for a panel, it could be assumed that the EEC anti-dumping legislation under which such measures had been taken was not being challenged by Japan in this dispute as inconsistent with the provisions of the General Agreement. The "measures" which had been taken by the EEC to secure compliance with its anti-dumping measures, and for which a Panel ruling was sought, related to the application of Council Regulation (EEC) No. 1761/87 to products assembled or produced by Japanese-related companies in the EEC using material of Japanese origin. In invoking Article XX(d), the EEC had itself acknowledged that these particular measures of exception were inconsistent with Article VI and with the provisions of the Anti-Dumping Code.

4.11 Canada considered that the recent Panel Report on section 337 of the United States Tariff Act of 1930 provided a perspective with respect to the concept of "necessity" in Article XX(d). This Panel had concluded that:

> "a contracting party cannot justify a measures inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably expect to employ and which is not inconsistent with other GATT provisions is available to it."[1]

The Panel had also stated that:

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[1]L/6439, paragraph 5.26.

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> "... in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."[1]

Consequently, in order for a derogation from the agreed international rules on anti-dumping measures to be "necessary" within the meaning of Article XX(d), it should be limited to the minimum degree of GATT inconsistency required to deal with the circumvention of anti-dumping duties. Therefore, the application of a measure of exception designed to secure compliance with an existing anti-dumping finding needed to be carefully circumscribed to limit its use to truly genuine forms of circumvention. In this respect Canada reiterated its view that circumvention of anti-dumping duties existed only if a clear causality could be shown between the imposition of anti-dumping duties and the subsequent increased importation of dumped parts and components for the assembled product, and the continued injury to the domestic producers of the assembled "like product". It might be helpful in this regard if the Panel examined, for each case in which the EEC had applied anti-circumvention measures, the criteria employed by the EEC to determine if measures were, in fact, necessary. Among the questions which might be relevant to such an examination were those of the relevance of the relationship between the exporter of parts and the producer of the final product, the degree of increase in parts imports and the share of imported parts in the total parts inputs.

4.12 Regarding the requirement that measures under Article XX(d) should not constitute disguised restrictions on international trade, Canada pointed to the fact that the EEC anti-circumvention legislation included factors such as the amount of research and development undertaken and the nature of the technology used, which were only peripherally related to the question of circumvention. The inclusion of these factors in the legislation raised the question of whether the measures provided for in Article 13:10 of Council Regulation (EEC) No. 2423/88 constituted a disguised restriction on international trade. While the existence of higher value added production processes or research and development might help establish that a production process involved more than simple assembly questions, it remained to be determined whether the absence of such activities permitted the conclusion that circumvention of an anti-dumping finding was occurring and causing injury to the domestic producer of finished like goods. There was a risk that any unilaterally established criteria to determine the existence of circumvention could go beyond the issue of circumvention and have effects, directly or indirectly, on other areas. Any such criteria should be carefully considered and be the minimum necessary so as not to unduly impede legitimate business investment and sourcing decisions which were the basis for international trade.

4.13 Hong Kong considered that, in enacting the provisions of Article 13:10 of Council Regulation (EEC) No. 2423/88, the EEC had unilaterally departed from existing international rules without having attempted to seek to resolve the problem of circumvention of anti-dumping duties through multilateral development of the rules of the General Agreement. The EEC was bound by the General Agreement and the Anti-Dumping Code. Article 13:10 of Council Regulation (EEC) No. 2423/88 was an integral part of the EEC anti-dumping legislation and led to the imposition of anti-dumping duties. This Article was, consequently, subject to the same limitations as other anti-dumping provisions of contracting parties to the General Agreement. The EEC had not acknowledged that Article 13:10 was contrary to Article VI of the General Agreement and the provisions of the Anti-Dumping Code but had argued that Article XX(d) of the General Agreement was a sufficient legal basis for the adoption of Article 13:10, although this was not stated in the text of this Article. Referring to Article XX(d), the EEC had argued that Article 13:10 was necessary to prevent circumvention of duties imposed pursuant to its anti-dumping legislation, which was "not inconsistent" with the provisions of the General Agreement. The fact that Article 13:10 itself arguably conflicted with provisions of the General

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[1]Idem.

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Agreement and of the Anti-Dumping Code was immaterial in the view of the EEC because Article XX provided for exceptions to obligations under the General agreement and Article 13:10 of Council Regulation (EEC) No. 2423/88 could be regarded as a measure to secure compliance with a regulation relating to customs enforcement, as provided for in Article XX(d) of the General Agreement.

4.14 Hong Kong considered that the general exceptions in Article XX of the General Agreement should be construed narrowly. As a leading commentator of the General Agreement had observed, this Article did "open the danger of excessive protectionism".[1] A broad interpretation of Article XX(d) would allow contracting parties to the General Agreement to draw up draconian new laws under the pretext of enforcement of existing trade policy, subject only to the loosely worded limitation that the measures in question not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". Anti-dumping measures were an exception to the freetrade principles of the General Agreement and the use of such measures was specifically circumscribed by the specific provisions of Article VI of the General Agreement. The general exceptions should not be interpreted in a way which would be inconsistent with specific provisions of the General Agreement.

4.15 Hong Kong argued that Article 13:10 of Council Regulation (EEC) No. 2423/88 was inconsistent with the requirement that measures under Article XX(d) of the General Agreement be not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail". That Article 13:10 was discriminatory followed from the fact that one of the criteria for application of duties under this Article was that the company carrying out assembly operations in the EEC had to be related to or associated with a company in a country subject to an anti-dumping measure. Under this test, a company which had no shareholders in the country subject to anti-dumping measures could import virtually all of its parts from that country, while companies with shareholders in that country would be allowed to purchase no more than 60 per cent of their parts from that country.

4.16 Hong Kong considered that, even if Article XX(d) would permit an exception to Article VI, the EEC rules on measures to prevent circumvention of anti-dumping duties went beyond the limitations of Article XX(d). The claim of the EEC that its anti-circumvention measures were justified under Article XX(d) because they were designed to prevent circumvention of anti-dumping duties was not supported by the wording of Article XX(d). "To secure compliance" did not have the same meaning as "to prevent circumvention". The true meaning of the exception on which the EEC had based its argument should not be distorted. Article XX(d) could not be extended to cover a situation where a measure was not as effective as intended because of the fact that companies were legitimately pursuing an alternative trading strategy, such as setting up an operation in the EEC. In spite of the absence of a multilaterally agreed definition of the term "circumvention" the EEC had unilaterally defined this term, although the concept of "circumvention" had not been defined in the text of Article 13:10. The EEC had argued that the conditions for the imposition of duties under Article 13:10 were intended to provide a definition of circumvention which was "fair, narrow, and based on objective criteria". Yet, not only was Article 13:10 far in excess of what was "necessary to secure compliance" with anti-dumping measures, it also went beyond what was necessary to prevent circumvention, in the broadest sense of the word. In determining whether Article 13:10 was necessary, it was important to note that the EEC already had customs rules and rules of origin which could adequately cope with situations of circumvention of anti-dumping duties. For example, General Rule 2(a) for the Interpretation of the Combined Nomenclature[2] appeared to be relevant to a situation in which parts were imported in

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[1]John JACKSON, World Trade and the Law of GATT (Indianapolis: Bobbs Merill, 1969), p.743.
[2]This rule provides that:

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the EEC for the sole purpose of simple assembly. This rule seemed adequate and much more appropriate to deal with real cases of circumvention.

4.17 Hong Kong considered that Article 13:10 was clearly designed to achieve a broader objective than only to ensure that the EEC was not defrauded of anti-dumping duties. The requirement that at least 40 per cent of the total parts value be made up of parts originating in the EEC or in countries not subject to anti-dumping duties placed limitations on where a company could source its parts and raised the suspicion that the EEC was seeking to increase substantial investment in the EEC by inducing companies to source more parts in the EEC. The fact that assembly costs were not a main criterion under Article 13:10 meant that companies might be liable for duties even when carrying out labour intensive operations. There was no justification for presuming that "circumvention" occurred only because 60 per cent of the parts used in the assembly operation were imported from the country subject to anti-dumping duties. The EEC had failed to explain the exclusion of assembly costs as a main criterion under Article 13:10 even though the declared objective of this provision was to prevent "screwdriver" assembly operations. A company could assemble a product from literally thousands of parts, a large proportion of which could be of EEC origin, in a large and well-staffed operation, and still be subject to duties under Article 13:10.

4.18 Hong Kong concluded that the fact that Article 13:10 could encompass companies which in no sense of the word intended to "circumvent" anti-dumping duties (a fortiori "not comply" with anti-dumping duties) meant that this provision was only valid if it was in conformity with provisions of the General Agreement other than Article XX(d). In view of the fact that application of Article 13:10 of Council Regulation (EEC) No. 2423/88 led to the imposition of anti-dumping measures, it followed from Article 1 of the Anti-Dumping Code that this provision was only valid if it was consistent with the provisions of the Anti-Dumping Code. However, Article 13:10, which provided for the possibility to extend anti-dumping duties to products assembled in the EEC, with the amount of duty levied being proportional to the value of imported parts included in the assembled products, was contrary to Article VI of the General Agreement and to the provisions of the Anti-Dumping Code. There was no provision under this Article for a separate investigation of whether the imported parts or the finished products assembled in the EEC were causing injury to a domestic industry producing the "like product". Therefore, unless the EEC admitted a clear breach of the basic principles of the Anti-Dumping Code, i.e., the requirements to establish dumping and consequent injury, it necessarily had to argue that anti-dumping duties were extended to a product which was "like" the product subject to the original anti-dumping duty. This type of argument implied that either the imported parts were considered "like products" in respect of the finished products, or that the finished products assembled in the EEC were considered equivalent to the finished products imported from the country subject to anti-dumping duties.

4.19 Hong Kong pointed out that in the Committee on Anti-Dumping Practices[1] the EEC had taken the view that the relevant question under Article VI of the General Agreement was whether the imported parts were "like products" in respect of the finished product. However, parts were at a level of trade different from that of finished products and could normally be incorporated into a variety of finished products. Parts often could be used only for incorporation into finished products. Only where parts

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"Any reference in a heading to an article shall be taken to include a reference to that article incomplete and unfinished provided that, as imported the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), imported unassembled or disassembled."

[1]Hong Kong referred in this context to discussions at the meeting of the Committee in June 1988.

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were so significant in the final product that it was substitutable with the final product could it be argued that parts and finished products were "like products".

4.20 Hong Kong further argued that, under Article 13:10 of Council Regulation (EEC) No. 2423/88 duties were imposed according to the value of parts originating in the country of export of the finished product subject to a definitive anti-dumping duty, which seemed to indicate that duties were being imposed on the parts. Nevertheless, the language of Article 13:10 and the fact that these duties were only imposed after the parts were incorporated into the finished product suggested that it was the finished product assembled in the EEC which apparently was considered by the EEC a "like product". Under Article VI of the General Agreement dumping occurred if "products from one country were introduced into the commerce of another country at less than their normal value". Article 13:10, however, provided that, if certain conditions were met, duties could be imposed on products "introduced into the commerce of the Community after having been assembled or produced in the Community". This was in violation of the basic principle of Article VI of the General Agreement that anti-dumping duties could be imposed only on imported products. It was wholly foreign to the concept of anti-dumping as regulated by the General Agreement and the Anti-Dumping Code to impose duties on products which might have the origin of the country imposing the duties. In this regard, Hong Kong also referred to Article 8:2 of the Anti-Dumping Code. Where a product was produced in the EEC, it was not "an import" from a "source" found to be causing injury. In fact, no investigation would have taken place to determine the existence of dumping and injury in relation to such products.

4.21 Hong Kong considered that where duties were imposed on products after they had been assembled in the EEC, but only on such products produced by producers related to or associated with exporters subject to anti-dumping duties, such duties amounted to discriminatory internal taxes which violated Articles I and III of the General Agreement. Furthermore, the lack of clarity regarding the nature of undertakings acceptable to the EEC in the context of investigations under Article 13:10 of Council Regulation (EEC) No. 2423/88 could well disguise the fact that companies in practice were being obliged to purchase a certain proportion of parts locally. Although the EEC had repeatedly denied that such a requirement existed, Japan had pointed out that it was the experience of Japanese firms which had been subject to investigations under Article 13:10 that such local content requirements had been imposed. Such requirements were inconsistent with Article III:5 of the General Agreement; they could in no way be seen as "necessary to secure compliance" with trade measures consistent with the General Agreement and were therefore not justifiable under Article XX(d) of the General Agreement.

4.22 Hong Kong concluded that Article 13:10 of Council Regulation (EEC) No. 2423/88 was clearly outside the provisions of the General Agreement and of the Anti-Dumping Code. This provision could not be considered to be covered by the exception of Article XX(d). The objectives of this provision were broader than only to "secure compliance" with anti-dumping duties and it could affect parties which were not circumventing anti-dumping duties. Hong Kong recognized that the problem which this provision attempted to address needed to be resolved within the framework of the General Agreement so that internationally agreed rules on this issue might be developed. However, in the absence of rules in the General Agreement dealing with this problem of circumvention, Article 13:10 of Council Regulation (EEC) No. 2423/88 had to be considered inconsistent with the provisions of the General Agreement. Hong Kong, therefore, requested the Panel to reach findings which would lead to the withdrawal of this Article.

4.23 Korea considered that the Panel should examine the nature of the measures applied by the EEC under Article 13:10 of Council Regulation (EEC) No. 2423/88 to determine whether or not these measures were anti-dumping measures. If the Panel came to the conclusion that the measures in question were anti-dumping measures, it should examine whether these measures were consistent with Article VI of the General Agreement and the Anti-Dumping Code. In this respect Korea pointed in particular to two practices which it considered as incompatible with Article VI and the Anti-Dumping Code:

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firstly, the imposition of anti-dumping duties on finished products assembled in the EEC without any investigation of the existence of dumping and injury and, secondly, the imposition on exporters of certain conditions regarding assembly operations in the EEC in the context of price undertakings accepted in anti-dumping investigations.

4.24 Korea was of the view that, if the Panel would not regard the measures provided for in Article 13:10 as anti-dumping measures, it should examine whether these measures were a new form of protectionism designed to increase the use of parts originating in the EEC and to support inefficient domestic industries in the EEC and which resulted in a distortion of trade in parts and components. In this respect the following points merited careful consideration: firstly, the imposition of requirements to use a certain proportion of parts of EEC origin only on those producers in the EEC who were related to foreign companies; secondly, the method used by the EEC to calculate the actual proportion of imported parts used in the assembly operation, in particular in case of sub-assemblies purchased in the EEC; thirdly, the market distorting effect of the requirement to use a certain proportion of parts of EEC origin in cases where such parts were produced inefficiently by quasi-monopolistic producers.

4.25 Singapore considered that Article 13:10 of Council Regulation (EEC) No. 2423/88 was inconsistent with Articles VI, I and III of the General Agreement and with the Anti-Dumping Code and did not meet the requirements of Article XX(d) of the General Agreement.

4.26 Singapore argued that the first question to be addressed in the examination of the duties provided for in Article 13:10 was whether these duties should be considered as internal or as border measures. The General Agreement made an important distinction between these two types of measures. In general, the criteria under the General Agreement to determine whether a measure was an internal or a border measure was the place of collection of a duty. The Panel Report on the dispute concerning Belgian family allowances[1] had considered the fact that the charges disputed in that case were imposed at the time when the purchase price was paid rather than at the time of importation and had concluded from this that these charges were internal measures within the meaning of Article III of the General Agreement. However, in the case of duties applied pursuant to Article 13:10 of Council Regulation (EEC) No. 2423/88, the fact that the duties were imposed as an explicit extension of a border measure (an anti-dumping duty) for which there was no domestic equivalent argued in favour of treating such duties as border measures. Furthermore, Article 13:10 was an integral part of the EEC anti-dumping legislation which provided for the application of anti-dumping duties. The EEC itself had also characterized the measures provided for in Article 13:10 as anti-dumping measures. Consequently, these measures had to be taken in conformity with Article VI of the General Agreement and with the provisions of the Anti-Dumping Code. Article VI of the General Agreement and the Anti-Dumping Code permitted departures from basic obligations under the General Agreement in exceptional circumstances and therefore had to be interpreted narrowly.

4.27 Singapore considered that Article 13:10 of Council Regulation (EEC) No. 2423/88 was inconsistent with Article VI of the General Agreement and with the Anti-Dumping Code because, firstly these rules required that anti-dumping duties be calculated and imposed on products in respect of their condition at the time of importation and, secondly, these rules required that anti-dumping duties be imposed only as a result of investigations to determine the existence of dumping and consequent injury in which interested parties were given adequate opportunities to defend their interests.

4.28 Singapore pointed out that Article VI:1 of the General Agreement referred to the imposition of anti-dumping duties at the point of importation. This provision stated that:

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[1]BISD, 1S/59

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> "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned ... For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another ..."

Other provisions in the General Agreement and in the Anti-Dumping Code on the imposition of anti-dumping duties supported the view that the relevant point in time was the moment when products were imported. Thus, Article 8:2 of the Anti-Dumping Code provided that:

> "When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case on a non-discriminatory basis on imports of such products from all sources found to be dumped and causing injury ..."

Articles 2:1 and 2:5 of the Anti-Dumping Code on the definition of "export price" indicated that the export price was the price at the point of importation of a product. Article 2:1 referred to "... the export price of the product exported from one country to another", and Article 2:5 provided that:

> "... the export price may be constructed on the basis of the price at which the imported products are first resold ..."

It was evident that the purpose of this provision in Article 2:5 was to arrive at an actual or notional price "at which the product is exported from one country to another". Finally, Article VI:6(a) of the General Agreement provided that:

> "No contracting party shall levy any anti-dumping duty on the importation of any product of the territory of another contracting party unless ..."

Thus, the General Agreement and the Anti-Dumping Code required that anti-dumping duties be calculated and imposed on products in respect of their condition at the time of importation and that anti-dumping duties be applied at the border. Article 13:10 of Council Regulation (EEC) No. 2423/88 was inconsistent with these requirements in that it allowed for the imposition of anti-dumping duties on products" introduced into the commerce of the Community after having been assembled or produced in the Community". Products produced or assembled in the EEC were not "imports" from a source found to be causing injury.

4.29 Singapore considered that Article 13:10 of Council regulation (EEC) No. 2423/88 was also inconsistent with Articles VI:2 and VI:6(a) of the General Agreement and Articles 2, 3, 5 and 6 of the Anti-Dumping Code which required that the existence of dumping and injury be determined through formal investigations before anti-dumping duties could be imposed. Under Article 13:10 of the EEC Regulation duties could be imposed based solely on the origin of the parts used. N° investigation was carried out to determine whether imported parts were being dumped and causing injury to the domestic industry producing a "like product". There was no indication of how an exporter could obtain a refund in case of changes in the margins of dumping of the imported parts.

4.30 Singapore argued that, if the Panel would decide that the duties levied by the EEC were internal charges, rather than anti-dumping duties, these internal charges were being imposed contrary to Article III of the General Agreement. The duties levied by the EEC were imposed on products after they have been assembled in the EEC, on the basis that a specified proportion of the value of the parts and materials used in the finished product was imported from a particular country by a related or associated manufacturer in the EEC. N° duty was applied on the domestic "like product" if such product contained only components produced in the EEC. In this regard the duties levied by the EEC on products

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assembled in the EEC were inconsistent with Article III:2 of the General Agreement. Furthermore, Article 13:10 of Council Regulation (EEC) No. 2423/88 exempted from any duties products which contained more than a certain proportion of domestically-produced components. This was contrary to Article III:4 of the General Agreement since it affected the internal sale of products and placed products containing imported components in a less advantageous position. Article 13:10 also entailed an obligation on companies to purchase a certain proportion of parts locally and in this respect it was in violation with Article III:5 of the General Agreement which prohibited local content requirements. Singapore further argued that duties under Article 13:10 were inconsistent with Article I of the General Agreement. The most-favoured-nation principle contained in Article I:1 prohibited discrimination between countries. This prohibition applied not only to import duties but also to internal measures.

4.31 Regarding the argument of the EEC that Article 13:10 of Council Regulation (EEC) No. 2423/88 was justified under Article XX(d) of the General Agreement, Singapore made the following observations. As a provision permitting exceptions to obligations under the General Agreement, Article XX should be interpreted narrowly. Measures which were otherwise inconsistent with the General Agreement could be taken under Article XX(d) only if (i) the "laws or regulations" with which compliance was being secured were "not inconsistent" with the General Agreement, (ii) the measures taken were "necessary to secure compliance" with such "laws or regulations", and (iii) the measures in question were "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." A contracting party invoking an exception to the General Agreement had to prove that it met all the necessary conditions. It was, therefore, incumbent upon the EEC to demonstrate that duties under Article 13:10 of Council Regulation (EEC) No. 2423/88 met each of the conditions of Article XX(d).

4.32 Singapore argued that the "laws or regulations" with which the duties levied by the EEC on products assembled in the EEC were intended to secure compliance were contained in Council Regulation (EEC) No. 2423/88. Since Article 13:10 of this Regulation was inconsistent with the General Agreement and with the Anti-Dumping Code, the measures taken by the EEC could not be considered to fall within the scope of the exception permitted by Article XX(d). Regarding the second condition of application of Article XX(d), Singapore argued that it followed from the term "necessary" in Article XX(d) that the EEC was required, if possible, to follow a procedure which involved no derogation from rules of the General Agreement or which limited such a derogation to a minimum. The EEC had not established that the measures taken under Article 13:10 of its anti-dumping Regulation were necessary to prevent circumvention of its anti-dumping legislation. The preamble of Council Regulation (EEC) No. 1761/87 had merely stated that:

> "… assembly in the Community of products whose importation in a finished state is subject to anti-dumping duty may give rise to certain difficulties …"

The preamble had concluded that:

> "… in order to prevent circumvention, it is necessary to provide for the collection of anti-dumping duties on products thus assembled."

The EEC had claimed that if at least 60 per cent of the value of parts and components used in assembly operation were imported from a particular country of which the exports of a finished product had been found to be dumped, dumping of the parts and components could be presumed without further investigation or evidence and anti-dumping duties were levied on that basis on the assembled product. However, existing rules of the General Agreement could be used to deal with problems of dumping of parts and components. There was no reason why one could not determine the export price and normal value of parts. The EEC could have used its existing anti-dumping legislation to prevent dumping of imported parts. The EEC, however, had chosen to depart from the existing international

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anti-dumping rules and had not attempted to properly establish that components were in fact being dumped. Even if the EEC were to argue that the assessment and collection of anti-dumping duties on imported components presented practical difficulties which justified a departure from the ordinary rules, it still remained to be shown that the means chosen by the EEC involved the least degree of inconsistency with the General Agreement. The onus lay on the EEC to prove why a derogation from the normal anti-dumping provisions had been necessary. In the view of Singapore, Article 13:10 of Council Regulation (EEC) No. 2423/88 could not be considered "necessary" within the meaning of Article XX(d) of the General Agreement.

4.33 Singapore further considered that Article 13:10 of Council Regulation (EEC) No. 2423/88 was discriminatory and a disguised restriction on trade because one of the conditions of application of duties under this Article was that the company in the EEC must be related to or associated with a company in a particular country which was subject to an anti-dumping measure. This implied that a company in the EEC which was not related to any company in the country subject to anti-dumping measures could source all its components from that country, while companies which were related to firms in the exporting country in question were allowed to purchase not more than 60 per cent of the parts which they used from that country.

4.34 The United States considered that the evasion or circumvention of an anti-dumping duty imposed in accordance with Article VI of the General Agreement and with the relevant provisions of the Anti-Dumping Code contravened the purpose of those provisions, undermined the effectiveness of the disciplines of the General Agreement and the Anti-Dumping Code relating to dumping and anti-dumping practices and provided an appropriate basis for further action consistent with the General Agreement to prevent injurious dumping. The interpretative history of Article VI of the General Agreement also indicated that a contracting party was entitled to safeguard the effect of a properly issued anti-dumping duty order through the establishment and administration of an anti-circumvention provision which was consistent with the General Agreement. The evolution of international production and trade had led to circumstances in which firms could and did readily circumvent the intent and effectiveness of legitimately imposed anti-dumping duties. Thus, not only were anti-circumvention measures permissible if taken in a manner which was consistent with the General Agreement, but such measures had become necessary to maintain the careful balance of rights and obligations envisioned under the General Agreement.

4.35 The United States argued that the concept of prevention of circumvention of anti-dumping measures was compatible with the letter and spirit of Articles VI and XX of the General Agreement and of the Anti-Dumping Code. Article VI of the General Agreement established the clear right of any contracting party to take action in the form of the imposition of anti-dumping duties in an amount not greater than the margin of dumping in order to counteract the effects of the dumping found to be causing injury. This right would be undermined if a firm which had been found to have dumped a product, imports of which had been found to cause material injury to a domestic industry, were able to evade those duties simply by shifting assembly operations of minimal or no commercial significance to the country of importation from the country of exportation. It was a paradigm of customs legislation that actions leading to evasion of validly imposed duties ordinarily were actionable. Thus, counteracting the circumvention of an anti-dumping duty finding was a justifiable and proper exercise of the rights of a contracting party under Article VI of the General Agreement.

4.36 The United States considered that the ability of contacting parties to protect the scope of an anti-dumping finding was strongly supported by the interpretative history of Article VI of the General

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Agreement.[1] For example, with respect to the issue of "indirect dumping" (i.e., instances in which dumped goods were not shipped directly from the country of manufacture but were exported from another country) the Report of a Group of Experts on Anti-Dumping and Countervailing Duties had concluded that:

> "... it was reasonable for countries to have the right to protect themselves against indirect dumping (whether of processed or unprocessed goods)."[2]

Similarly, in 1955 a Working Party which had considered the narrower question of whether, in a case of indirect dumping, the dumping margin should be determined based on the price at which goods were sold in the country of exportation or in the country of manufacture had concluded that either price could be used.[3] The Working Party had appeared to accept as given that the only question in an instance of indirect dumping was how to calculate the dumping margin, not whether it was appropriate to assess a margin on goods shipped from the country of export.[4] The Reports of the Group of Experts and of the Working Party affirmed the view that a contracting party was entitled, in order to effectuate its rights under Article VI of the General Agreement, to protect itself against practices which circumvented the terms of an outstanding anti-dumping finding.

4.37 The United States argued that this conclusion was also supported by the fundamental principles and policy goals underlying the authority provided in Article VI to levy anti-dumping duties on dumped and injurious imports and the authority under Article XX(d) to adopt "measures ... to secure compliance with laws or regulations, which are not inconsistent with the provisions" of the General Agreement, including measures related to customs enforcement. The basic principle of Article VI of the General Agreement was that "dumping ... is to be condemned if it causes or threatens material injury." Article VI:2 authorized contracting parties to levy anti-dumping duties in order to "offset or prevent dumping". Thus, the basic right to impose anti-dumping duties flowed from Article VI. Nevertheless, the rights under Article VI were supplemented by the provisions of Article XX(d), which authorized a contracting party to take actions necessary to enforce a customs duty. Thus, if an anti-dumping duty was otherwise permissible under Article VI, Article XX(d) gave a contracting party the right to take certain narrow supplemental actions to preserve the validity of its tariff in the face of customs fraud, or, in this case, circumvention. It was a general principle of international customs practice that substance should prevail over the form of a transaction. In certain situations assembly operations could constitute a sham to evade the payment of anti-dumping duties. This was no different from the routine problems faced every day by all contracting parties of preventing efforts to evade the collection of legitimate customs tariffs on merchandise. Contracting parties had to be permitted to make use of the flexibility afforded by Articles VI and XX to take account of the new methods of manufacture and commerce which had arisen over the last decade and which had presented new challenges to administering authorities seeking to enforce the basic precepts of the General Agreement and the Anti-Dumping Code.

4.38 The United States considered that the need for an anti-circumvention provision grew directly out of the changing nature of international commercial reality, in particular the increasing international integration of manufacturing operations and the ease of multinational sourcing of parts and location

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[1]Report of the Group of Experts on Anti-Dumping and Countervailing Duties, BISD 8S/145; Report of the Working Party on Other Barriers to Trade, BISD 3S/222.

[2]BISD 8S/149.

[3]BISD 3S/223.

[4]The Working Party had added that this conclusion would not apply in a case of mere transhipment:

"It is of course understood that where goods are merely transhipped through a third country without entering into the commerce of that country, it would not be permissible to apply anti-dumping duties by reference to prices of like goods in that country." Idem.

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of assembly operations. At the time Article VI of the General Agreement had come into force in 1947, and even at the time of the conclusion of the Anti-Dumping Code in 1979, international trade and dumping had been considerably more straightforward and simpler phenomena than they were at present. For example, the problem of "indirect dumping" (which might include circumvention of an anti-dumping finding) was one with which contracting parties had had little or no experience in the early years of the GATT.[1] This was not surprising in light of the fact that the commercial norm at that time was one in which a given product was manufactured in its entirety in one country and exported directly to a second country. Terms like "like product" and "domestic industry" had been much easier concepts to distinguish and evaluate. Current commercial realities were, however, very different. Production of goods had become both globalized and compartmentalized. Components of a product were often manufactured in two or more places, only to be assembled in another location and, perhaps, finally to be shipped to yet another destination. Transportation costs had fallen dramatically, tariff barriers and barriers to foreign investment had in many cases been reduced or eliminated, export markets had been opened up and economies of scale had risen. The globalization of business had been accelerated both by the push for industrial growth in countries offering lower custom costs and by advances in production technology. The result had been that it was often no longer necessary or economically efficient to start and complete production in one plant.

4.39 The United States argued that, while the above-mentioned development were in most cases a healthy and natural consequence of the economic growth and trade liberalization which had occurred over the past forty years, the globalization and compartmentalization of manufacturing operations had also presented special challenges to administering authorities charged with ensuring that the international trade rules which had helped to advance the economic progress of the last forty years continued to apply to the world which these rules had helped to create. In particular, the United States and other contracting parties had to be prepared to use the tools of the General Agreement and the Anti-Dumping Code to protect the integrity of the fundamental principles which had guided the expansion and development of the international trading system. Thus, recalling the fundamental principles underlying the purpose of Article VI and the applicable provisions of the Anti-Dumping Code was imperative at a time when an increasing number of firms had chosen to take advantage of globalized, compartmentalized methods of manufacture: some firms adopting manufacturing strategies specifically to evade payment of duties levied as a result of the application of traditional anti-dumping procedures. Thus, anti-circumvention measures, if applied consistent with the General Agreement and the Anti-Dumping Code, were an essential aspect of modern anti-dumping practices. Such measures reflected and were a direct response to the changes in methods of manufacture but, like other actions taken in response to dumping, they were applied only when it was necessary to "offset or prevent dumping". Global sourcing and flexibility of production could, within a matter of months, eviscerate an anti-dumping duty order issued on a final product. To deny contracting parties the means by which to address practices which could arise out of these new methods of manufacture would be to undermine the remedies provided by Article VI of the General Agreement and the applicable provisions of the Anti-Dumping Code. Without anti-circumvention measures, the delicate balance of rights and obligations which formed the foundation of the international trading system might be seriously undermined which would, in turn, destroy the confidence in the fairness and relevancy of the system as a whole.

4.40 The United States pointed out that in light of the principles and purposes of Articles VI and XX(d) and the interpretative history of those provisions and in view of the changing commercial realities of internationally integrated manufacturing operations, the provisions in the Omnibus Trade and Competitiveness Act of 1988 on circumvention of anti-dumping duties had been drafted to ensure that any action taken would be consistent with and supported by the original finding of dumping and injury. Under these provisions three steps had been provided in applying anti-circumvention measures: (1)

[1]BISD 8S/148.

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an inquiry to ascertain what had occurred with respect to imports since the original imposition of the anti-dumping duties; (2) an investigation to ensure that any duties finally collected on dumped parts and components were calculated in the proper amount; and (3) an opportunity to review the determination of injury.[1] Specifically, the provision dealing with circumvention through assembly operations in the United States[2] provided the Department of Commerce with the authority to include imported parts and components used in the completion or assembly of merchandise sold in the United States within the scope of an anti-dumping order if, after taking into account any advice of the United States International Trade Commission (USITC), the Department found that:

(1) "merchandise sold in the United States is of the same class or kind as a product that is subject to an outstanding order";

(2) such merchandise sold in the United States "is completed or assembled in the United States from parts or components produced in the foreign country with respect to which" the order applied; and

(3) "the difference between the value of such merchandise sold in the United States and the value of the imported parts and components [imported from the foreign country referred to in paragraph (2)] is small."

In addition, in determining whether to include parts or components in the order, the Department of Commerce was directed to examine three specific factors: (i) the pattern of trade; (ii) whether the foreign manufacturer of the parts and components was related to the party performing the completion or assembly in the United States; and (iii) whether imports into the United States of the parts or components had increased subsequent to the issuance of the anti-dumping duty order.[3] These factors provided specific direction to the Department of Commerce in respect of the implementation of the language of the statute. The approach taken under the anti-circumvention provision (i.e., identification of factors for an administering authority to examine) was consistent with the General Agreement and the Anti-Dumping Code.[4] A fundamental aspect of this provision was that the Department of Commerce was required to notify the USITC of the proposed inclusion of parts and components within the scope of an anti-dumping duty order and to take into account any written advice provided by the USITC as to whether the proposed inclusion of the parts and components taken as a whole would be inconsistent with the affirmative determination of injury on which the anti-dumping duty order was based. In drafting this provision, Congress had explicitly taken into account the provision's consistency with Article VI of the General Agreement.[5]

4.41 The United States was of the view that, in examining the anti-circumvention provisions adopted by the EEC, the Panel should consider the essential necessity for anti-circumvention measures and approve provisions which were consistent with the General Agreement, yet fitted within the anti-dumping procedures and institutions of individual contracting parties. Not all such measures operated identically. The provisions on circumvention in the legislation of the United States were a valid exercise of the rights and obligations of the United States under the General Agreement.

[1]Section 781 of the Tariff Act of 1930, as amended.
[2]Section 781(a) of the Tariff Act of 1930, as amended.
[3]Section 781(a)(2) of the Tariff Act of 1930, as amended.
[4]See e.g. Articles 2:4, 3:2 and 4:1(ii) of the Anti-Dumping Code.
[5]H.R. Rep. No. 576, 100th Cong., 2nd Sess. 602 (1988).

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V. **FINDINGS**

Introduction

5.1 The Panel noted that the issues before it arise essentially from the following facts and arguments: In June 1987, the EEC included in its anti-dumping regulation, Council Regulation No. 2176/84, a provision intended to prevent the circumvention of anti-dumping duties on finished products through the importation of parts or materials for use in the assembly or production of like finished products within the EEC. The provision was subsequently incorporated in Article 13:10 of Council Regulation No. 2423/88 adopted on 11 July 1988 which states, inter alia, that

> "Definitive anti-dumping duties may be imposed ... on products that are introduced into the commerce of the Community after having been assembled or produced in the Community, provided that:
>
> - assembly or production is carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to a definitive anti-dumping duty,
>
> - the assembly or production operation was started or substantially increased after the opening of the anti-dumping investigation,
>
> - the value of parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty exceeds the value of all other parts or materials used by at least 50%."

Article 13:10(d) of the same Regulation states that the provisions of the Regulation concerning investigation, procedure and undertakings apply to all questions arising under Article 13:10. Under these provisions, the EEC made the suspension of proceedings under Article 13:10 conditional on undertakings by assemblers and producers in the EEC to limit the use of imported parts and materials. During the period between the adoption of Article 13:10 in June 1987 and the establishment of the Panel in October 1988, investigations under Article 13:10 resulted in the imposition of duties on products produced or assembled in the EEC in eight cases and in the acceptance of undertakings in seven cases. During this period there were four cases in which the acceptance of undertakings led to the revocation of the duties initially imposed. All investigations initiated and measures taken during this period under Article 13:10 involved products assembled or produced in the EEC by parties related to or associated with Japanese manufacturers whose exports of the finished like products were subject to definitive anti-dumping duties in the EEC (for further details, see Annex I).

5.2 The Panel further noted that Japan considers

- the duties imposed under Article 13:10,

- the acceptance of undertakings under Article 13:10, and

- the provisions of Article 13:10 as such,

to be inconsistent with the EEC's obligations under Articles I and II or III, and not justified by Article VI of the General Agreement. The EEC considers both the application of Article 13:10 and the Article itself to be justified by Article XX(d). Japan disagrees that Article XX(d) justifies the measures at issue. Japan further considers that the administration of Article 13:10 contravenes Article X of the General Agreement concerning the publication and administration of trade regulations, inter alia,

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because the EEC has failed to publish criteria for accepting undertakings and to determine the origin of parts in a uniform manner. The EEC considers that it has acted in conformity with that provision.

5.3 The Panel decided to examine successively:

(a) the imposition of duties under Article 13:10 of the EEC's Council Regulations No. 2176/84 and No. 2423/88 (hereinafter referred to as "anti-circumvention duties");

(b) the acceptance of undertakings under Article 13:10 of Regulations No. 2176/84 and No. 2423/88 (hereinafter referred to as "parts undertakings");

(c) Article 13:10 of Regulations No. 2176/84 and No. 2423/88 itself (hereinafter referred to as "anti-circumvention provision"); and

(d) the non-publication of criteria for accepting parts undertakings and the administration of the rules of origin for parts and materials.

The Panel further decided that it would examine each of the above issues first in the light of the provisions of the General Agreement which Japan claims to have been violated by the EEC and then, if it were to find an inconsistency with any of the provisions invoked by Japan, in the light of the exception in the General Agreement invoked by the EEC.

Anti-circumvention duties

5.4 Categorization as customs duties (Article II:1(b)) or internal taxes (Article III:2). The Panel noted that Japan argued that the anticircumvention duties could be considered to be either duties imposed on or in connection with importation within the meaning of Article II:1(b) or internal taxes within the meaning of Article III:2. The EEC considered that the duties do not fall under Article III:2. The Panel recalled that the distinction between import duties and internal charges is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently: the imposition of "ordinary customs duties" for the purpose of protection is allowed unless they exceed tariff bindings; all other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items (Article II:1(b)). By contrast, internal taxes that discriminate against imported products are prohibited, whether or not the items concerned are bound (Article III:2). The Panel therefore first examined whether the duties constitute customs or other duties imposed on or in connection with importation falling under Article II:1(b) or internal taxes falling under Article III:2.

5.5 The Panel noted that the anti-circumvention duties are levied, according to Article 13:10(a), "on products that are introduced into the commerce of the Community after having been assembled or produced in the Community". The duties are thus imposed, as the EEC explained before the Panel, not on imported parts or materials but on the finished products assembled or produced in the EEC. They are not imposed conditional upon the importation of a product or at the time or point of importation. The EEC considers that the anti-circumvention duties should, nevertheless, be regarded as customs duties imposed "in connection with importation" within the meaning of Article II:1(b). The main arguments the EEC advanced in support of this view were: firstly, that the purpose of these duties was to eliminate circumvention of anti-dumping duties on finished products and that their nature was identical to the nature of the anti-dumping duties they were intended to enforce; and secondly, that the duties were collected by the customs authorities under procedures identical to those applied for the collection of customs duties, formed part of the resources of the EEC in the same way as customs duties and related to parts and materials which were not considered to be "in free circulation" within the EEC.

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5.6 In the light of the above facts and arguments, the Panel first examined whether the policy purpose of a charge is relevant to determining the issue of whether the charge is imposed in "connection with importation" within the meaning of Article II:1(b). The text of Articles I, II, III and the Note to Article III refers to charges "imposed on importation", "collected ... at the time or point of importation" and applied "to an imported product and to the like domestic product". The relevant fact, according to the text of these provisions, is not the policy purpose attributed to the charge but rather whether the charge is due on importation or at the time or point of importation or whether it is collected internally. This reading of Articles II and III is supported by their drafting history and by previous panel reports (e.g. BISD 1S/60; 25S/49, 67). A recent panel report which has examined the provisions of the General Agreement governing tax adjustments applied to goods entering into international trade (among them Articles II and III) stated that

> "the tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products; they do not distinguish between taxes with different policy purposes" (BISD 34S/161, emphasis added).

The Panel further noted that the policy purpose of charges is frequently difficult to determine objectively. Many charges could be regarded as serving both internal purposes and purposes related to the importation of goods. Only at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) or Article III:2. The Panel therefore concluded that the policy purpose of the charge is not relevant to determining the issue of whether the charge is imposed in "connection with importation" within the meaning of Article II:1(b).

5.7 The Panel proceeded to examine whether the mere description or categorization of a charge under the domestic law of a contracting party is relevant to determining the issue of whether it is subject to requirements of Article II or those of Article III:2. The Panel noted that if the description or categorization of a charge under the domestic law of a contracting party were to provide the required "connection with importation", contracting parties could determine themselves which of these provisions would apply to their charges. They could in particular impose charges on products after their importation simply by assigning the collection of these charges to their customs administration and allocating the revenue generated to their customs revenue. With such an interpretation the basic objective underlying Articles II and III, namely that discrimination against products from other contracting parties should only take the form of ordinary customs duties imposed on or in connection with importation and not the form of internal taxes, could not be achieved. The same reasoning applies to the description or categorization of the product subject to a charge. The fact that the EEC treats imported parts and materials subject to anti-circumvention duties as not being "in free circulation" therefore cannot, in the view of the Panel, support the conclusion that the anti-circumvention duties are being levied "in connection with importation" within the meaning of Article II:1(b).

5.8 In the light of the above, the Panel found that the anti-circumvention duties are not levied "on or in connection with importation" within the meaning of Article II:1(b), and consequently do not constitute customs duties within the meaning of that provision.

5.9 Article III:2. The Panel proceeded to examine the anti-circumvention duties in the light of Article III:2, first sentence, according to which

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

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The Panel noted that, in the cases in which anti-circumvention duties had been applied, the EEC followed sub-paragraph (c) of the anti-circumvention provision, according to which "the amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete products on the c.i.f. value of the parts or materials imported". The Panel further noted that like parts and materials of domestic origin are not subject to any corresponding charge. The Panel therefore found that the anti-circumvention duties on the finished products subject imported parts and materials indirectly to an internal charge in excess of that applied to like domestic products and that they are consequently contrary to Article III:2, first sentence.

5.10 Having found that the anti-circumvention duties are inconsistent with Article III:2, first sentence, the Panel saw no need for examining whether the anti-circumvention duties are also inconsistent with the obligations of the EEC under Article III:2, second sentence, and Article I:1. The Panel proceeded to examine the question of whether the inconsistency of the duties with Article III:2, first sentence, can be justified under the exception in the General Agreement invoked by the EEC.

5.11 Article VI. The Panel noted that, in the proceedings before the Panel, the EEC had not defended the anti-circumvention duties as anti-dumping duties within the meaning of Article VI of the General Agreement but as measures designed to prevent what it considered to be circumvention of anti-dumping duties through the importation and subsequent assembly of parts and components. The legal basis of these measures, in the view of the EEC, was Article XX(d) of the General Agreement which permits contracting parties to take measures necessary to secure compliance with laws or regulations which are not inconsistent with the General Agreement. The Panel further noted that the United States, as an interested third party, had argued that Article VI of the General Agreement provided to a certain extent a legal basis for measures to prevent what it considered to be circumvention of anti-dumping duties. At one point in the proceedings the EEC stated that, if the Panel were to find that the anti-circumvention duties were justifiable under Article VI, "it would not disagree" with such an approach (supra paragraph 3.76). However, the EEC presented no arguments in support of a justification of its measures under Article VI; on the contrary, in the subsequent proceedings the EEC continued to present various arguments to the effect that measures under Article 13:10 were "necessary" within the meaning of Article XX(d) because Article VI did not provide a basis for the application of measures to prevent circumvention of anti-dumping duties (supra paragraphs 3.86-89). In conformity with the practice of panels not to examine exceptions under the General Agreement which have not been invoked by the contracting party complained against (see, e.g. BISD 31S/74) and not to examine issues brought only by third parties (cf. L/6514, page 15 and the references therein), the Panel decided not to examine whether the anti-circumvention duties could be justified under Article VI of the General Agreement.

5.12 Article XX(d). The Panel proceeded to examine whether Article XX(d), which the EEC did invoke, can justify the imposition of the anti-circumvention duties. The Panel noted that the relevant part of Article XX(d) provides that

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

The Panel noted that Article XX refers to "measures" in its introductory sentence and to "laws and regulations" in sub-paragraph (d). The Panel considered that the "measure" referred to in Article XX is the measure requiring justification under Article XX and that, therefore, the imposition of

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anti-circumvention duties inconsistent with Article III:2 is the "measure" in the present case. It further considered that the "laws or regulations" to be examined under sub-paragraph (d) are the laws or regulations the contracting party invoking Article XX(d) claims to secure compliance with, in the present case the Council Regulations Nos. 2176/84 and 2423/88 (except for the anti-circumvention provision) and the individual Council regulations imposing definitive anti-dumping duties on finished products from Japan.

5.13 The Panel then considered whether Council Regulations Nos. 2176/84 and 2423/88 (except for the anti-circumvention provision) and the individual EEC anti-dumping regulations imposing definitive anti-dumping duties on finished products imported from Japan could be considered as laws or regulations "which are not inconsistent" with the provisions of the General Agreement. The Panel recalled Japan's doubts as to whether these laws and regulations are "not inconsistent" with the provisions of the General Agreement. However, the Panel noted that its terms of reference and the submissions by both parties have been limited to the anti-circumvention provision and its application. The Panel therefore decided to assume that, for the purposes of its proceeding, Council Regulations Nos. 2176/84 and 2423/88, with the exception of the anti-circumvention provision, and the individual EEC regulations imposing definitive anti-dumping duties on imports from Japan are "laws or regulations which are not inconsistent with the provisions of this Agreement" in terms of Article XX(d). The Panel emphasizes that this assumption applies only to its proceeding and is consequently without prejudice to any examination of these regulations in any other dispute settlement proceeding.

5.14 The Panel noted that, in order for a measure to be covered by Article XX(d), it must "secure compliance with" laws or regulations that are not inconsistent with the General Agreement. The Panel therefore proceeded to examine the question of whether the imposition of anti-circumvention duties inconsistent with Article III:2 is a measure "to secure compliance with" the EEC's general anti-dumping regulations and the individual regulations imposing definitive anti-dumping duties. The essential argument of Japan on this point was that Article XX(d) permits contracting parties to take only measures to enforce the obligations provided for in the laws or regulations consistent with the General Agreement. The only part of the EEC's anti-dumping regulations that requires enforcement is the part establishing the obligation to pay anti-dumping duties. The anti-circumvention duties do not serve to secure the payment of these duties and can therefore in the view of Japan not be considered to be securing compliance with the EEC's anti-dumping regulations. The essential argument of the EEC was that the terms "to secure compliance with" should be interpreted more broadly to cover not only the enforcement of laws and regulations per se but also the prevention of actions which have the effect of undermining the objectives of laws and regulations. In the view of the EEC, the anti-circumvention duties, being levied only in narrowly defined circumstances in which the objectives of the EEC's anti-dumping regulations are clearly being undermined, therefore secure compliance with these regulations within the meaning of Article XX(d).

5.15 The Panel concluded from the above that the interpretative issue before it was: Does the qualification "to secure compliance with laws or regulations" mean that the measure must prevent actions inconsistent with the obligations set out in laws or regulations, or does it support a more expansive interpretation according to which it would also cover a measure which prevents actions that are consistent with laws or regulations but undermine their objectives?

5.16 The Panel first examined this interpretative issue in the light of the text of Article XX(d). The Panel noted that this provision does not refer to objectives of laws or regulations but only to laws or regulations. This suggests that Article XX(d) merely covers measures to secure compliance with laws and regulations as such and not with their objectives. The examples of the laws and regulations indicated in Article XX(d), namely "those relating to customs enforcement, the enforcement of monopolies ..., the protection of patents ... and the prevention of deceptive practices" (emphasis added) also suggest that Article XX(d) covers only measures designed to prevent actions that would be illegal

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under the laws or regulations. This conclusion is further supported by the fact that the provision corresponding to Article XX(d) in the 1946 Suggested Charter for an International Trade Organization used the terms "to induce compliance with" while Article XX(d) of the General Agreement uses the stricter language "to secure compliance with" (emphasis added).

5.17 The Panel then examined the alternative interpretations in the light of the purpose of Article XX(d) and found the following. If the qualification "to secure compliance with laws and regulations" is interpreted to mean "to enforce obligations under laws and regulations", the main function of Article XX(d) would be to permit contracting parties to act inconsistently with the General Agreement whenever such inconsistency is necessary to ensure that the obligations which the contracting parties may impose consistently with the General Agreement under their laws or regulations are effectively enforced. If the qualification "to secure compliance with laws and regulations" is interpreted to mean "to ensure the attainment of the objectives of the laws and regulations", the function of Article XX(d) would be substantially broader. Whenever the objective of a law consistent with the General Agreement cannot be attained by enforcing the obligations under that law, the imposition of further obligations inconsistent with the General Agreement could then be justified under Article XX(d) on the grounds that this secures compliance with the objectives of that law. This cannot, in the view of the Panel, be the purpose of Article XX(d): Each of the exceptions in the General Agreement - such as Articles VI, XII or XIX - recognizes the legitimacy of a policy objective but at the same time sets out conditions as to the obligations which may be imposed to secure the attainment of that objective. These conditions would no longer be effective if it were possible to justify under Article XX(d) the enforcement of obligations that may not be imposed consistently with these exceptions on the grounds that the objective recognized to be legitimate by the exception cannot be attained within the framework of the conditions set out in the exception.

5.18 For the reasons indicated in the preceding paragraphs, the Panel found that Article XX(d) covers only measures related to the enforcement of obligations under laws or regulations consistent with the General Agreement. The Panel noted that the general anti-dumping Regulation of the EEC does not establish obligations that require enforcement; it merely establishes a legal framework for the authorities of the EEC. Only the individual regulations imposing definitive anti-dumping duties give rise to obligations that require enforcement, namely the obligation to pay a specified amount of anti-dumping duties. The Panel noted that the anti-circumvention duties do not serve to enforce the payment of anti-dumping duties. The Panel could, therefore, not establish that the anti-circumvention duties "secure compliance with" obligations under the EEC's anti-dumping regulations. The Panel concluded for these reasons that the duties could not be justified under Article XX(d).

Acceptance of parts undertakings

5.19 Article III:4. The Panel proceeded to examine whether, as contended by Japan, the acceptance of undertakings to limit the use of imported parts and materials constituted a "requirement" that accords treatment to imported products less favourable than that accorded to domestic products contrary to Article III:4.

5.20 The Panel recalled that, during the period June 1987 to October 1988, eleven undertakings by parties related to or associated with Japanese manufactures had been accepted by the EEC in investigations under the anti-circumvention provision and that, according to the relevant Commission decisions published in the Official Journal of the European Communities, these undertakings related, inter alia, to changes in the sourcing of parts and materials used in assembly or production operations in the Community. The Panel noted that there is no obligation under the EEC's anti-dumping Regulation to offer parts undertakings, to accept suggestions by the EEC Commission to offer such undertakings and to maintain the parts undertakings given. However, the consequence of not offering an undertaking, or of withdrawing an existing undertaking, can be the continuation of procedures that may lead to the

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imposition of the anti-circumvention duties. Article 10 of Regulation No. 2324/88 states that "where an undertaking has been withdrawn or where the Commission has reason to believe that it has been violated ... it may ... apply ... antidumping ... duties forthwith on the basis of the facts established before the acceptance of the undertaking".

5.21 The Panel noted that Article III:4 refers to "all laws, regulations or requirements affecting (the) internal sale, offering for sale, purchase, transportation, distribution or use". The Panel considered that the comprehensive coverage of "all laws, regulations or requirements affecting" (emphasis added) the internal sale, etc. of imported products suggests that not only requirements which an enterprise is legally bound to carry out, such as those examined by the "FIRA Panel" (BISD 30S/140, 158), but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute "requirements" within the meaning of that provision. The Panel noted that the EEC made the grant of an advantage, namely the suspension of proceedings under the anti-circumvention provision, dependent on undertakings to limit the use of parts or materials of Japanese origin without imposing similar limitations on the use of like products of EEC or other origin, hence dependent on undertakings to accord treatment to imported products less favourable than that accorded to like products of national origin in respect of their internal use. The Panel therefore concluded that the decisions of the EEC to suspend proceedings under Article 13:10 conditional on undertakings by enterprises in the EEC to limit the use of parts or materials originating in Japan in their assembly or production operations are inconsistent with Article III:4.

5.22 Having found the acceptance by the EEC of parts undertakings limiting the use of imported parts and components to be inconsistent with Article III:4, the Panel saw no need for examining whether the acceptance of such undertakings is also inconsistent with Article I:1 of the General Agreement.

5.23 Article VI. The Panel recalled that the EEC had, in the course of the Panel proceeding, not invoked Article VI as a justification of its anti-circumvention duties (see paragraph 5.11 above). As the EEC had also not invoked Article VI as a justification of its parts undertakings, the Panel decided not to examine whether the acceptance of undertakings inconsistent with Article III:4 of the General Agreement could be justified under Article VI.

5.24 Article XX(d). The Panel recalled its finding that the imposition of anti-circumvention duties inconsistent with Article III:2 could not be justified under Article XX(d) because the duties did not "secure compliance with" the EEC's anti-dumping regulations within the meaning of that provision (see above paragraph 5.18). The Panel found that this implies that the acceptance of parts undertakings, which functioned as a substitute for the anti-circumvention duties, could likewise not be considered to "secure compliance with" the EEC's anti-dumping regulations.

Article 13:10 of the EEC Council Regulation

5.25 Japan considers not only the measures taken under the anticircumvention provision but also the provision itself to be violating the EEC's obligations under the General Agreement. Japan therefore asked the Panel to recommend to the CONTRACTING PARTIES that they request the EEC not only to revoke the measures taken under the provision but also to withdraw the provision itself. The Panel therefore examined whether the mere existence of the anti-circumvention provision is inconsistent with the General Agreement. The Panel noted that the anti-circumvention provision does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions. Under the provisions of the General Agreement which Japan claims to have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures. The Panel further noted that it has been recognized in a previous panel report adopted by the CONTRACTING PARTIES that legislation mandatorily

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requiring the executive authority to impose internal taxes discriminating against imported products is inconsistent with Article III:2 whether or not an occasion for its actual application has as yet arisen (BISD 34S/160), but that legislation merely giving the executive authorities the possibility to act inconsistently with Article III:2 cannot, by itself, constitute a violation of that provision (BISD 34S/160, 164). At issue in that case was, inter alia, a provision in the Superfund Act of the United States which directs the United States tax authorities to impose a tax on certain chemical substances but allows these authorities not to impose the tax provided they issue certain regulations. The panel which examined that case noted that the levying of the tax would be inconsistent with Article III:2 and that the regulations eliminating the need to impose that tax had not yet been issued. The panel then concluded:

> "From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement" (BISD 34S/163).

5.26 In the light of the above the Panel found that the mere existence of the anti-circumvention provision in the EEC's anti-dumping Regulation is not inconsistent with the EEC's obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General Agreement, be desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties.

Publication of Criteria for the Acceptance of Parts Undertakings and Administration of the Rules of Origin for Parts and Materials

5.27 The Panel considered the argument of Japan that, in the administration of the anti-circumvention provision, the EEC violated its obligations under Article X:1 and X:3 of the General Agreement, in particular in respect of the criteria for the acceptance of undertakings and the methodology for determining the origin of imported parts and components. Given that the Panel found the anti-circumvention duties and the acceptance of parts undertakings to be inconsistent with Article III:2 and 4, and not justifiable under Article XX(d), and that any further imposition of such duties or acceptance of related undertakings would therefore be inconsistent with the General Agreement, the issue of whether the administration of the anti-circumvention provision is consistent with Article X is no longer relevant.

Concluding Comment by the Panel

5.28 The Panel was aware that a number of participants in the ongoing multilateral trade negotiations consider that the increased internationalization of production processes has led to certain problems in the administration of their anti-dumping laws, and that these issues are presently the subject of these negotiations. The Panel would like to underline that its task was limited to an examination of the measures taken by the EEC in the light of the existing provisions of the General Agreement invoked by the parties to the dispute.

VI. **CONCLUSIONS**

6.1 The duties imposed by the EEC under Article 13:10 of Council Regulations Nos. 2176/84 and 2423/88 on products assembled or produced within the EEC by enterprises related to Japanese manufacturers of products subject to anti-dumping duties are inconsistent with Article III:2, first sentence, and are not justified by Article XX(d) of the General Agreement.

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6.2 The decisions of the EEC to suspend proceedings under Article 13:10 conditional on undertakings by enterprises in the EEC to limit the use of parts or materials originating in Japan in their assembly or production operations are inconsistent with Article III:4 and not justified by Article XX(d) of the General Agreement.

6.3 The Panel recommends that the CONTRACTING PARTIES request the EEC to bring its application of Article 13:10 into conformity with its obligations under the General Agreement.

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ANNEX I: Investigations carried out under Article 13:10 of Council Regulation (EEC) No. 2176/84, or, since July 1988, Article 13:10 of Council Regulation (EEC) No. 2423/88

1. Electronic typewriters

Date of initiation	Exporters concerned	Related Assemblers	Initial Results	Subsequent Procedure
1 September 1987 (OJ, No. C235/2)	Brother	Brother Industries (UK)	Termination of investigation on 18 April 1988, 40 per cent non-Japanese parts achieved (OJ, No. L101/26)	-
1 September 1987 (OJ, No. C235/2)	TEC	Tec Electronik-Werk (FRG)	Termination of investigation on 18 April 1988; cessation of assembly operations prior to opening of the investigation (OJ, No. L101/26)	-
1 September 1987 (OJ, No. C235/2)	Canon	Canon Bretagne (FR)	Duty extended on 18 April 1988; 80 per cent Japanese parts used (OJ, No. L101/4)	Undertaking accepted and duty withdrawn on 11 July 1988 (OJ, No. L183/39 and L183/1)
1 September 1987 (OJ, No. C235/2)	Matsushita	Kyushu Matsushita (UK)	Duty extended on 18 April 1988; 82 per cent Japanese parts used (OJ, No. L101/4)	Undertaking accepted and duty withdrawn on 16 May 1988 (OJ, No. L128/89 and L123/31)

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1. Electronic typewriters (Cont'd.)

Date of initiation	Exporters concerned	Related Assemblers	Initial Results	Subsequent Procedure
1 September 1987 (OJ, No. C235/2)	Sharp	Sharp Manufacturing (UK)	Duty extended on 18 April 1988; 76 per cent Japanese parts value (OJ, No. L101/4)	Undertaking accepted and duty withdrawn on 25 July 1988 (OJ, No. L203/25 and L203/1)
1 September 1987 (OJ, No. C235/2)	Silver Reed	Silver Reed Int. (UK)	Duty extended on 18 April 1988; 96 per cent Japanese parts value (OJ, No. L101/4)	-

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2. Electronic weighing scales

Date of initiation	Exporters concerned	Related Assemblers	Initial Results	Subsequent Procedure
1 September 1987 (OJ, No. C235/3)	TEC	TEC KEYLARD (NL)	Termination of investigation on 18 April 1988; 40 per cent non-Japanese parts value achieved (OJ, No. L101/28)	-
1 September 1987 (OJ, No. C235/3)	TEC	TEC (UK)	Duty extended on 18 April 1988; 93 per cent Japanese parts value (OJ, No. L101/1) L189/27 and L244/1)	Undertaking accepted in July 1988 and duty withdrawn in September 1988 (OJ, No.

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3. Hydraulic Excavators

Date of initiation	Exporters concerned	Related Assemblers	Initial Results	Subsequent Procedure
23 October 1987 (OJ, No. C285/4)	KOMATSU	KOMATSU (UK)	Termination of investigation on 18 April 1988; 40 per cent non-Japanese parts value achieved (OJ, No. L101/24)	-

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4. Plain paper photocopiers

Date of initiation	Exporters concerned	Related Assemblers	Initial Results	Subsequent Procedure
17 February 1988 (OJ, No. C44/3)	Canon	Canon Bretagne (FR	Undertaking accepted on 17 October 1988; 63 per cent Japanese parts value during reference period (OJ, No. L248/60)	-
17 February 1988 (OJ, No. C44/3)	Canon	Canon Giessen (FRG)	Termination of investigation on 17 October 1988; 40 per cent non-Japanese parts value during reference period (OJ, No. L248/60)	-
17 February 1988 (OJ, No. C44/3)	Canon	Olivetti-Canon (I)	Termination of investigation on 17 October 1988; 40 per cent non-Japanese parts value during reference period (OJ, No. L248/60)	-
17 February 1988 (OJ, No. C44/3)	Konica	Konica Business Machine Manufacturing (D)	Duty extended on 17 October 1988; 99 per cent Japanese parts value (OJ, No. L248/36)	Undertaking accepted on 23 December 1988 and duty withdrawn on 13 February 1989 (OJ, No. L43/54 and L43/1)
17 February 1988 (OJ, No. C44/3)	Matsushita	Matsushita Business Machine Europe (D)	Duty extended on 17 October 1988; 98 per cent Japanese parts value (OJ, No. L248/36)	Undertaking accepted on 16 November 1988 and duty withdrawn on 19 December 1988 (OJ, No. L355/66 and L355/1)
17 February 1988 (OJ, No. C44/3) and 1 December 1988 (OJ, No. C306/8)	Sharp	Sharp Manufacturing (UK)	Acceptance of undertaking on 28 April 1989; 60 per cent Japanese parts value (OJ, No. L126/38)	-

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4. Plain paper photocopiers (cont'd)

Date of initiation	Exporters concerned	Related Assemblers	Initial Results	Subsequent Procedure
17 February 1988 (OJ, No. C44/3)	Toshiba	Toshiba Systems (FR)	Duty extended on 17 October 1988; 70 per cent Japanese parts value (OJ, No. L284/36) (OJ, No. L355/66 and L355/1)	Undertaking accepted on 16 November 1988 and duty withdrawn on 19 December 1988
17 February 1988 (OJ, No. C44/3)	Minolta Dr Eisbein (FRG)	Firma Develop	Undertaking accepted on 17 October 1988; 94 per cent Japanese parts value during period of investigation (OJ, No. L248/60)	-
17 February 1988 (OJ, No. C44/3)	Ricoh	Ricoh Products (UK)	Undertaking accepted on 17 October 1988; 87 per cent Japanese parts value during period of investigation (OJ, No. L248/60)	-
4 May 1989 (OJ, No. C113/6)	Ricoh	Ricoh Industries (FR)	-	-

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5. Ball Bearings

Date of initiation	Exporters concerned	Related Assemblers	Initial Results	Subsequent Procedure
8 June 1988 (OJ, No. C150/4)	Nippon Seiko KK	NSK Bearings (Europe) (UK)	Termination of investigation on 20 January 1989; 40 per cent non-Japanese parts value during reference period (OJ, No. L25/90)	-
8 June 1988 (OJ, No. C150/4)	NTN Toyo Bearing	NTN Kugellager Fabrik (FRG)	Termination of investigation on 20 January 1989; 40 per cent non-Japanese parts value during reference period (OJ, No. L25/90)	-

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