

ANTIDUMPING—REDEFINITION OF CONFIDENTIALITY AND  
RIGHT OF JUDICIAL REVIEW — INSTITUTION OF A NEW FORM  
OF RELIEF: *Timex Corporation v. Council and Commission  
of the European Communities*

I. FACTS

In June 1980, the British Clock and Watch Manufacturers' Association Limited, on behalf of the manufacturers of mechanical watches in France and the United Kingdom, lodged a complaint with the Commission of the European Communities.<sup>1</sup> The complaint involved the dumping of mechanical watches and watch movements produced in the Soviet Union and dumped in the European market.<sup>2</sup> In response to the complaint, Commission Regulation (EEC) No. 84/82 was adopted on January 14, 1982.<sup>3</sup> That regulation imposed a provisional antidumping duty on all Soviet-produced wrist watches dumped in the European Community.<sup>4</sup> Council Regulation (EEC) No. 1072/82 extended the provisional duty on May 4, 1982,<sup>5</sup> and on July 12, 1982, a definitive antidumping duty was adopted in Council Regulation (EEC) No. 1882/82.<sup>6</sup> The scope of these regulations was limited to assembled wrist watches and did not impose any antidumping duty, provisional or definitive, on the movements of such watches.<sup>7</sup>

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<sup>1</sup> The antidumping proceeding opened pursuant to that complaint ended in the adoption of Commission Regulation (EEC) No. 84/82, imposing a provisional duty on mechanical wrist watches originating in the Soviet Union. Commission Regulation (EEC) No. 84/82, Jan. 14, 1982, 25 O.J. EUR. COMM. (No. L11/14) (1982).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Council Regulation (EEC) No. 1072/82, May 4, 1982, 25 O.J. EUR. COMM. (No. L125/1) (1982).

<sup>6</sup> Council Regulation (EEC) No. 1882/82, July 12, 1982, 25 O.J. EUR. COMM. (No. 207/1) (1982). The rate of duty imposed by article 1 of that regulation, equal to the dumping margin found, was 12.6% for watches without gold plating of a thickness not exceeding five microns and 26.4% for watches with gold plating of a thickness exceeding five microns. *Id.*

<sup>7</sup> *Id.* In regard to mechanical watch movements, the preamble to Commission Regulation No. 84/82 states:

[A]s regards mechanical watch movements, the Commission has determined that, while there are substantial margins of dumping, the low level of market penetration and the effect of the quantitative restrictions in force

During the original Commission proceedings, Timex Corporation of Dundee, Scotland,<sup>8</sup> on whose behalf the action had been instituted,<sup>9</sup> was denied opportunity to inspect information obtained by the Commission for purposes of determining appropriate antidumping duties.<sup>10</sup> According to Timex, the resulting duties proved wholly inadequate, especially insofar as they did not pertain to unassembled mechanical watch movements.<sup>11</sup>

On September 27, 1982, Timex Corporation filed an action against the Commission of the European Communities and the Council of the European Communities for the partial annulment of article 1 of Regulation No. 1882/82.<sup>12</sup> Timex alleged that such regulation was adopted in breach of substantive and procedural rules laid down in the parent regulation, Commission Regulation (EEC) No. 3017/79 of December 20, 1979,<sup>13</sup> and in the EEC Treaty.<sup>14</sup> Upon hearing before the Court of Justice of the European Communities, article 1 of Regulation No. 1882/82, *held*, void. The antidumping duties adopted by the article are inadequate to protect the interests of Timex and other manufacturers of mechanical watches and watch movements, but shall be maintained until the competent institutions adopt replacement measures sufficient to comply with the court's judgment.<sup>15</sup>

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in France are such that material injury is not being caused and there is no threat that it will be caused.

Commission Regulation No. 84/82, *supra* note 1, at preamble. Mechanical watch movements are not mentioned in the preamble to Council Regulation No. 1882/82, however.

<sup>8</sup> Timex Corporation is the leading manufacturer of mechanical watches and watch movements in the European Community and the only manufacturer of those products in the United Kingdom. *Timex Corporation v. Council of the European Communities*, No. 264/82 (E. Comm. Ct. J. Mar. 20, 1985) at 6.

<sup>9</sup> The complaint which led to the adoption of Regulation No. 1882/82 was lodged by the British Clock and Watch Manufacturers' Association Limited on behalf of manufacturers of mechanical watches in France and the United Kingdom. The Association filed the complaint after one lodged by Timex in April 1979 was rejected by the Commission on the ground that it came from only one Community manufacturer. *Timex*, No. 264/82, at 9. Similarly, Timex was joined in its later action by the Federal Republic of Germany, the French Clock and Watchmakers' Association, and the Pforzheimer Uhren-Rohwerke Parta GmbH & Co. *Id.* at 6-7.

<sup>10</sup> See allegations made by Timex. *Timex*, No. 264/82, at 11-18.

<sup>11</sup> *Id.*

<sup>12</sup> *Timex*, *supra* note 8.

<sup>13</sup> *Id.*; see Commission Regulation (EEC) No. 3017/79, Dec. 20, 1979, 22 O.J. EUR. COMM. (No. L. 339/1) (1979).

<sup>14</sup> See Treaties Establishing the European Communities, done at Rome, March 25, 1957, art. 173, 298 U.N.T.S. 75 [hereinafter cited as Treaty of Rome].

<sup>15</sup> *Timex*, No. 264/82, at 20-21.

## II. LEGAL BACKGROUND

Antidumping<sup>16</sup> regulations such as those in dispute in *Timex* date from around the turn of the century.<sup>17</sup> At that time, the governments of most major trading nations, while attempting to avoid a general increase in tariffs, were anxious to find means of controlling imports adversely affecting domestic industries.<sup>18</sup> To protect these domestic markets, governments began taking unilateral measures against dumping.<sup>19</sup> The particular antidumping practices adopted varied from country to country.<sup>20</sup>

Prior to the outbreak of World War II, however, the major industrial nations of the world became dissatisfied with existing systems for trade protection.<sup>21</sup> The fluctuating tariffs and quotas used by most countries proved inadequate to protect domestic markets; world trade had continued to decline and unemployment had risen.<sup>22</sup> Prior

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<sup>16</sup> The applicable GATT and EEC provisions hold a product to be "dumped" where its export price is less than the "normal value" of a like product, usually as compared to the home market price of the exporting country. Prior to the adoption of these provisions:

... the practice of "dumping" has been roughly defined as an unfair practice under which low price exports were subsidized in order to capture a new market or to unload unsaleable goods. In due course, however, this concept became more refined and assumed a more technical meaning.

D. LASOK & W. CAIRNS, *THE CUSTOMS LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 239 (1983) [hereinafter cited as LASOK & CAIRNS]; see General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, EEC, art. VI, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

<sup>17</sup> C. STANBROOK, *DUMPING: A MANUAL ON THE EEC ANTI-DUMPING LAW AND PROCEDURE* 5 (1980); see J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1966).

<sup>18</sup> STANBROOK, *supra* note 17, at 5.

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., VINER, *supra* note 17, at 192-273 (1966) (detailing foreign and United States antidumping legislation).

Anti-dumping legislation made its appearance in response to the clamor raised against the allegedly injurious effects of American and German dumping. In 1904 Canada enacted the first anti-dumping law specifically providing for additional duties on imports sold at dumping prices. Other countries followed Canada's lead, such as the Union of South Africa in 1914 and the United States, Great Britain, Australia, New Zealand and Newfoundland in 1921. Some of these acts applied mandatory duties upon "dumped" products while others were applied at the discretion of customs and other authorities.

*Id.* at 378.

<sup>21</sup> STANBROOK, *supra* note 17, at 6. The major trading nations of that time included Great Britain, the United States, and most of the Western European nations. *Id.*

<sup>22</sup> *Id.*

to 1939 the United States, under Franklin Roosevelt, led a reform movement concentrated on lowering tariffs and eliminating quotas.<sup>23</sup> At the close of World War II, the United States, with the help of Great Britain, renewed its efforts to foster reforms in the methods used to protect domestic markets from outside competition.<sup>24</sup> Reform of these protection systems was aimed at preventing a recurrence of the type of worldwide depression experienced in the 1930's.<sup>25</sup>

In 1946, the newly-formed United Nations Economic and Social Council adopted a resolution to convene the United Nations Conference on Trade and Employment, and assembled a committee to prepare for the conference.<sup>26</sup> Preliminary meetings of the committee, held in New York and Geneva, generated proposals for an International Trade Organization (ITO)<sup>27</sup> and the General Agreement on Tariffs and Trade (GATT).<sup>28</sup> The ITO failed due to lack of United

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* The proposals of Britain and the United States involved utilizing three instruments — a central bank, a developmental bank, and an international trade organization — to stabilize and refine international trade policy. The creation of the International Monetary Fund (IMF) and the World Bank followed from these proposals. The formation of a worldwide trade organization, however, proved unworkable. *Id.*; see *infra* note 27 and accompanying text.

<sup>25</sup> STANBROOK, *supra* note 17 at 6.

Although there were a number of international congresses to coordinate customs administration dating back as far as 1900, none of these developed a successful program of international discipline or international economic behavior. This failure was viewed by many as a primary cause of both the Great Depression and World War II. As a result, a multinational effort at the close of World War II sought to develop a viable set of international economic rules.

Jackson, Louis, & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267, at 270 (1982); see JACKSON, LOUIS, & MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND* (1984) [hereinafter referred to as Tokyo Round Book] (giving more detailed description of the events leading to the Depression and World War II).

<sup>26</sup> Jackson, Louis, & Matsushita, *supra* note 25, at 270.

<sup>27</sup> *Id.* The executive branch in the United States had been a major supporter of such an international trade regulatory body, but Congress refused to pass it. Absent support from the United States, the major economic power in the world at the time, the ITO had no chance for success. *Id.*

<sup>28</sup> *Id.* The GATT is more a framework for action (an agreement to agree) than a document of fixed legal rules. T. SCHOENBAUM, M. MATSUSHITA, & G. WILNER, *INTERNATIONAL COMMERCIAL LAW AND POLICY: CASES AND MATERIALS*, 31 (1984) (unpublished manuscript).

When it was originally drafted, the GATT was intended to be a multilateral agreement preliminary to a charter for an international trade organization that was to be created later. Due primarily to opposition from the United

States support;<sup>29</sup> the GATT, however, was applied as international law by the Protocol of Provisional Application.<sup>30</sup>

Adoption of the GATT resulted in several rounds of formal negotiations on reduction of international tariff barriers.<sup>31</sup> Utilizing the GATT as a basis, the adopting countries<sup>32</sup> attempted to stimulate

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States Congress, no international trade organization was ever agreed upon. The GATT has therefore become an international trade organization, but it rests on an inadequate constitutional and institutional basis. The United States and other governments accept it as the chief international trade forum for the resolution of trade problems.

*Id.* at 38-39.

The GATT is a multilateral treaty intended to provide the framework for the progressive elimination of tariff barriers. The agreement embodies the "most favored nation" principle, whereby any privilege or favor granted by a contracting party to the products of any other country in respect of custom duties or charges shall be accorded immediately and unconditionally to similar products originating in the territory of any other contracting party. The Agreement prohibits quantitative restrictions (subject to certain exceptions), restricts measures such as imposing internal taxation of a higher rate on imports than on domestic products and charging fees in excess of cost for custom services, and promotes periodic "rounds" for negotiations on world tariff levels.

D. WYATT & A. DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 18-19 (1980).

<sup>29</sup> See *supra* note 27 and accompanying text.

<sup>30</sup> Protocol of Provisional Application of the GATT, Oct. 30, 1947, 61 Stat. A. 2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308. The original signatories, which include Australia, Belgium, Canada, France, Luxembourg, the Netherlands, the United Kingdom, and the United States, signed the Protocol to make the GATT operative provisionally as an international trade agreement. *Id.* Such implementation was necessary since the GATT was originally intended to supplement the ITO, which never came into being. See *supra* note 27 and accompanying text.

<sup>31</sup> D. WYATT & A. DASHWOOD, *supra* note 28, at 19. Under the auspices of the GATT, there have been seven major "rounds" of tariff and trade negotiations. The first five of these rounds (the 1947 Geneva negotiation of the original GATT; a 1949 round in Annecy, France; 1950 in Torquay, England; 1955 in Geneva; and the 1955 "Dillon Round") were primarily item-by-item negotiations for the reduction of tariffs, with very little attention paid to nontariff barriers. Because of the growing complexity of this sort of negotiation, the sixth round of tariff reductions (the "Kennedy Round") attempted a "linear tariff reduction" approach. It set the goal of a 50 percent, across-the-board cut in tariffs. The Kennedy Round also attempted to address major nontariff barriers. The seventh trade round was launched in September 1973 in Tokyo, and thus the name "Tokyo Round." Although this negotiation contained a significant element of tariff reduction, a larger part of the activity in the Tokyo Round focused on a variety of nontariff barriers. Jackson, Louis, & Matsushita, *supra* note 25, at 271; see also *infra* note 34 and accompanying text.

<sup>32</sup> As of February 1983, 88 countries had acceded to the GATT; Tunisia had acceded provisionally. In addition, 30 countries apply the GATT on a *de facto* basis. T. SCHOENBAUM, M. MATSUSHITA, & G. WILNER, *supra* note 28, at 38.

international trade by uniformly limiting their individual trade protection policies.<sup>33</sup> The most significant achievement of the early rounds of the GATT negotiations was the formulation of the 1967 Anti-Dumping Code.<sup>34</sup>

One of the most notable developments in the area of antidumping regulation since 1968 came about at the "Tokyo Round" of the GATT in 1979. That conference resulted in the Agreement for Implementation of article VI of the General Agreement on Tariffs and Trade, better known as the Anti-Dumping Code of 1979 (ADC).<sup>35</sup> The ADC was formally incorporated as article VI of the GATT in 1979.<sup>36</sup>

In addition to the GATT provisions on dumping, the EEC has a history of standardized antidumping regulation originating in the 1957 Treaty of Rome.<sup>37</sup> Utilizing powers granted by the Treaty of Rome and the provisions of the GATT, the Council of the European Communities and the Commission of the European Communities<sup>38</sup> de-

<sup>33</sup> JACKSON, LOUIS, & MATSUSHITA (Tokyo Round Book), *supra* note 25, at 11-13.

<sup>34</sup> Jackson, Louis, & Matsushita, *supra* note 25, at 271. The 1967 GATT Anti-Dumping Code [hereinafter referred to as the 1967 ADC] "may be viewed as an attempt to state an international consensus about the correct policy and practice of national antidumping laws." Hudec, *United States Compliance with the 1967 GATT Antidumping Code*, 1 MICH. Y.B. INT'L LEGAL STUD. 205 (1979).

<sup>35</sup> Jackson, Louis, & Matsushita, *supra* note 25, at 273. "At a late day in Tokyo Round, it was decided to revise the (1967) Anti-Dumping Code, and to enter into a new code which embodied many of the concepts that had already been negotiated in the Subsidies-Countervailing Duty Code." *Id.* The Anti-Dumping Code and the Subsidies and Countervailing Duties Code were incorporated into a single regulation. In the EEC, that single regulation was adopted "for protection against dumped or subsidized imports from countries which are not members of the [EEC]." *Id.* This regulation, effective January 1, 1980, assured a strict parallelism between international and inter-Community law. *Id.* at 291; *see also* Council Regulation (EEC) No. 3017/79, *supra* note 13.

<sup>36</sup> *Id.*

<sup>37</sup> Article 113 of the treaty provides that by 1968, "a common commercial policy should be established within the Community." Treaty of Rome, *supra* note 14, art. 113. Article 91 deals with dumping between member states during the transitional periods prior to membership. *Id.* art. 91.

<sup>38</sup> The Treaty of Rome states the general duties of the Council and Commission as follows:

To ensure that the objectives of the [t]reaty are attained, the Council, in accordance with the [t]reaty's provisions, is to ensure coordination of the general economic policies of the member states and have power to take decisions.

*Id.* art. 145.

In order to ensure the proper functioning and development of the common market,

veloped a series of specialized regulations establishing antidumping practices and procedures for the Community.<sup>39</sup>

The most important regulation adopted concerning dumping of products other than coal and steel was Council Regulation No. 3017/79.<sup>40</sup> This regulation expanded upon the ideas of the ADC and served as the parent regulation for EEC antidumping regulations.<sup>41</sup> Regulation 3017/79 was created to protect against dumped or subsidized imports from countries not members of the EEC.<sup>42</sup> The regulation was intended to define dumping and to clarify procedures for the institution of antidumping actions and the imposition of duties.<sup>43</sup>

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the Commission shall:

- ensure that the provisions of this treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the Assembly in the manner provided for by this Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

*Id.* art. 155. The Commission, thus, performs many investigative tasks while the council handles many legislative functions.

<sup>39</sup> Two sources of rules provide the legal framework for the EEC's protective measures against the dumping of imports. First, the EEC is committed under international law to observe the provisions of article VI of the GATT as elaborated in the Tokyo Round Anti-Dumping Code. These instruments provide detailed rules concerning most aspects of the antidumping system and specify the conditions under which definitive action may be taken. Second, under Community law, two sets of rules have been issued governing EEC antidumping procedures. C. STANBROOK, *supra* note 17, at 11. The first set of rules, Commission Recommendation ECSC 3018/79, applies to dumping involving products under the authority of the European Coal and Steel Community. All other products are governed by the second set of rules, embodied in Council Regulation (EEC) 3017/79. *Id.*

<sup>40</sup> *Id.* The regulation formally recognizes the provisions of the 1979 Anti-Dumping Code (1979 ADC) of the Tokyo Round of the GATT and gives effect to these provisions in its preamble. Article 1 applies the provisions of the regulation to "dumped or subsidized imports from countries not members of the [EEC]." Article 2 defines "dumping" and the applicable terms related to dumping. Article 3 regulates subsidies. Article 4 defines "injury" as required in bringing an action against dumped or subsidized products. Subsequent articles discuss procedures governing institution of proceedings, duties, and review. Council Regulation (EEC) No. 3017/79, *supra* note 13.

<sup>41</sup> See the preamble to Regulation 3017/79, *id.*, at No. L339/1 (detailing the many purposes for which the Regulation was adopted, including those mentioned herein).

<sup>42</sup> Article 1, *id.* at No. L339/2.

<sup>43</sup> See *supra* note 40 and accompanying text.

## III. ALLEGATIONS

The regulation in dispute in the *Timex* case<sup>44</sup> had its origins in the parent Regulation 3017/79.<sup>45</sup> Specifically, Timex alleged that in creating Regulation 1882/82, the Council and Commission violated the provisions of 3017/79 dealing with price comparisons.<sup>46</sup> Timex contended that the resulting duty formulated by the Council and Commission was too low to protect Timex from injury caused by dumping.<sup>47</sup> According to Timex, the Commission's failure to provide adequate information about prices used by the Commission for comparisons in the original antidumping action<sup>48</sup> prevented Timex from adequately presenting its case for a higher duty.<sup>49</sup>

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<sup>44</sup> Council Regulation (EEC) No. 1882/82. July 12, 1982, 25 O.J. EUR. COMM. (No. 207/1)(1982). The preamble to this regulation makes several references to Regulation 3017/79, especially to article 12 of such regulation. *Id.*

<sup>45</sup> Article 12 of Regulation 3017/79 states, in pertinent part, "where the facts are finally established to show that there is dumping or subsidization and injury caused thereby, and the interests of the Community call for Community intervention, a definitive antidumping or countervailing duty shall be imposed by the Council, acting by qualified majority on a proposal submitted by the Commission after consultation." Council Regulation (EEC) No. 3017/79, *supra* note 13, at No. L339/10.

<sup>46</sup> See article 2 of 3017/79, which describes how "normal value" shall be determined and defines "export price," "comparison," "like product," and "dumping margin." Council Regulation (EEC) No. 3017/79, *supra* note 13, at No. L339/3; see also article 13 setting out "general provisions on duties." *Id.* at No. L339/11, and *infra* note 48.

<sup>47</sup> *Timex*, No. 264/82, at 6.

<sup>48</sup> Article 2, section 5 of 3017/79 provides:

In the case of imports from non-market economy countries . . . normal value shall be determined in an appropriate and not unreasonable manner on the basis of the following criteria:

- (a) The price of which the like product of a market economy third country is actually sold:
  - (i) for consumption on the domestic market of that country, or
  - (ii) to other countries, including the Community . . . .

Council Regulation 3017/79, *supra* note 13, at No. L339/3.

"Like product" is defined in article 2, section 12 as "a product which is identical, i.e., alike in all respects, to the product under consideration, or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration." *Id.* at No. L339/5.

Pursuant to these provisions, watch movements and their prices were provided by Hong Kong manufacturers for comparison in place of the Soviet products. Those products were selected for similarity in their outward appearance to that of the Soviet products. *Timex*, No. 264/82, at 16.

<sup>49</sup> *Id.* In the original antidumping action, the Commission provided Timex "only a list of movements selected in France and considered comparable to the Soviet movements and a 'scheme showing . . . how the normal value was constructed' which, however, consisted only of a list of mechanical watch parts and other price



The Commission withheld the price figures obtained from watch manufacturers in Hong Kong under the authority of article 8 of Regulation 3017/79.<sup>50</sup> Timex contended, however, that article 7(4)(a) of the same regulation dictated that parties to such an action are entitled to inspect information "when it is relevant to the defense of their interests."<sup>51</sup> According to Timex, the information should not have been deemed confidential under article 8 because no request for confidentiality had been made by the Hong Kong manufacturers, and because methods were available to release such information in a form which would protect the business interests of the manufacturers and still prove useful to Timex.<sup>52</sup>

When the measures adopted pursuant to the original antidumping action proved unsatisfactory to Timex, it instituted a formal action for nullification of article 1 of Regulation 1882/82.<sup>53</sup> In that action, Timex alleged that the Council and Commission violated Regulation 3017/79 as well as certain portions of the Treaty of Rome.<sup>54</sup>

#### IV. DECISION

The Court of Justice of the European Community agreed to hear Timex's case under authority granted to it by article 173 of the Treaty of Rome.<sup>55</sup> Additional authority was provided by a similar case before the court in 1983, *EEC Seed Crushers' and Oil Producers' Federation v. Commission* (the *Fediol* case).<sup>56</sup> The court in *Fediol* stated:

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components without any corresponding figures and which was therefore of no use to Timex." *Id.* at 17.

<sup>50</sup> For pertinent sections of article 8, see Council Regulation (EEC) No. 3017/79, *supra* note 13, and accompanying text.

<sup>51</sup> *Timex*, No. 264/82, at 12.

<sup>52</sup> *Id.* at 14.

<sup>53</sup> *Id.* at 6.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 7-10. Article 173 of the Treaty provides that the Court of Justice shall have the power to review the legality of acts of the Council and Commission (other than recommendations or opinions) "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this [t]reaty or of any rule of law relating to its application, or misuse of powers." It further provides, "Any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation . . . is of direct and individual concern to the former." Treaty of Rome, *supra* note 14, art. 173. The court ruled that Timex was eligible to bring an action under such article. *Timex*, No. 264/82, at 7-12. See *infra* note 92 and accompanying text.

<sup>56</sup> *EEC Seed Crushers' and Oil Processors' Federation [Fediol] v. Commission of the European Communities*, 1983 E.C.R. 2913 (1983). Though *Fediol* was an anti-subsidies case, it answered questions pertinent to antidumping actions as well. *Id.*; see *Bellis*, *infra* note 64.

[Applicants are entitled to] put before the [c]ourt any matters which would facilitate a review as to whether the Commission has observed the procedural guarantees granted to complainants by Regulation No. 3017/79 and whether or not it has committed manifest errors in its assessment of the facts, has omitted to take any essential matters into consideration, or has based the reasons for its decision on considerations amounting to a misuse of powers.<sup>57</sup>

In deciding the *Timex* case, the court agreed that Timex had not been provided adequate information as required by article 7(4)(a) of Regulation 3017/79.<sup>58</sup> The court, therefore, nullified article 1 of Regulation 1882/82 as having been imposed in breach of article 7(4)(a) of Regulation 3017/79.<sup>59</sup> The court, however, allowed the article to remain in operation until the appropriate institutions take action to modify the duty.<sup>60</sup>

## V. COMMENT

In the *Timex* case, the Court of Justice clarified its position on several previously unclear points of procedure. Consequently, the court's decision in *Timex* represents a significant step in the rapidly developing<sup>61</sup> area of EEC antidumping regulation.

The court's procedural clarifications came in three major areas. First, by allowing Timex to bring the action, the court demonstrated its willingness to afford individual complainants in annulment actions an opportunity for judicial review. Second, the court instituted a new

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<sup>57</sup> *Fediol*, 1983 E.C.R. at 2935 (quoted in *Timex*, No. 264/82, at 11).

<sup>58</sup> *Timex*, No. 264/82, at 16. The court, interpreting article 7(4)(a), stated "[A]ll non-confidential information, whether supplied by a Community undertaking or an undertaking in a non-member country, which has been used by the Commission during its investigation and which has a decisive influence on its decision regarding the anti-dumping duty must be made available to the complainant requesting it." *Fediol*, 1983 E.C.R. 2913 (1983).

<sup>59</sup> *Timex*, No. 264/82, at 18-19.

<sup>60</sup> *Id.* The court allowed the regulation to stand, in the interim, citing as authority for such an action article 174 of the Treaty of Rome. *Id.* That article states:

If the action is well founded, the Court of Justice shall declare the act concerned to be void.

In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

Treaty of Rome, *supra* note 14, art. 174.

<sup>61</sup> For a discussion of the increased number of antidumping cases brought before the European Court of Justice in recent years, see Vermulst, *Dumping in the United States and the European Community: A Comparative Analysis*, 1984 L.I.E.I. 103, at 133-147 (1984).

form of relief which addresses the needs of complainants more adequately than does immediate annulment. Finally, the court re-examined the level of information which must be provided to parties in an antidumping action and limited the Council's discretion to withhold information on the basis of confidentiality.

Until quite recently, cases involving complainants seeking increased duties had been rare;<sup>62</sup> as a result, the precedential value of such cases was limited and unclear.<sup>63</sup> For example, prior to *Timex*, whether individual complainants such as Timex could assert a right to be heard by the Court of Justice at all was unclear.<sup>64</sup> *Timex*, however,

<sup>62</sup> See *supra* note 60.

<sup>63</sup> See, e.g., *The Japanese Ballbearing Cases*, joined cases 113, 118-121/77, 1979 E.C.R. 1185 (1979); *NTN Toyo Bearing Company, Ltd. and Others v. Council of the European Communities*, 1979 E.C.R. 1185 (1979) (carefully limited to peculiar facts; thus, the precedential value of such a case is unclear); Vermulst, *supra* note 61, at 146; see *id.* at 139-140 (a discussion of the apparent irreconcilability of the *Ballbearing Cases* with the *Alusuisse* case, *Alusuisse Italia Spa v. Council and Commission of the European Communities*, 1982 E. COMM. CT. J. REP. 3463, on the point of admissibility of cases for judicial review).

<sup>64</sup> Paragraph 2 of article 173 of the Treaty of Rome states that "any natural or legal person may . . . institute proceedings against . . . a decision which, although in the form of a regulation . . . is of direct and individual concern to the former." Treaty of Rome, *supra* note 14, art. 2 (emphasis added). The defendants in *Timex* contended that the regulation did not concern Timex because Timex was not specifically mentioned by the regulation, and because the regulation affects all manufacturers of mechanical wrist watches in the Community alike. *Timex*, No. 264/82, at 7. Such a contention had barred claims in previous cases. See, e.g., *Ballbearing Cases*, *supra* note 63 (excluding some manufacturers on grounds that they were not specifically mentioned by the regulation in question).

Regulation No. 3017/79, the basic EEC anti-dumping . . . legislation does not make any provision for judicial review. The matter therefore has to be examined solely under article 173 of the EEC Treaty and more specifically article 173(2) concerning actions by individuals. Article 173(2) provides that individuals may institute proceedings against decisions addressed to them as well as against regulations insofar as they constitute "decisions in the form of a regulation" which are "of direct and individual concern" to such individuals. This latter provision, which has generally been restrictively construed by the court, is of great significance in anti-dumping . . . cases as anti-dumping . . . duties . . . are imposed by regulation.

Bellis, *Judicial Review of EEC Anti-Dumping and Anti-Subsidy Determinations After Fediol: The Emergence of a New Admissibility Test*, 21 COMMON MKT. L. REV. 539, 540 (1984).

[T]he right of private parties to bring an annulment action is considerably narrower as compared with that of the member states or of the Community institutions. This difference concerns not only the conditions under which this action may be brought but also the nature and origin of acts which may be impugned and the grounds of illegality charged.

G. BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 21 (1981).

expanded upon the court's decision in *Fediol*<sup>65</sup> to give a clearer definition of complainants' rights to judicial review.<sup>66</sup>

In hearing the *Timex* case, the court demonstrated its willingness to review actions for annulment brought by individual complainants.<sup>67</sup> This willingness represents a significant departure from earlier court decisions.<sup>68</sup> Until recently, individual complainants were thought barred from bringing such actions except in the case of a "decision which, though in the form of a regulation . . . is of direct and individual concern to the [individual complainant]"<sup>69</sup> as provided by article 173

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<sup>65</sup> Complainants' standing to sue under article 173 was examined by the court for the first time in *Fediol*. See *Fediol*, *supra* note 56. In that case, the court's search for an appropriate admissibility test led it to shift the focus of the admissibility inquiry from the nature of the contested measure (which had been the focus of the test prior to *Fediol*) to that of the proceeding leading to that measure. In the subsequent *Allied* case, the court similarly focused on the complainants' involvement in the proceeding leading to adoption of the measure. See *Allied Corp. v. Commission*, Joined Cases 239/82 and 275/82, 1985 E.C.R. 1005 (1984). This suggests that complainants need not be named in a regulation to have standing to challenge it. They need only participate in such proceedings to be "individually concerned" by the regulation. *Bellis*, *supra* note 64, at 541-549.

See the court's discussion of *Fediol* in *Timex*, No. 264-82, at 10-11. The court applied the language of *Fediol* entitling parties directly concerned with a regulation to judicial review to the fact pattern of the *Timex* case. *Id.* at 9-11. The court's application of the *Fediol* standard to a complainant such as *Timex* seems to expand the applicability of the *Fediol* rule. *Fediol* concerned an EEC federation while *Timex* applied to an individual manufacturer.

<sup>66</sup> *Id.* The court in *Timex* stated the traditional rule, "In light of the criteria set out in the second paragraph of article 173 [of the Treaty of Rome] the measures in question are, in fact, legislative in nature and scope, inasmuch as they apply to traders in general," but the court immediately added, "nevertheless, their provisions may be of direct and individual concern to some of those traders." *Id.* at 9. The latter phrase of that sentence modified considerably the general rule, and arguably decided the entire admissibility issue in favor of *Timex*.

<sup>67</sup> The court in *Timex* did not limit the application of its ruling to the specific factual pattern involved as severely as it had in the *Ballbearing Cases*, nor did it limit itself by using the fact that *Timex* was mentioned specifically in the preamble to Regulation 1882/82, as it might have under article 173. While the court mentioned both of these facts, it made neither the single basis of its admissibility decision. See *id.* at 7-11.

<sup>68</sup> See Rasmussen, *Why is Article 173 Interpreted Against Private Plaintiffs?*, 5 EUR. L. REV. 112 (detailing the history and rationale of the court's denial of review to individuals under article 173).

<sup>69</sup> Treaty of Rome, *supra* note 14, art. 173. "Regulations are defined by the EEC Treaty as being of general application, binding in their entirety, and as being directly applicable to all member states; . . . They are essentially acts of a legislative nature, not of an administrative nature. Regulations are traditionally used to implement the Community's commercial policies . . ." Oldekop & Van Bael, *European Antidumping Law and Procedure*, 1 MICH. Y.B. INT'L LEGAL STUD. 231, 233 (1979).

of the Treaty of Rome.<sup>70</sup> Early interpretations of this article had so limited the language of the article as effectively to bar all such complaints.<sup>71</sup>

In an article published shortly after the *Fediol* decision, one commentator stated:

It follows [from a review of the recent cases in the area] that each party, who is adversely affected by a dumping determination, has the right to judicial review . . . . After initial careful confinement of this possibility to the facts of a rather exceptional case . . . , the court has recently granted the right in rather broad terms to . . . complainants . . . .<sup>72</sup>

*Timex* represents a continuation of this trend as well as an expansion of the *Fediol* decision.<sup>73</sup> By redefining its position on individual complainants' rights to judicial review, the court helped to eliminate a dilemma facing complainants seeking annulment of an insufficient antidumping duty.

The *Timex* decision eliminated a second dilemma for complainants by developing a new form of relief tailored to the peculiar needs of such complainants.<sup>74</sup> Prior to *Timex*, individuals wishing to challenge

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<sup>70</sup> Treaty of Rome, *supra* note 14, art. 173; *see supra* note 64 and accompanying text.

<sup>71</sup> *See supra* note 63.

<sup>72</sup> Vermulst, *supra* note 61, at 146-47. The movement of the Court of Justice toward a broader concept of judicial review parallels and may have been influenced by the extensive judicial review procedure in the American Trade Agreements Act, and may indicate that the Community is moving toward a more adjudicatory approach to antidumping law. *Id.* at 147.

<sup>73</sup> *See supra* notes 55 and 68.

<sup>74</sup> *Timex*, No. 264/82, at 19. After stating that article 1 of Regulation 1882/82 is void, the court instituted the new form of relief without elaboration, stating simply:

However, the aim of the action is not to have the provision in question declared void, but to have it replaced by a more stringent measure fixing a higher anti-dumping duty on mechanized watches and imposing such a duty on mechanical watch movements. The anti-dumping duty imposed by the provision declared void should therefore be maintained, in accordance with the second paragraph of article 174 of the EEC Treaty, until the competent institutions adopt the measures needed to comply with this judgment.

*Id.*

Article 174, paragraph 2, of the treaty states:

In the case of a regulation, . . . the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

Treaty of Rome, *supra* note 14, art. 174.

an insufficient duty were usually limited to a single remedy: to seek annulment of the existing duty hoping that a new one would be adopted in its place.<sup>75</sup> This "solution" had the anomalous result of worsening the complainant's position in the interim between annulment and adoption of a new duty. In cases where severe injury was already occurring as a result of the dumping,<sup>76</sup> the prospect of having no duty during the interim served as a great deterrent to justify annulment actions that might otherwise have been brought by complainants.

Thus, the only alternative offered to complainants prior to *Timex* was resignation to the status quo. Obviously, such a response failed to bring the inadequacy of the existing duty to the attention of the proper institutions. Such inaction conveyed a false indication of general satisfaction to these institutions, providing them no incentive to alter existing duties.

Complete annulment thus proved wholly inadequate to address the needs of complainants regarding an insufficient duty.<sup>77</sup> The court in *Timex* remedied this situation by allowing the existing duty to remain in operation until the competent institutions adopt a more suitable duty.<sup>78</sup> This solution provides a certain degree of protection for the complainants during the period between annulment and adoption of a new duty.<sup>79</sup>

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<sup>75</sup> Actions for annulment have their origins in the Treaty of Rome. After stating the jurisdictional considerations for the Court of Justice, the treaty states simply, "If the action [before the court] is well founded, the Court of Justice shall declare the act concerned to be void." Treaty of Rome, *supra* note 14, art. 174; *see also id.* articles 164-188 (describing the jurisdiction of the court).

<sup>76</sup> Article 4 of Regulation 3017/79 requires that injury be proven before an antidumping duty may be properly levied. Council Regulation 3017/79, *supra* note 13, at No. L339/6. Complainants seeking increased duties, therefore, of necessity have to plead or imply that injury is continuing despite the adopted duty, to have their claims adjudicated. *See Timex*, No. 264/82, at 6 (pleading the insufficiency of the adopted duty and implying continued injury).

<sup>77</sup> Recognition of such inadequacy may be the reason for the court's adoption of the new form of relief without comment. *See supra* note 74 and accompanying text.

<sup>78</sup> *Timex*, No. 264/82, at 19.

<sup>79</sup> The court had previously instituted a similar form of relief in *Commission v. Council*, 1973 E.C.R. 575 (1973), in which a council regulation presenting a scale for staff salaries within the Community institutions was declared void, but was allowed to remain in effect until the complete adoption of a new scale. *Id.* at 586; *see L. BROWN AND F. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 110 (1983).

The third advancement made by the Court of Justice in *Timex* concerns the level of information provided to complainants by the Commission in antidumping proceedings.<sup>80</sup> Prior to *Timex*, the Com-

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<sup>80</sup> Article 8 of Regulation 3017/79 provides:

2. (a) Neither the Council, nor the Commission, nor member states, nor officials of any of these, shall reveal any information of a confidential nature received in pursuance of this regulation, or any information provided on a confidential basis by a party to an anti-dumping or countervailing investigation, without specific permission from the party submitting such information.

(b) Each request for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible to such summary.

3. Information will ordinarily be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.

Council Regulations (EEC) No. 3017/79, *supra* note 13, at No. L339/9.

Article 7(4)(a), however, provides:

The complainant . . . may inspect all information made available to the Commission by any party to an investigation . . . provided that it is relevant to the defense of [its] interests and not confidential within the meaning of article 8 and that it is used by the Commission in the investigation. To this end, [it] shall address a written request to the Commission, indicating the information required.

*Id.* at No. L339/8 (quoted in *Timex*, No. 264/82, at 120). Before the *Timex* decision, D.J. Gijlstra described the type of dilemma created by these sections as follows:

The question of confidentiality seems therefore not yet to be settled. It remains to be seen how the Commission interprets its obligation to refrain from disclosing other undertakings' business secrets. It seems to be difficult to protect, on the one hand, business secrets, and, on the other, to rely on certain protected information in a statement of objections.

Gijlstra, *Legal Protection in Competition Cases*, 1983 L.I.E.I. 87, at 95-96 (1983); see a discussion of cases challenging the confidentiality of information prior to *Timex*, *id.* at 94-96.

The court significantly settled the question of withholding information in *Timex* by stating a rule relatively free of the ambiguities of past rulings, declaring:

[A]ll non-confidential information, whether supplied by a Community undertaking or an undertaking in a non-member country, which has been used by the Commission during its investigation and which has had a decisive influence on its decision regarding the anti-dumping duty must be made available to the complainant requesting it.

*Timex*, No. 264/82, at 16.

After a discussion of the Community's duty to protect the business secrets of non-member countries and the need to interpret such an obligation so as to also protect complainants' rights, the court stated:

It follows that in the present case the Commission ought to have made every effort, as far as was compatible with the obligation not to disclose business secrets, to provide the applicant with information relevant to the defense of its interests, choosing, *if necessary on its own initiative*, the

mission had broad discretion in determining what information would be provided to the parties in an antidumping action.<sup>81</sup> Similarly, the Commission determined what information should be withheld from the parties on the basis of confidentiality.<sup>82</sup> The Commission also had discretion as to how the information would be distributed to the parties.<sup>83</sup> Before *Timex*, the court rarely, if ever, challenged the Commission's discretionary exercise of power.<sup>84</sup>

While the *Timex* decision neither specified guidelines outlining the requisite level of information to be given to the parties<sup>85</sup> nor expanded upon the definition of "confidential information,"<sup>86</sup> it did give a clear indication that some level of information is required to be given to the parties,<sup>87</sup> and that no information is to be arbitrarily designated

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appropriate means of providing such information.

*Id.* at 18 (emphasis added).

The court's treatment of the confidentiality issue seems consistent with pushing parties and the Commission toward utilizing a system such as that promoted by Order of the Court of March 30, 1982. *Celanese Chemical Company, Inc. v. Council and Commission of the European Communities*, 1982 E.R.C. 1183 (1982). In that case, the court held that documents or portions thereof which have been submitted without prior agreement of the parties should be examined by the court and, after the defendants have been heard it should be determined whether confidentiality should be accorded. Documents which are refused confidential treatment may be withdrawn by the applicant. "Confidential" documents are placed in a special file open only to the parties and the court. Riesenfeld, *The Treatment of Confidential Information in Anti-Dumping Cases: A Comment on the Celanese Case*, 21 COMMON MKT. L. REV. 553, 554 (1984).

<sup>81</sup> Speaking of such broad discretion generally granted to the institutions of administration, E. Vermulst stated:

The European Community primarily views the taking of protective measures against dumped imports as a matter of trade policy and, therefore, it weighs the necessity of protection of domestic producers against other Community interests. This standpoint obviously entails broad discretion for the administering authorities and as a consequence, until recently, it was generally believed, that the judiciary, the European Court of Justice, had no task in supervising the action of the Council and the Commission in this field. This belief has been shaken by the *Allied Case*, in which the European Court of Justice, in a potentially far-reaching judgment, granted the right of judicial review to foreign exporters, hurt by Community anti-dumping measures.

Vermulst, *supra* note 61, at 103.

<sup>82</sup> See Gijlstra, *supra* note 80 (cases showing the Commission's exercise of broad discretionary powers in terms of confidentiality).

<sup>83</sup> *Id.*

<sup>84</sup> See *supra* note 81.

<sup>85</sup> See *Timex*, No. 264/82, at 18.

<sup>86</sup> *Id.* at 16-18 (court uses term "confidential" repeatedly without elaboration or definition other than that provided in article 8 of Regulation No. 3017/79).

<sup>87</sup> See *id.* (court utilizes affirmative language creating a duty of the Commission



“confidential.”<sup>88</sup> Clearly, the Commission may no longer deny parties access to information by designating it confidential if a method exists which can release the information and at the same time protect the interests of one requesting confidentiality.<sup>89</sup>

In short, the court implied that parties must be provided with adequate information to prepare their cases unless overriding concerns for confidentiality exist and no alternative methods exist for releasing such information.<sup>90</sup> If no overriding concerns exist, withholding information arbitrarily is construed as a breach of Community procedural requirements.<sup>91</sup> As described in article 173 of the Treaty of Rome,<sup>92</sup> such a breach may result in the annulment of an act of the Council or Commission.<sup>93</sup>

The court's decision in *Timex* is a complainant-oriented decision. The decision reflects the rapid advancements currently being made in EEC antidumping regulation. The decision indicates that the court will now recognize the rights of individual complainants to challenge antidumping duties and will aid complainants by eliminating some of the risk and uncertainties previously encountered. The clarifications and redefinitions of policy enunciated by the court in *Timex* will undoubtedly open the door to more complainants bringing similar actions.

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to make every effort to provide *all* non-confidential information to complainants in a useful manner).

<sup>88</sup> See *id.* at 17-18 (court agrees that alternative methods existed for releasing information to Timex which would not have threatened confidentiality, and finds that withholding such information constituted a breach of article 173).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 18.

<sup>92</sup> Treaty of Rome, *supra* note 14, art. 173. Article 173 states, in pertinent part, that the Court of Justice may “review the legality of acts of the Council and the Commission other than recommendations or opinions” on grounds of “lack of competence, infringement of an essential procedural requirement, infringement of this [t]reaty or of any other rule of law relating to its application, or misuse of powers.” *Id.*

<sup>93</sup> See *Timex*, No. 264/82, at 18-20 (court holding article 1 of Regulation 1882/82 void as being adopted in breach of procedural requirements in article 7(4)(a) of Regulation No. 3017/79).

