Editorial

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Creeping Protectionism

The sweeping trade bill approved by the US Senate last July has been rightly condemned outside the US as a protectionist ragbag. It includes measures ranging from import restrictions to help troubled industries, to calls for selective retaliation against countries whose import restrictions are considered to be offensive by the US Trade Representative.

The Japanese procurement policy for the construction of Kansai Airport, and the slow access of foreign banks and brokers to the Tokyo financial market, have also received wide coverage in the media as typical examples of Japanese protectionism.

The recently-settled *pasta* dispute between the US and the EEC highlights the US allergy to the EEC agricultural policy known for its subsidies to protect the European farmer against lower world market prices.

The increase in the US trade deficit, in spite of the strengthening yen and the declining dollar, together with the apparent difficulty US and European firms have in penetrating the Japanese market, have created a climate where free trade is at risk. Politicians feel justified in openly introducing protectionist measures, and the GATT disciplines are under strain. Bilateral negotiations tend to prevail over GATT's multilateral approach, as shown by the US-Japan semiconductor pact for example.

No doubt these developments will lead to interesting discussions in the Uruguay Round, where the future form and fate of the GATT system will be decided.

In addition to the overt calls for protectionist measures such as the US trade bill, which are widely publicized and the subject of public debate, there are various forms of covert or "creeping" protectionism all over the world which escape public scrutiny.

The European Community's enforcement of its anti-dumping rules is an example of hidden protectionism which deserves to be exposed. In the eyes of the public the "dumper" is seen as a *quasi* "white collar criminal" who must be punished. Yet, with the methodology currently followed by the Commission, even a prudent foreign exporter cannot avoid becoming the victim of a dumping finding.

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Dumping occurs when export prices are lower than domestic prices. However, when determining the dumping margin, the Community does not take into account the exports sold at a higher price than the domestic one. Furthermore, the Community's methodology is geared to inflate domestic prices and deflate export prices. This is particularly apparent in a situation where a foreign exporter sells both in the EEC and in his home market through sales subsidiaries. In this situation the Community authorities now subtract all costs (including overheads) and profits from the export prices, but subtract only so-called directly-related selling expenses, excluding overheads and profits, from the normal value. In other words, a normal value which includes all distribution overheads and profits is compared to an export price from which overheads and profits have been deducted. Needless to say, this interpretation of the Regulation creates dumping margins, and would seem to violate the principle of fair comparison whereby apples will be compared with apples.

A second example of the Community's creative and protectionist interpretation of the Regulation can be found in its application of the refund request rules.

Since EEC anti-dumping duties apply across the board to all future imports from the country concerned, whether exported at dumped or non-dumped prices, the Regulation provides for a refund procedure if an importer can demonstrate that the duty collected exceeds the actual dumping margin.

From an examination of the few decisions published in this field, it would seem that up to now importers have only rarely succeeded in obtaining refunds. The claims take several years to process and usually only a fraction of the amount asked for is granted. Mention should be made here that the Commission deducts anti-dumping duties from the price of first resale to independent buyers in constructed export price cases. This means that the Commission treats anti-dumping duties as a cost, even though they may be refundable, thereby prejudging the idea of refundability. If a duty can qualify for a refund, it should be treated as a neutral element, not as a cost.

Except to the parties to the proceeding, the unfairness of the Community's methodology is not readily apparent. Outsiders simply have access to the information published in the Official Journal. Contrary to US practice the specific arguments raised by the parties are only rarely included in the information published about the case. More often than not, this is limited to general selfserving statements to the effect that the rules have been correctly applied.

Needless to say, this lack of transparency in the administrative proceedure, combined with the wide discretion enjoyed by the Commission and Council for applying the Community's anti-dumping rules, make it all the more imperative for the European Court of Justice to review carefully the findings of the Community authorities.

Unfortunately, in May 1987, the Court in its miniature bearings judgment, made it clear that it was prepared to engage in only a limited review of the facts. It did not intend to interfere with the Commission and Council's appraisal of the facts unless there had been "a manifest error of appraisal" or "a misuse of powers".

It is submitted that the Court's being allergic to doublechecking the findings of the Community authorities creates a situation where the defendant must prove his innocence—*in dubio pro Commissione*. It is not because the authorities have avoided committing any "manifest error" that they have properly discharged their obligation to prove a breach of the anti-dumping rules.

Increased "judicialization", *i.e.* increased judicial control over the factual assessments made by the Community authorities, would seem to be the best way to avoid obscure findings remaining beyond scrutiny. In this connection it is to be hoped that the creation of a court of first instance, as provided in the Single Act, will contribute to installing a proper system of checks and balances.

In addition to increased judicialization of the administrative process, it is equally important for the European Parliament to be allowed to play a more active role in the preparation of Community legislation. Another example from the Community's anti-dumping enforcement will underscore this point. In June of this year, the Council of Ministers adopted the so-called "Parts Amendment" to the EEC Anti-dumping Regulation. In the press this move has been described as a necessary tool to crack down on those seeking to circumvent anti-dumping duties by setting up simple assembly plants inside the Community.

This clever presentation of the Parts Amendment as being the only way to close the so-called "screwdriver" assembly plant loophole is misleading in many respects. The Community is using a sledgehammer to kill a gnat, and putting inward investment in the Community at risk.

Had the Parts Amendment been the subject of an open debate in Parliament, politicians would perhaps have realized that the Administration was in effect rewriting the rules of origin, instead of merely attacking "screwdriver" operations.

Such a dramatic change in the rules in mid-game seems unfair. One can only hope that European investors abroad will not receive similar treatment from authorities who first welcome foreign investment, then treat it as a hostage.