

## Case C-69/89

Nakajima All Precision Co. Ltd

v

Council of the European Communities

(Dumping — Definitive duty — Imports of serial-impact dot-matrix printers  
originating in Japan)

Report for the Hearing .....	2074
Opinion of Mr Advocate General Lenz delivered on 5 December 1990 .....	2112
Judgment of the Court, 7 May 1991 .....	2169

### Summary of the Judgment

- Measures adopted by the Community institutions — Application in time — Application of a new basic anti-dumping regulation to proceedings already in progress — Whether a specific statement of reasons is necessary — Not necessary if no new rules in relation to previous practice are introduced*  
(EEC Treaty, Art. 190; Council Regulation No 2423/88, Arts 2(3)(b)(ii) and 19(2))
- International agreements — GATT — Possibility of relying on the GATT Anti-Dumping Code in order to contest the validity of the basic anti-dumping regulation by means of an objection of illegality — Not dependent on the Code's having direct effect*  
(EEC Treaty, Art. 184; Council Regulation No 2423/88; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1979 Anti-Dumping Code))
- Common commercial policy — Protection against dumping practices — Dumping margin — Determination of the normal value — Method of establishing the constructed value — Conformity of provisions of the basic anti-dumping regulation with the GATT Anti-Dumping Code*  
(Council Regulation No 2423/88, Art. 2(3)(b)(ii); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1979 Anti-Dumping Code), Art. 2(4))

4. *Action for annulment — Pleas in law — Infringement of essential procedural requirements — Breach by an institution of its rules of procedure — Plea submitted by a natural or legal person — Inadmissible*  
(EEC Treaty, Art. 173, first and second paras)
5. *Common commercial policy — Protection against dumping practices — Dumping margin — Determination of the normal value — Use of constructed value — Order of priority to be followed as between different methods of calculation*  
(Council Regulation No 2423/88, Art. 2(3)(b)(ii))
6. *Common commercial policy — Protection against dumping practices — Dumping margin — Determination of the normal value — Use of constructed value — Exporter not involved in the marketing of his products on the domestic market — Method of calculation — Reference to the expenses and profits of other producers or exporters selling on the domestic market — Whether lawful*  
(Council Regulation No 2423/88, Art. 2(3)(b)(ii))
7. *Common commercial policy — Protection against dumping practices — Dumping margin — Comparison between the normal value and the export price — Comparison at the ex-factory level — Producer selling exclusively for exportation — Comparison at the level of the first sale to an independent purchaser*  
(Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1979 Anti-Dumping Code, Art. 2(6))
8. *Common commercial policy — Protection against dumping practices — Injury — Community production affected — Exclusion of certain producers — Producers importing the dumped product — Discretion enjoyed by the institutions — Conditions governing its exercise — Whether account to be taken of producers resorting to imports as a measure of self-defence*  
(Council Regulation No 2423/88, Art. 4(5))
9. *Common commercial policy — Protection against dumping practices — Injury — Period to be taken into consideration — Discretion enjoyed by the institutions — Conditions governing its exercise*  
(Council Regulation No 2423/88, Art. 4(2)(c))
10. *Common commercial policy — Protection against dumping practices — Anti-dumping duty — Ad valorem duty — Duty based on the net free-at-Community-frontier price — Rate of duty determined on the basis of the injury threshold expressing the price increase necessary to offset the price-undercutting by the imported product — Injury threshold established by reference to the price charged to the first purchaser in the Community rather than to the free-at-frontier price — Need to convert the injury threshold arithmetically into a percentage of the export price at the c. i. f. level*  
(Council Regulation No 2423/88, Art. 13(2) and (3))

11. *Community law — Principles — Rights of the defence — Compliance with those rights in the course of administrative proceedings — Anti-dumping — Obligation on the institutions to accede to requests for information by the undertakings involved — Limits — Late requests or requests concerning confidential information*  
(Council Regulation No 2423/88, Arts 7(4)(c)(i)(cc) and 8(3))
12. *Common commercial policy — Protection against dumping practices — Dumping margin — Determination of the normal value — Use of constructed value — Discretion enjoyed by the institutions with regard to the method of calculation — Breach of the principle of legal certainty — None — Change in the method of calculation — Breach of the principles of the protection of vested rights and legitimate expectations — None*  
(Council Regulation No 2423/88, Art. 2(3)(b)(ii))

1. The wording of Article 2(3)(b)(ii) of the new basic anti-dumping Regulation No 2423/88 merely clarifies the scope of the rules laid down in the same article of the previous basic regulation by referring to the different methods of calculating the reasonable amount for selling, general and administrative expenses and the reasonable margin of profit to be applied in individual cases when the constructed value is determined, that clarification being designed to codify the previous practice of the Community institutions.

Thus, to the extent to which, precisely, the new wording of that provision cannot be regarded as a substantial alteration of the provision previously in force, its application, pursuant to the second paragraph of Article 19 of Regulation No 2423/88, to 'proceedings already initiated' did not require a specific statement of reasons.

2. The possibility of calling in question, by means of an objection of illegality allowed by Article 184 of the Treaty, the validity of the basic anti-dumping regulation on the ground that it is at variance with an international

agreement, namely the Anti-Dumping Code drawn up in 1979 within the framework of the GATT for the purpose of ensuring the implementation of Article VI thereof, does not presuppose that that agreement has direct effect. That possibility exists merely by virtue of the fact that the agreement is binding on the Community and it is established that by adopting the contested regulation the Community intended to comply with its international obligations.

3. Article 2(3)(b)(ii) of the basic anti-dumping Regulation No 2423/88 is in conformity with Article 2(4) of the GATT Anti-Dumping Code inasmuch as, without going against the spirit of the latter provision, it confines itself to setting out, for the various situations which might arise in practice, reasonable methods of calculating the constructed normal value of the product alleged to have been exported to the Community at dumping prices.

4. The purpose of the rules of procedure of a Community institution is to organize the internal functioning of its services in the interests of good admin-

istration. The rules laid down, particularly with regard to the organization of deliberations and the adoption of decisions, have therefore as their essential purpose to ensure the smooth conduct of the procedure while fully respecting the prerogatives of each of the members of the institution.

It follows that natural or legal persons may not rely on an alleged breach of those rules in support of an action for annulment since they are not intended to ensure protection for individuals.

5. It follows from the wording of Article 2(3)(b)(ii) of the basic anti-dumping Regulation No 2423/88 that the three methods of calculating the constructed normal value there set out must be considered in the order in which they are presented. It is only in the case where none of those methods can be applied that recourse must be had to the general provision set out at the end of Article 2(3)(b)(ii), according to which expenses and profit may be calculated 'on any other reasonable basis'.
6. It is consistent with the scheme of both the Anti-Dumping Code and the basic anti-dumping regulation to calculate the constructed normal value of the products of an undertaking, which sells exclusively for the purposes of exportation and does not engage in the marketing of its own products on the domestic market of the country of origin or exportation, by reference to the expenses and profits of other undertakings which sell their products on that domestic market, pursuant to the second method of calculation provided

for in Article 2(3)(b)(ii) of the basic anti-dumping Regulation No 2423/88.

According to the scheme of the basic anti-dumping regulation, the purpose of constructing the normal value is to determine the selling price of a product as it would be if that product were sold in its country of origin or exportation. From this it follows that the normal value of a product must in all cases be constructed as if the product was intended for distribution and sale within the domestic market, regardless of whether or not the producer has, or has access to, a distribution structure for his products on the domestic market.

If the producer for whom a normal price is constructed sold his products on the domestic market, he would inevitably have to adapt to the conditions imposed on other undertakings operating on that market. There would therefore be discrimination between undertakings if the normal value for a producer operating on the domestic market were to be calculated on the basis of all the expenses and profits included in the price of the product in question whilst in the case of a producer disposing of his products exclusively by way of exportation the normal value were to be calculated without having regard to those accounting data.

7. In the case of a producer whose sales of the product which is the subject of the anti-dumping proceeding consist only of export sales, a correct comparison between the normal value and the export price at the ex-factory level, having regard also to the rules laid

down in Article 2(6) of the Anti-Dumping Code, presupposes that those two values are compared at the level of the first sale to an independent purchaser.

8. When dealing with an anti-dumping proceeding, it is for the Commission and the Council, in the exercise of their discretion, to determine whether they should exclude from the Community industry producers who are themselves importers of the dumped product. That discretion, the exercise of which is subject only to the limitation that it must not constitute a manifest error, must be exercised on a case-by-case basis, by reference to all the relevant facts.

If the imports effected by Community undertakings were carried out as measures of self-defence to fill gaps in the range of products of the undertakings concerned brought about by their abandonment of their own production in certain sectors forced upon them by dumping practices, there is no reason to exclude those undertakings from the group of Community producers for the purpose of determining whether injury has occurred. In such a case, the Community producers who imported products did not intend to inflict injury on themselves by causing, through those imports, a reduction in the use of their own capacity, price falls or the abandonment of projects designed to increase their own production or the development of new products.

9. The Community institutions have a wide discretion when evaluating complex economic situations. This is so in particular when the period to be taken into consideration for the purposes of determining injury in an anti-dumping proceeding is determined.

The fact that the period selected is longer than that covered by the investigation into the existence of dumping practices does not constitute an error of appraisal. According to Article 4(2)(c) of Regulation No 2423/88, an examination of injury presupposes a study of 'actual or potential trends in the relevant economic factors' which must, therefore, be carried out over a sufficiently long period.

10. Since the definitive anti-dumping duties are imposed on the net free-at-Community-frontier price before duty, that is to say on the customs value (c. i. f. price) of the imports, and determined by reference to the injury threshold, which corresponds to the amount by which the prices of the dumped products must be increased in order to offset the amount by which they undercut the prices of Community products, that injury threshold cannot be used as such to express the rate of duty when it is obtained by reference, not to the free-at-Community-frontier price (the c. i. f. price), but to the price to the first independent buyer in the Community, inasmuch as the latter price will necessarily be higher than the c. i. f. price because it includes customs duties and charges. In such a situation, in order to determine the rate of the

- anti-dumping duty to be imposed, the injury threshold must be converted arithmetically into a percentage of the price of each exporter at c. i. f. level.
11. In an anti-dumping proceeding, an undertaking cannot complain that the Community institutions infringed its rights of defence by failing to provide it with all information which it had requested when its request had been received after the expiry of the period of one month following imposition of the provisional duty laid down in Article 7(4)(c)(i)(cc) of Regulation No 2423/88 and concerned details relating to the costs and profits of its competitors, which constitute confidential information under Article 8(3) of that regulation and could not be divulged to it.
  12. The basic anti-dumping regulation allows the Community institutions a margin of discretion, particularly in calculating the amount of the selling, general and administrative expenses to be included in the constructed normal value, and the fact that an institution exercises that discretion without explaining in detail and in advance the criteria which it intends to apply in every specific situation does not constitute a breach of the principle of legal certainty.
- Likewise, the principles of the protection of vested rights and legitimate expectations are not breached where, for the purpose of calculating that value, the Community institutions use a different method from that applied previously to the same undertaking during an earlier proceeding.

## REPORT FOR THE HEARING in Case C-69/89 \*

### Contents

I — Presentation by the applicant .....	I-2076
II — Summary of the facts .....	I-2076
III — Community law framework .....	I-2077
IV — Written procedure and forms of order sought by the parties .....	I-2079
V — Pleas in law and arguments of the parties .....	I-2080

\* Language of the case: French.