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Japan in the EC: Changing Strategies for Changing Times

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Abstract

This Note addresses the effects of European integration on Japanese-Community trade relations. It explores, in order, the effects of the customs union and the common customs tariff, the changing quota system, the Community's anti-dumping legislation and rules of origin, and voluntary export restraint agreements. The Note also considers the effect of the General Agreement on Tariffs and Trade (GATT) on these trade relations. While recognizing that the Community is taking steps to impede Japanese investment in the Community, the author observes that some of these measures may be neither legal nor effective. The author concludes that Japan is well-positioned to take advantage of economic opportunities presented by the 1992 integration and suggests that Japanese officials take advantage of the European propensity to enter into voluntary restraint agreements while continuing to challenge protective measures aimed directly at Japan as violative of the GATT.

Table of Contents

It is a bad plan that admits of no modification.
Publilius Syrus, *Maxim 469*

I. INTRODUCTION

As December 1992 approaches, the European Community[1] (the Community or EC) proceeds toward economic integration and the establishment of a single market. In 1985, the European Commission[2] proposed almost three hundred directives[3] designed to remove physical, technical, and fiscal barriers impeding the creation of a single market.[4] By July

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1. The twelve nation Community includes Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, the United Kingdom, and Germany.

The Treaty Instituting the European Coal and Steel Community laid the foundations of European unity in 1951 by establishing a common market in coal and steel products. Original signatories included Belgium, France, Italy, Luxembourg, the Netherlands, and the Federal Republic of Germany. Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, 143 [hereinafter ECSC Treaty]; *see generally* 1 LAW OF THE EUROPEAN COMMUNITIES para. 1.03 (David Vaughan ed. 1986) (discussing the ECSC Treaty). On March 25, 1957, the same six states signed the Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167, 169 [hereinafter EURATOM Treaty], and the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; *see generally* 1 LAW OF THE EUROPEAN COMMUNITIES, *supra*, para. 1.06 (discussing the EEC Treaty). The three Communities were merged pursuant to the Convention Relating to Certain Institutions Common to the European Communities, Mar. 25, 1957, 298 U.N.T.S. 267, and the Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 8 J.O. COMM. EUR. 1917 (1965) [hereinafter Merger Treaty]; *see generally* 1 LAW OF THE EUROPEAN COMMUNITIES, *supra*, para. 1.13 (discussing the Merger Treaty).

Denmark, Ireland, and the United Kingdom joined the Community on January 1, 1973. Greece joined on January 1, 1981, and Spain and Portugal joined on January 1, 1986. DERRICK WYATT & ALAN DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 11-12 (2d ed. 1987).

2. The Commission consists of seventeen members appointed by the member states. The Commission must include at least one, but not more than two, nationals of each state. Merger Treaty, *supra* note 1, arts. 10-11. As the executive organ of the Community, the Commission initiates legislation and administers Community policy. ROBERT WILLIAMS ET AL., THE WORLD'S LARGEST MARKET: A BUSINESS GUIDE TO EUROPE 1992 11-12 (1990).

3. Article 189 of the EEC Treaty authorizes the Commission to adopt regulations, issue directives, make decisions and recommendations, or deliver opinions. Directives shall be binding upon each member state addressed. EEC Treaty, *supra* note 1, art. 189, 298 U.N.T.S. at 78-79; *see also* WYATT & DASHWOOD, *supra* note 1, at 38-47.

4. WILLIAMS ET AL., *supra* note 2, at 6. The original 297 directives appeared in Lord Cockfield's "White Paper for the Completion of the Internal Market," published in

1990, the Commission negotiated sixty percent of them.[5] The architects of the single market plan, however, paid little attention to the effect of integration on the Community's external trade policy.[6]

Economic integration will affect external trade significantly.[7] Whether 1992 will see the emergence of "Furtress Europe," an inward-looking, protectionist trading bloc, or a "Europe World Partner," a region characterized by liberalized world trade, remains unclear.[8] Different trading partners may characterize the outcome differently. European-Japanese trade relations appear particularly vulnerable.

In spite of an awareness that the single market project targets them,[9] the Japanese remain cautiously optimistic about 1992.[10] With a 1987 population of 323 million people[11] and a 1987 gross domestic product (GDP) of 3,669 billion ECUs,[12] the Community may become the world's largest single market.[13] The Community's average per capita

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June 1985. *See* NICHOLAS COLCHESTER & DAVID BUCHAN, EUROPOWER 30 (1990). Designed to produce a plan for integration of the European economies, this paper concluded a research project commissioned by the British government in 1984. *Id.* at 28. The White Paper set Dec. 31, 1992 as the deadline for integration and ultimately led to the passage of the Single European Act in 1987. *Id.* at 29.

By the end of 1990, the Commission reduced the number of directives to 279 by consolidating some proposals and abandoning others. *See id.* at 239.

5. Linda C. Hunter, *Europe 1992: An Overview*, FED. RESERVE BANK DALLAS ECON. REV., Jan. 1991, at 17, 26.

6. CLIFFORD CHANCE, THE CCH GUIDE TO 1993: CHANGES IN EEC LAW ¶709 (1989). At least one author asserts that as recently as 1988 the Community's external trade policy remained "an unopened book." COLCHESTER & BUCHAN, *supra* note 4, at 191.

7. CHANCE, *supra* note 6, ¶709.

8. *See id.*; COLCHESTER & BUCHAN, *supra* note 4, at 191-94. Whatever the unfolding of Europe 1992 brings, it will pose new challenges to United States companies. George C. Lodge, *Foreward* to ROBERT WILLIAMS ET AL., THE WORLD'S LARGEST MARKET: A BUSINESS GUIDE TO EUROPE 1992 at xix (1990).

9. COLCHESTER & BUCHAN, *supra* note 4, at 197. "No one doubts that a major impetus behind the 1992 program is to address the challenge presented by Japan, to counter both the aggressiveness of its companies in Europe and its numerous barriers to imports." WILLIAMS ET AL., *supra* note 2, at 164.

10. COLCHESTER & BUCHAN, *supra* note 4, at 197.

11. CHANCE, *supra* note 6, ¶303. The United States 1987 population, by comparison, is approximately 244 million, and Japan's 1987 population is approximately 122 million. *Id.*

12. An ECU, or European Currency Unit, comprises defined percentages of the national currencies of member states. *See* COLCHESTER & BUCHAN, *supra* note 4, at 165.

13. The United States 1987 gross domestic product (GDP), by comparison, approximated 3,869 billion ECUs, and Japan's 1987 GDP approximated 2,058 billion ECUs. CHANCE, *supra* note 6, ¶303. Some economists estimate that the opening of the Euro-

GDP, which exceeds 13,500 dollars, suggests a relatively high standard of living and a relatively high demand for luxury goods.[14] Japan, therefore, views European unification as creating an opportunity to dominate a new and powerful world market.[15] Japan realizes, however, that the 1992 program may have negative effects on the way foreigners conduct business in the Community.[16] If the Community succeeds in reducing its trade imbalance with Japan,[17] Japan's current trade surplus with the Community will suffer.[18] Therefore, Japanese officials proceed toward 1992 with strategic tact, clinging to longstanding notions that Japan's trade surplus results from the production of higher quality goods at similar or lower prices[19] and hoping that powerful Japanese industries can establish themselves as "good Europeans" within the Community.[20]

The Community, by contrast, remains cautious about Japan and 1992. As the dollar depreciates relative to the Japanese yen,[21] many fear Japan will shift exports and investments from the United States to the Community.[22] Although some Community officials view Japanese investment as an opportunity for job creation in the Community, others fear that an increased Japanese presence will lead to an increased Japanese

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pean market could add as much as 200 billion ECUs to the Community's GDP by the late 1990s. COLCHESTER & BUCHAN, *supra* note 4, at 145. Generally, as physical, technical, and fiscal barriers disappear, efficiency increases, thus creating cost savings. CHANCE, *supra* note 5, ¶305.

14. Per capita GDP varies drastically among member states, ranging from just under $3000 in Portugal, to almost $20,000 in Denmark. WILLIAMS ET AL., *supra* note 2, at 2-3.

15. *Cf. id.* at 2 (detailing opportunities for United States distributors and retailers).

16. *See id.* at 23 (relating the existence of "Euro-Hazards" in the 1992 European market).

17. The Community's trade deficit with Japan increased by over 12% in 1988. *Id.* at 164. This deficit reached $1.55 billion per month according to recent estimates for October 1990. Christopher J. Chipello, *Japan's Surplus in Trade Dipped 30.4% in Month*, WALL ST. J., Nov. 15, 1990, at A10.

18. The Community's trade deficit with Japan declined in 1989, but Community investments in Japan remain at less than one-tenth of those made by Japan in the Community. WILLIAMS ET AL., *supra* note 2, at 164.

19. Lucien R. Le Lièvre & Luc G. Houben, *EC Versus Japan: The Community's Legal Weapons*, 24 COMMON MKT. L. REV. 427, 428 (1987). Many of Japan's competitors, by contrast, attribute the trade surplus to Japan's unwillingness to open its markets to foreign exports. *Id.* at 427.

20. COLCHESTER & BUCHAN, *supra* note 4, at 9.

21. Since 1985, the United States dollar has depreciated approximately 50% relative to the Japanese yen. Edson W. Spencer, *Japan as Competitor*, 78 FOREIGN POL'Y 153, 153 (1990).

22. Le Lièvre & Houben, *supra* note 19, at 427-28.

market share.[23] Additionally, some fear that Japanese investment will impair European attempts to compete successfully in electronics, biotechnology, and other future industries.[24] Hoping to prevent a Japanese invasion of the European market akin to the one that occurred in the United States,[25] the Community is struggling to justify measures aimed at tackling the trade deficit between the Community and Japan.[26]

This Note examines the potential effects of European unification on Japanese-Community trade relations. It expands upon previous works by examining Community actions designed to deal with the deficit, Japanese reactions, and Community responses. Specifically, part II explores the effect of the customs union and the Common Customs Tariff (CCT) on Japanese exports to the Community. Using the European car market as a case study, part III examines the future of the quota system. Part IV addresses the effect of Community anti-dumping legislation on Japanese industries. Part V evaluates rules of origin legislation and Japanese attempts to circumvent it. Part VI considers ways that Japan can minimize the fallout of 1992 through voluntary export restraints (VERs). Part VII explores the applicability of the General Agreement on Tariffs and Trade (GATT) to Japanese-Community trade relations by considering GATT as both a constraint on Community actions and a means by which Japan can avoid retaliatory measures. The Note concludes with several recommendations designed to maximize the benefits to be realized by Japan upon European unification.

II. THE CUSTOMS UNION AND THE COMMON CUSTOMS TARIFF

The customs union lies at the heart of European unification.[27] Article 9 of the EEC Treaty provides for the creation of this union, which has

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23. WILLIAMS ET AL., *supra* note 2, at 164-65. The Community would like to see more Japanese investment in manufacturing industries, rather than in services, and more technology transfer. *Id.*

24. LODGE, *supra* note 8, at xi. Increasing competitiveness in these sectors remains a primary goal of European unification. *Id.*

25. *See* DOUGLAS FRANTZ & CATHERINE COLLINS, SELLING OUT: HOW WE ARE LETTING JAPAN BUY OUR LAND, OUR INDUSTRIES, OUR FINANCIAL INSTITUTIONS, AND OUR FUTURE (1989).

26. *See* Le Lièvre & Houben, *supra* note 19, at 427-28.

27. *See* 2 LAW OF THE EUROPEAN COMMUNITIES para. 12.01 (David Vaughan ed. 1980). A customs union is defined as an association of states, in which goods can move as freely as they would within the boundaries of the component units, and that adopts a common policy toward products coming from outside the association. D. LASOK & W. CAIRNS, THE CUSTOMS LAW OF THE EUROPEAN ECONOMIC COMMUNITY 1 (1983). It differs from a free trade area in the sense that it "presents a single external face to the

three basic aspects: first, goods produced in one member state circulate freely within the Community without the payment of customs duties;[28] second, goods produced outside the Community are subject, upon importation into any member state, to payment of the appropriate customs duty in accordance with a tariff common to all member states;[29] and third, goods imported from a third state into a member state enter into free circulation in the Community upon compliance with that member state's import formalities.[30] In short, Community officials envision the abolishment of internal obstacles to the free movement of goods and the uniform treatment of imported goods at the external frontier.[31]

To ensure uniform treatment of imported goods at the external frontier, the EEC Treaty provides for a common customs tariff (CCT).[32] By erecting a single tariff wall that no individual member state can breach freely,[33] the CCT ensures that member states' customs authorities uni-

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world," in addition to abolishing internal barriers to trade. LAURENCE W. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC 1 (1985).

28. F. BURROWS, FREE MOVEMENT IN EUROPEAN COMMUNITY LAW 3 (1987). This concept, referred to as the principle of the free movement of goods, constitutes one of four fundamental freedoms that lie at the heart of European unification. The other three principles are the free movement of legal and natural persons, the free movement of capital, and the free movement of services. *See* GORMELY, *supra* note 27, at 1; *see also* EEC Treaty, *supra* note 1, art. 3, 298 U.N.T.S. at 15-16.

29. BURROWS, *supra* note 28, at 3. Article 10 of the EEC Treaty provides:

> Products having been entered for consumption in a Member State shall be deemed to be products coming from a third country in cases where, in respect of such products, the necessary import formalities have been complied with and the appropriate customs duties or charges with equivalent effect have been levied in such Member State and where such products have not benefited by any total or partial drawback on such duties or charges.

EEC Treaty, *supra* note 1, art. 10(1), 298 U.N.T.S. at 19.

30. F. BURROWS, *supra* note 28, at 3. *See* Case 41/76, Donckerwolcke & Schou v. Procureur de la République au Tribunal de Grande Instance, Lille & Director General of Customs, Paris, 1976 E.C.R. 1921, 1935 ("as regards free circulation of goods within the Community, products entitled to 'free circulation' are definitively and wholly assimilated to products originating in Member States.").

31. Marise Cremona, *The Completion of the Internal Market and the Incomplete Commercial Policy of the European Community*, 15 EUR. L. REV. 283, 283 (1990).

32. JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 55 (1988). Article 9 of the EEC Treaty provides for "the adoption of a common customs tariff [by the Community] in [Member States] relations with third countries." EEC Treaty, *supra* note 1, art. 9, 298 U.N.T.S. at 19.

33. *See* STEINER, *supra* note 32, at 55; *see also* Joined Cases 37 & 38/73, Sociaal Fonds voor de Diamantarbeiders v. N.V. Indiamex and Association de fait De Beider, 1973 E.C.R. 1609, 1622 ("This common tariff is intended to achieve an equalization of customs charges levied at the frontiers of the Community on products imported from

formly approach customs issues.[34] Articles 18 through 29 of the EEC Treaty contain transitional provisions for establishing the CCT.[35] Generally, only the Council may alter the tariff. To allow otherwise would negate the concept of a common external tariff.[36] Article 25 of the EEC Treaty, however, gives the Commission a limited power to grant temporary tariff quotas duty-free or at a reduced duty rate to member states.[37] Originally, the Community set the CCT equal to the arithmetic average of the duties assessed on a particular product in the four customs territories that constituted the Community on January 1, 1957.[38] In 1968, however, authorities fixed the CCT in Council Regulation 950/68 and its Annex.[39]

In drafting Council Regulation 950/68, Community officials looked to the Brussels Nomenclature, an international goods classification system.[40] This classification system remains in use today, although the

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third countries, in order to avoid any deflection of trade in relations with those countries and any distortion of free internal circulation or of competitive conditions.").

34. *See* Clive Stanbrook et al., *Regulation of International Trade by the EEC*, 15 INT'L BUS. LAW. 338, 339 (1987).

35. BURROWS, *supra* note 28, at 24. Implementation of the Common Customs Tariff (CCT) has occurred in all member states except Spain and Portugal. The deadline for full implementation of the CCT in these two states is January 1, 1993. *See* Cremona, *supra* note 31, at 284.

36. Cremona, *supra* note 31, at 284. Article 28 of the EEC Treaty outlines the Council's authority to modify the CCT. EEC Treaty, *supra* note 1, art. 28, 298 U.N.T.S. at 26.

37. EEC Treaty, *supra* note 1, art. 5, 298 U.N.T.S. at 17; *see* Cremona, *supra* note 31, at 284-85.

38. STEINER, *supra* note 32, at 55; *see* EEC Treaty, *supra* note 1, art. 19(1), 298 U.N.T.S. at 22.

39. Council Regulation 950/68, 1968 J.O. (L 172) 1. Article 189 of the EEC Treaty provides that regulations shall be binding in their entirety and directly applicable to all member states. EEC Treaty, *supra* note 1, art. 189, 298 U.N.T.S. at 78-79. The adoption of Council Regulation 950/68 came in the wake of allegations that the originally proposed calculation methods violated articles I and XXIV of the General Agreement on Tariffs and Trade. *See generally* K. LIPSTEIN, THE LAW OF THE EUROPEAN COMMUNITY 61 (1974) (discussing the potential violation of GATT); *infra* notes 284-91 and accompanying text. The Annex to Council Regulation 950/68, setting out the amended CCT, assigns the following to each product: (1) a CCT heading number; (2) a description; (3) an ad valorem autonomous rate of duty; and (4) an ad valorem conventional rate of duty. The autonomous rate applies if it is less than the conventional rate or if no conventional rate exists. Stanbrook et al., *supra* note 34, at 339; 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.06. The CCT headings are regarded as exhaustive. BURROWS, *supra* note 28, at 25.

40. *See* Stanbrook et al., *supra* note 34, at 339. The Brussels Nomenclature was derived from the Convention on Nomenclature for the Classification of Goods in Cus-

Council adopted a decision approving the International Convention on the Harmonised Commodity Description and Coding System (HS) on April 7, 1987.[41] The HS Nomenclature replaced the Brussels Nomenclature as the basis for the CCT nomenclature on January 1, 1988.[42]

Neither the EEC Treaty nor Council Regulation 950/68 explicitly regulates customs charges having an effect equivalent to a separate national tariff on member state-third state relations.[43] Nonetheless, in *Sociaal Fonds voor de Diamantarbeiders v. N.V. Indiamex*,[44] the European Court of Justice found the application of such charges inconsistent with the EEC Treaty.[45] Thus, it appears impermissible to impose charges with an equivalent effect in the Community unilaterally.

Full implementation of the CCT throughout the Community[46] will have significant effects on Japanese-Community trade. Because the CCT forbids member states to determine, modify, or interpret the duties levied on goods entering their territory from third states,[47] and because article 23 of the EEC Treaty calls upon member states to bring tariffs applicable to third states into conformity with CCT provisions,[48] the CCT will lower high tariffs existing in some member states. Implementation of the CCT in Spain and Portugal, two protectionist states with traditionally high national tariffs,[49] promises to open new markets to Japanese exports.

An examination of member states that have fully implemented the

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toms Tariffs of 1950. *See* 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.04, at 24 & n.1. The Brussels Nomenclature represents an attempt to achieve international unification in the classification of goods for customs purposes by providing a systematic classification of goods in international commerce. *See* Stanbrook et al., *supra* note 34, at 339.

41. Stanbrook et al., *supra* note 34, at 339.

42. *International Customs Body Launches New Trade System*, Europe Reuters Business Report, Sept. 22, 1987, *available in* LEXIS Library, Alleur File. The failure of some of the Community's major trading partners, including the United States, to adopt the Brussels Nomenclature has complicated trade. Stanbrook et al., *supra* note 34, at 339. Officials, however, expect all of the Community's major trading partners, including the United States and Japan, to ratify the HS. *Id.*

43. WYATT & DASHWOOD, *supra* note 1, at 120.

44. Joined Cases 37 & 38/73, Sociaal Funds voor de Diamantarbeiders v. N.V. Indiamex and Association de fait De Beider, 1973 E.C.R. 1609.

45. *Id.* at 1625.

46. *See supra* note 35 and accompanying text.

47. *See* Case 38/75, Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen, 1975 E.C.R. 1439, 1450-51; P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 128 (5th ed. 1990).

48. EEC Treaty, *supra* note 1, art. 23, 298 U.N.T.S. at 24.

49. *See* COLCHESTER & BUCHAN, *supra* note 4, at 182.

CCT[50] suggests that Japan has already benefitted from the CCT. Because high-technology goods, the most common Japanese exports,[51] were prone to the highest tariffs before implementation, full implementation presumably has benefitted Japan even in states in which average national tariff rates traditionally approximated the CCT.[52]

Japan, however, should temper its optimism about potential trade benefits resulting from implementation of the CCT. Article 115 of the EEC Treaty empowers the Commission to authorize member states to take "necessary protective measures" to prevent the construction of commercial policy by trade deflection or economic difficulties.[53] Because the common commercial policy remains incomplete in certain sensitive areas,[54] and because member states' arrangements concerning quantitative restrictions[55] and voluntary export restraints vary,[56] article 115 remains a viable Community weapon. This provision's potency is best illustrated by a hypothetical: Suppose member state A arranges with Japan to import Japanese widgets. Also, suppose that member state B has a different arrangement with Japan to import these widgets and that, in addition, member state B's arrangement is more favorable to Japan. Absent article 115, Japan could circumvent the terms of its arrangement with member state A by importing an excess of widgets into member state B and then exporting the surplus to member state A via free circulation.[57] Article 115, however, permits the Commission to implement protective measures. The Japanese, therefore, must be aware that their ability to take advantage of any discrepancies in Community import agreements remains limited.

Nonetheless, the Japanese can savor the fact that the Commission has rarely resorted to article 115.[58] Because article 115 protective measures create an exception to a basic Community rule—the rule of free movement of goods[59] —they are interpreted strictly and apply only for a lim-

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50. *See supra* note 35.

51. *See* WILLIAMS ET AL., *supra* note 2, at 16.

52. *See generally id.* (discussing pre-1992 tariffs).

53. EEC Treaty, *supra* note 1, art. 115, 298 U.N.T.S. at 60-61; *see* 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.115.

54. Although the CCT is designed to be exhaustive, *see supra* note 39, this is not always true in practice. *See* BURROWS, *supra* note 28, at 321.

55. *See infra* notes 62-155 and accompanying text.

56. *See infra* notes 248-79 and accompanying text.

57. *See supra* note 28 and accompanying text.

58. BURROWS, *supra* note 28, at 85.

59. *See supra* note 28.

ited period.[60] Furthermore, the Commission likely will end article 115 protection in the near future.[61]

III. QUANTITATIVE RESTRICTIONS

A. *Survey of Current EC Legislation*

Eliminating customs duties is insufficient to guarantee that goods will circulate freely. Therefore, the EEC Treaty also eliminates quantitative restrictions on imports and all measures having an equivalent effect.[62] Quantitative restrictions, or quotas, encompass all measures amounting to a restraint, by amount or value,[63] on imports.[64] A straightforward importation prohibition constitutes the clearest and most traditional trade restriction prohibited by article 30.[65] In 1974, however, the European Court of Justice prohibited all trading rules hindering Community trade, "directly or indirectly, actually or potentially," as measures having an equivalent effect.[66] The European Court of Justice deemed invalid not only all measures affecting Community trade, but also all measures possibly affecting it.[67] Since then, the phrase "measures having equivalent effects to quantitative restrictions" has been interpreted broadly to include not only overtly protective measures, such as measures applicable only to imports, but also measures applicable to imports and domestic goods alike.[68] These measures include regulatory measures designed to enforce minimum standards—of size, weight, quality, price, or content—certification requirements to ensure that goods conform to these standards, and measures capable of influencing the traders' behavior,[69]

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60. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.115.

61. COLCHESTER & BUCHAN, *supra* note 4, at 65-66.

62. EEC Treaty, *supra* note 1, art. 30, 298 U.N.T.S. at 26; MATHIJSEN, *supra* note 47, at 131. Quotas are capable of disturbing the flow of international trade to an even greater extent than tariffs. The volume of imports cannot expand to meet increased demand, and the efficiency improvement of manufacturers in exporting states cannot secure access to the protected market. WYATT & DASHWOOD, *supra* note 1, at 123 n.2 (citation omitted).

63. *See* WYATT & DASHWOOD, *supra* note 1, at 123.

64. *See generally* GORMLEY, *supra* note 27, at 20-26 (discussing prohibited restrictions on imports).

65. Case 2/73, Riseria Luigi Geddo v. Ente nazionale Risi, 1973 E.C.R. 865, 866.

66. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 837; *see* STEINER, *supra* note 32, at 63-64.

67. *See* WYATT & DASHWOOD, *supra* note 1, at 127.

68. *See* STEINER, *supra* note 32, at 62-63.

69. *Id.*

such as promotions based on national origin.[70]

Although the Community theoretically should strive to eliminate all quantitative import restrictions by the end of 1992,[71] in practice some seven hundred national quantitative restrictions remained in effect as of 1990.[72] Some quantitative restrictions fall within an article 36 exception, which provides that article 30 does not preclude the following justifications for import prohibitions or restrictions: public morality, public policy, or public security; the protection of human, animal, or plant health and life; the protection of national treasures possessing artistic, historic, or archaeological value; or industrial or commercial-property protection.[73] These prohibitions or restrictions, however, cannot constitute a means of arbitrary discrimination or a disguised trade restriction.[74]

The European Court of Justice uses a two-pronged article 36 justification test. First, it examines whether the contested measure fits within one of the categories of allowable restrictions.[75] Second, it determines whether the measure nevertheless fails as arbitrary discrimination or a disguised trade restriction.[76] In *Simmenthal SpA v. Italian Minister for Finance*,[77] the court clarified that article 36 does not reserve certain matters for the member states' exclusive jurisdiction, but rather permits national laws that derogate from the free movement principle to attain objectives embodied in the article.[78] National measures must not restrict trade any more than necessary to protect the interest in question.[79] National authorities of member states bear the burden of justifying any re-

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70. *See* Case 249/81, Commission v. Ireland, 1982 E.C.R. 4005 (prohibiting a "Buy Irish" advertising campaign involving the use of a guaranteed Irish symbol).

71. *See* John Marcom Jr., *The Unacceptable Face of Protectionism*, FORBES, Nov. 12, 1990, at 36.

72. *See* COLCHESTER & BUCHAN, *supra* note 4, at 65.

73. EEC Treaty, *supra* note 1, art. 36, 298 U.N.T.S. at 29.

74. *Id.*

75. *See generally* GORMLEY, *supra* note 27, at 123-24 (discussing an essentially equivalent three-pronged test under which the following issues are examined, in order: (1) whether the contested measure falls within the set of measures basically prohibited; (2) if so, whether the measure qualifies for an exemption; and (3) whether the measure nonetheless fails as a means of arbitrary discrimination or a disguised restriction on trade between member states).

76. *Id.*

77. Case 35/76, 1976 E.C.R. 1871.

78. *Id.* at 1886. This concept is referred to as the principle of proportionality. *See* BURROWS, *supra* note 28, at 62.

79. WYATT & DASHWOOD, *supra* note 1, at 139-40. The court will not uphold measures if the purpose for which they exist could be achieved as effectively by less burdensome measures. *See* GORMLEY, *supra* note 27, at 124.

strictive trading rules under article 36.[80]

The European Court of Justice has considered derogation to protect the public morality in two cases. In *Regina v. Henn & Darby*,[81] English officials successfully invoked article 36 to justify banning the importation of pornography.[82] In *Conegate Ltd. v. Customs & Excise Commissioners*,[83] however, the court took a stricter view and refused to uphold a seizure of inflatable rubber "love dolls" and other erotic materials on the basis that production and manufacture were not banned in the importing state.[84] The public policy justification, in contrast, has never succeeded as a basis for derogation under article 36.[85] In *Campus Oil Ltd. v. Minister for Industry & Energy*,[86] the Irish government successfully invoked the public security grounds for derogation. In *Campus Oil*, the court upheld an Irish order requiring petroleum products importers to purchase up to thirty-five percent of their petroleum requirements from the Irish National Petroleum Company.[87] Irish officials successfully argued that Ireland's heavy dependence on imported oil supplies made it indispensable to maintain and support a national refining capacity.[88]

Because protecting the health and life of humans, animals, and plants is a great concern, the second clause of article 36 has given rise to a wealth of case law.[89] In the *De Peijper* case,[90] the European Court of Justice noted that the "[h]ealth and the life of humans rank first among the property or interests protected by Article 36."[91] To succeed on these

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80. WYATT & DASHWOOD, *supra* note 1, at 141; *see also* Case 227/82, Criminal proceedings against L. van Bennekom, 1983 E.C.R. 3883, 3905.

81. Case 34/79, 1979 E.C.R. 3795.

82. *See id.*

83. Case 121/85, 1987 Q.B. 254.

84. *Id.* at 269; *see* STEINER, *supra* note 32, at 72-73. The court distinguished *Regina v. Henn & Darby* on the grounds that the pornographic material in question in that case was illegal in the United Kingdom. 1987 Q.B. at 262-64.

85. The public policy justification, however, has been argued in a number of cases. *See, e.g.*, Case 95/81, Commission v. Italian Republic, 1982 E.C.R. 2187 (public policy exception cannot be invoked to serve purely economic ends); Case 16/83, Criminal Proceedings against K. Prantl, 1984 E.C.R. 1299 (public policy exception cannot be invoked on the grounds that the activities it seeks to curb carry criminal sanctions).

86. Case 72/83, 3 C.M.L.R. 544 (E.C.J. 1984).

87. *Id.* at 547; *see also* BURROWS, *supra* note 28, at 67.

88. *See* BURROWS, *supra* note 28, at 67; STEINER, *supra* note 32, at 73.

89. *See* GORMLEY, *supra* note 27, at 139.

90. Case 104/75, De Peijper, 1976 E.C.R. 613 (recognizing that the effective protection of human health and life requires that medicinal preparations be available at reasonable prices).

91. *Id.* at 635.

grounds, however, a petitioner must prove that a real health risk exists.[92] When the exporting state maintains standards comparable to those found in the importing state, the petitioner must demonstrate that the exporter's standards are inadequate to meet the risk.[93]

The Court has not yet had the opportunity to consider the justification of protecting national treasures with artistic, historic, or archaeological value.[94] Because this exemption most likely will be relied upon to restrict a member state's exports,[95] rather than imports, further examination of this provision is unwarranted in this Note.

The exemption protecting industrial and commercial property must be read in conjunction with EEC Treaty article 222.[96] Article 222 provides that the EEC Treaty "shall in no way prejudice the system existing in Member States in respect of property."[97] Although this provision appears to ensure that national laws governing industrial property remain intact,[98] these property rights have been curtailed seriously.[99] In balancing the competing interests of free movement and protection of nationally recognized rights,[100] the court interprets article 36 to permit prohibitions or restrictions on the free movement of goods only to the extent needed to protect the rights that form the "specific subject-matter of the property."[101] The court also distinguishes between the existence of industrial property rights, which remain unaffected by Community laws, and the exercise of these rights, which may be curtailed.[102] Finally, the court applies the exhaustion of rights doctrine to hold that once a protected

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92. *See* STEINER, *supra* note 32, at 74; Case 238/82, Duphar BV v. Netherlands State, 1984 E.C.R. 523.

93. *See* STEINER, *supra* note 32, at 74; Case 124/81, Commission v. United Kingdom, 1983 E.C.R. 203 (finding unjustified a requirement that imported milk be marketed only by approved dairies or distributors to ensure that milk was free from bacteriological or viral infections when the exporting state subjected milk to equivalent controls). *But see* Case 4/75, Rewe-Zentralfinanz eGmbH v. Landwirtschaftskammer, 1975 E.C.R. 843 (upholding health plant inspection applicable only to imported apples when the imported apples posed a real risk of San José Scale, a pest not found in domestic apples).

94. STEINER, *supra* note 32, at 75.

95. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.105.

96. *See* STEINER, *supra* note 32, at 75.

97. EEC Treaty, *supra* note 1, art. 222, 298 U.N.T.S. at 88.

98. STEINER, *supra* note 32, at 75. Industrial and commercial property includes patents, trademarks, copyrights, and similar rights. BURROWS, *supra* note 28, at 72.

99. STEINER, *supra* note 32, at 76.

100. GORMLEY, *supra* note 27, at 184.

101. STEINER, *supra* note 32, at 76. *See* Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG, 1971 E.C.R. 487.

102. *See* STEINER, *supra* note 32, at 76.

product has been placed in the market by or with the owner's consent, the owner no longer can rely on national property rights to prevent circulation within the Community.[103]

In short, the court construes article 36 narrowly.[104] The list of exceptions has been deemed exhaustive.[105] To the extent that article 36 leaves national authorities a margin of discretion in protecting the interests listed therein, it also limits the exercise of this discretion.[106]

The European Court of Justice also recognizes the member states' need, pending action at the Community level, to ensure that certain interests or values are guaranteed.[107] This notion, referred to as the rule of reason, has been analyzed in various ways: as an application of the article 36 public policy provision, as a broad interpretation of article 36, clause 1, and, as another exception to article 30.[108] It even has been deemed an application of the international law principle of equity.[109] Most authorities, however, favor the third interpretation—another exception to article 30.[110]

The court has placed several restrictions on the development of this rule. First, when Community level action is taken, member states have no interest in demanding additional guarantees, and the rule of reason is inapplicable.[111] Second, any measures taken by member states in the absence of Community measures must be reasonable.[112] Third, the method of satisfying the requirement must be readily accessible to Community nationals.[113] Finally, the measures must not violate the final clause of

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103. *See id.*

104. *See* GORMLEY, *supra* note 27, at 123.

105. Exceptions to article 36 upheld by the court include the protection of consumers or the fairness of commercial transactions, economic policy, or the protection of creativity and cultural diversity. WYATT & DASHWOOD, *supra* note 1, at 138.

106. *Id.* at 139.

107. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.83, at 119, 120 n.4.

108. GORMLEY, *supra* note 27, at 51; *see also* 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.83.

109. *See* GORMLEY, *supra* note 27, at 51.

110. *See, e.g.*, 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.83. The view that the rule of reason is simply an application of the public policy provision of article 36 is untenable in light of the judgment in Case 113/80, Commission v. Ireland, 1981 E.C.R. 1625, and the consistently strict interpretation of article 36. *See supra* note 104 and accompanying text. The same conclusion applies to the argument that the rule of reason amounts to a broad interpretation of the first sentence of article 36. *See* GORMLEY, *supra* note 28, at 52.

111. GORMLEY, *supra* note 28, at 51.

112. *Id.*

113. *Id.*

article 36—they must not constitute "arbitrary discrimination or a disguised restriction on trade between Member States."[114]

Some debate exists concerning whether the court intends to reduce article 30's substantive scope via the rule of reason,[115] or merely to adopt national measures pending the adoption of appropriate Community-level guarantees.[116] Most commentators prefer the latter interpretation.[117] Whatever the reason, the interests recognized by the court as meriting protection under the rule of reason include consumer protection,[118] unfair trade practice prevention,[119] public health protection,[120] environmental protection,[121] improvement of working conditions,[122] and fiscal effectiveness.[123]

In addition to article 36 and the rule of reason, other specific EEC Treaty provisions allow for derogation from article 30 principles.[124] Most important, article 115 allows for quantitative restrictions, or measures having the equivalent effect, specifically designed to protect against

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114. *Id.* (quoting Case 8/74, Procureur du Rui v. Dassonville, 1974 E.C.R. 837, 852); *see supra* note 74 and accompanying text.

115. The rule of reason conceivably could operate to reduce the substantive scope of article 30 by defining measures, which although justified under the rule of reason, are not measures having an effect equivalent to those of quantitative restrictions. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.83, at 119, 120 n.15.

116. *Id.* para. 12.83.

117. *Id. But see* Joined Cases 3, 4, & 6/76, Officer van Justitie v. Kramer, 1976 E.C.R. 1279, 1313; Case 119/78, S.A. des Grandes Distilleries Peureux v. Directeur des Services Fiscaux de la Haute-Saône, 1979 E.C.R. 975, 985.

118. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.85; *see, e.g.*, Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 662.

119. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.86. *See* Case 58/80, Dansk Supermarked A/S v. A/S Imerco, 1981 E.C.R. 181, 195.

120. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.87. Public health protection seems duplicative of the second clause of Article 36. *See supra* notes 91-92 and accompanying text; Case 788/79, Criminal Proceedings against Gilli & Andres, 1980 E.C.R. 2071, 2078 (recognizing the protection of public health within the ambit of the rule of reason).

121. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.88. *See* Joined Cases 3, 4, & 6/76, Officier van Justitie v. Kramer, 1976 E.C.R. 1279, 1313.

122. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.89. *Cf.* Case 155/80, Oebel, 1981 E.C.R. 1993, 2017 (although the court did not approach this case in terms of the rule of reason, the judgment points to the acceptability of equally applicable national measures for the prevention of worker exploitation).

123. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.90. *See* Case 13/77, NV GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak, 1977 E.C.R. 2115, 2142.

124. STEINER, *supra* note 32, at 80-81.

trade deflection and economic difficulties in any member state.[125] As with measures adopted under the guise of article 36 or the rule of reason, the restrictions must comply with the proportionality requirement[126] and may not be invoked in areas subject to common Community regulation.[127]

B. *Case Study of the Automobile Industry*

The main quota issue in Japanese-Community trade relations today involves the automobile industry.[128] To date, Japanese automobiles have had limited access to many European markets.[129] Theoretically, the dismantling of trade barriers within the Community should lead to an opening of the Community automobile market to fierce Japanese competition.[130] Understandably, the large automakers—Fiat, Volkswagen, Ford, Peugot, and Renault—that now command seventy-five percent of the West European market[131] fear that Japan's share of that market may rise from its current ten percent[132] to eighteen or twenty percent or even more by 1995.[133]

In preparation for the battle that looms ahead,[134] foreign and European automakers alike are altering their strategies. A rash of joint ventures and mergers already has occurred.[135] In an attempt to force automakers to manufacture in Europe, the Community is considering

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125. *See supra* notes 53-61 and accompanying text.

126. EEC Treaty, *supra* note 1, art. 115, 298 U.N.T.S. at 60-61.

127. *See supra* note 73 and accompanying text.

128. *See supra* note 101 and accompanying text.

129. COLCHESTER & BUCHAN, *supra* note 4, at 111. For years, France has limited Japanese automobile imports to three percent of total annual sales. Marcom, *supra* note 71, at 36. Italy has capped Japanese imports at one percent of annual sales. *Id.* Spain, Portugal, and Britain also limit market share. *Id.*

130. *See supra* note 62 and accompanying text.

131. *Ready, steady . . .*, ECONOMIST, Sept. 23, 1989, at 79.

132. Marcom, *supra* note 71, at 37.

133. *Ready, steady . . .*, *supra* note 131, at 79. "The 1992 process will transform the EC's fragmented automobile market into the world's largest." WILLIAMS ET AL., *supra* note 2, at 74.

134. *See Ready, steady . . .*, *supra* note 131, at 79.

135. Ford has swallowed Jaguar, General Motors has made a 50/50 deal with Saab, Fiat has merged with Maserati, Honda has taken 50% of Rover, and Renault and Chrysler have entered into a cooperation agreement. WILLIAMS ET AL., *supra* note 2, at 75. Consolidation in the automobile industry will lead to "survival of the fittest." Candy McCampbell, *No Free Ride for Autos in Europe*, TENNESSEAN, Sept. 13, 1991, at E1, E4.

strict local content requirements[136] designed to combat Japanese screwdriver plants.[137] Three of the largest Japanese manufacturers, Nissan, Toyota, and Honda, have responded by beginning to assemble cars in Britain.[138] In response, the Community may institute strict rules of origin.[139] If a protectionist bias exists in the 1992 program, it can be found in the plans for the European automobile industry.[140]

To countervene the pending Japanese onslaught, European automakers will need to increase production efficiency.[141] This strategy necessitates cost reduction measures,[142] flexible manufacturing techniques designed to speed up design and development,[143] and skillful collaboration with other European automakers.[144]

Seeking additional time to develop the necessary skills for competition,[145] some European automakers advocate imposition of a transitional quota on Japanese automobile imports after 1992.[146] Jacques Calvert, president of France's Peugeot S.A., suggests the maintenance of a ten percent quota on Japanese automobiles throughout the Community through 2002, combined with tighter limits in states like France that have restricted imports to date.[147] An alternative Community proposal involves limiting imported Japanese automobile sales until 1997 to nine percent of the European market and capping market share for made-in-

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136. *See infra* notes 191, 246 and accompanying text.

137. *See* WILLIAMS ET AL., *supra* note 2, at 166; *infra* notes 188-89 and accompanying text. The term "screwdriver assembly plant" refers to a plant set up in the Community to assemble a product using a high percentage of foreign-made component parts. *See* COLCHESTER & BUCHAN, *supra* note 4, at 200, 202; CHANCE, *supra* note 6, ¶712.

138. *Ready, steady . . . ., supra* note 131, at 79.

139. *See infra* notes 216-48 and accompanying text.

140. *See* WILLIAMS ET AL., *supra* note 2, at 164.

141. *See Ready, steady . . . ., supra* note 131, at 79-80.

142. European automakers currently require an average of 37 man-hours to build an automobile, while United States automobile plants require less than 20, and Japanese plants require only 17. *Id.*

143. The Community particularly needs plants capable of shifting rapidly from production of one model to production of another model without retooling. These plants are starting to appear. For example, Volkswagen's new plant at Emden, Germany "can rapidly shift from building Passats to building Golfs." *Id.* at 80.

144. Joint ventures can reduce the cost of developing new cars. *See supra* note 135 and accompanying text. As 1992 approaches, everyone in the European automobile industry allegedly is negotiating with everyone else. *Ready, steady . . . ., supra* note 131, at 79-80.

145. WILLIAMS ET AL., *supra* note 2, at 24.

146. *Ready, steady . . . ., supra* note 131, at 80.

147. Marcom, *supra* note 71, at 37. Calvert also calls upon the Community to end the Japanese building of production facilities in Europe. *Id.*

Europe foreign automobiles at around ten percent.[148] Advocates of transitional quotas claim that they will give the Community much-needed time to adopt new manufacturing methods and to launch joint ventures.[149] Critics, however, argue that Community-wide restrictions will lead only to higher automobile prices for Community consumers[150] and could deal a self-defeating blow to the entire 1992 plan.[151] One fact remains certain—no one in Brussels talks of free trade in automobiles after 1992.[152]

One proposed solution to the Community automobile market problems involves persuading Japan to limit automobile exports to the Community voluntarily for a period.[153] Negotiations to this effect are allegedly under way between Community and Japanese officials.[154] Two problems, however, persist. First, these measures may affect the kinds of automobiles imported by encouraging Japan to import more expensive models. Second, allegedly temporary measures sometimes last longer than expected or become of indefinite duration.[155]

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148. *Id.* Many Europeans suggest that the United States erred in allowing Japanese "transplants" to capture 20% of United States production. *Id.* at 37.

149. *Ready, steady . . . ., supra* note 131, at 80.

150. Mark N. Nelson, *Sticking Points*, WALL ST. J., Sept. 21, 1990, at R37, 38.

151. A "cartelized, walled-off" European automobile market arguably contradicts the plan to create a Europe without frontiers. Marcom, *supra* note 71, at 37.

152. *Id.*

153. *See* Nelson, *supra* note 150, at R38.

154. The voluntary restraint agreement currently under consideration involves a Community commitment to phase out existing national quotas on Japanese automobile imports and a Japanese commitment to restrict automobile exports to the Community for a transition period. The length of the transition period and the number of automobiles to be allowed have not been revealed. *See* WILLIAMS ET AL., *supra* note 2, at 165-66.

155. For example, in May 1981 Japanese officials announced that they would restrict the number of automobiles exported by Japanese manufacturers to the United States for a three-year period. *See* Michael W. Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of United States Antitrust Laws*, 27 HARV. INT'L L.J. 99, 99 (1986). In January 1991, with the voluntary restraint still in effect, Japanese officials decided again to continue the restraint for another year. *See A Decision in Tokyo*, WALL ST. J. Jan. 9, 1991, at A7.

IV. EC ANTI-DUMPING LEGISLATION

A. *Survey of Current EC Legislation*

The Community's anti-dumping[156] legislation may be the most significant legal instrument available to protect European industries against unfair trade practices.[157] Since the initiation of the first anti-dumping proceeding in 1970, over four hundred proceedings have been brought.[158] One reason for the popularity of anti-dumping actions is the greater opportunity for selectivity. Unlike safeguard measures, which must be ap-

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156. Dumping refers to a differential pricing strategy, adopted by a foreign producer, that results in an export price below the product's normal price, the price actually paid or payable on the exporting state's domestic market. *See* LASOK & CAIRNS, *supra* note 27, at 239. The export price, by comparison, refers to the "price actually paid or payable for the product sold for export to the Community net of all taxes, discounts and rebates actually granted and directly related to the sales under consideration." Council Regulation 2423/88, art. 2(C)(8)(a), 1988 O.J. (L 209) 1, 5. Discounts and rebates may be deducted from the normal price when directly linked to the sales under consideration and claimed by the foreign producer. Jean-François Bellis et al., *Further Changes in the EEC Anti-dumping Regulation: A Codification of Controversial Methodologies*, J. WORLD TRADE, April 1989, at 21, 24. The foreign producer must produce evidence that any discounts or rebates have actually been granted. The Commission may determine that the directly related requirement disallows the deduction of multiproduct discounts and rebates. In cases in which a foreign producer sells to unrelated customers not in the home or export markets, the effect of this determination is neutral, because it affects both sides of the equation equally. If a foreign producer sells to related companies in both markets, however, the determination tilts toward a finding of dumping. Multiproduct discounts and rates are deducted in the construction of the export price, but are not deducted from the sales price in the home market, becuase only direct selling expenses are deductible. *See* Bellis et al., *supra* at 22-23. Alternatively, an export price may be constructed by determining the price at which the imported product is resold to the first independent buyer and then adjusting that price for costs incurred between importation and resale. 1 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 1, para. 4.67. The Commission commonly constructs the export price when exports, but no price, exist; when an association or compensation agreement exists between the exporter and either the importer or a third party; or when the actual export price of the product sold is unreliable "for other reasons." The extent of dumping, or dumping margin, then corresponds to the excess of the normal price over the export price. *See id.* para. 4.65.

157. *See* Le Lièvre & Houben, *supra* note 19, at 434. Of the various Community trade remedy laws available, Community authorities most frequently resort to anti-dumping proceedings. Jean François Bellis, *The EEC Anti-dumping System*, *in* ANTI-DUMPING LAW AND PRACTICE 41, 42 (John J. Jackson & Edwin A. Vermulst eds., 1989). The most convincing evidence of the creation of a "fortress Europe" can be found in the evolution of the Community's anti-dumping policy. COLCHESTER & BUCHAN, *supra* note 4, at 199.

158. *See* Bellis, *supra* note 157, at 42-43.

plied on a nondiscriminatory basis to all exporting states, anti-dumping measures can be taken against individual exporting states or individual firms.[159]

Council Regulation 2423/88 of July 11, 1988 (the anti-dumping regulation) currently governs almost all anti-dumping proceedings.[160] It authorizes the Commission,[161] upon receipt of a complaint, to investigate the complaint and impose provisional anti-dumping duties.[162] Upon completion of the investigation, the Commission may recommend definitive action to the Council of Ministers,[163] which has sole competence[164] to order the imposition of definitive anti-dumping duties on any dumped product.[165]

Before issuing a recommendation to the Council, the Commission requires that four factors be established.[166] First, the petitioner must demonstrate that goods have been dumped. Second, the petitioner must prove injury to a Community industry producing a like product. Third, the petitioner must demonstrate that the dumped goods have caused this injury. Finally, the petitioner must show that the interests of the Community call for Community intervention.[167]

Even if dumping exists, a determination that injury has occurred will be made only if the dumped goods cause or threaten to cause material injury to an established Community industry or, alternatively, materially retard the establishment of an industry.[168] The Commission examines a number of factors to determine whether injury has actually occurred. These factors include volume,[169] import price,[170] and impact on the in-

159. *Id.* at 43.

160. Council Regulation 2423/88, 1988 O.J. (L 209) 1. For coal and steel products within the scope of the ECSC Treaty, Commission Decision 2424/88 governs. Commission Decision 2424/88, 1988 O.J. (L 209) 18.

161. *See supra* note 2.

162. Commission Decision 2424/88, art. 7, 11, 1988 O.J. (L 209) at 25-26, 28; Bellis, *supra* note 157, at 45.

163. The Council of Ministers consists of one minister from every member state. It is the Community's primary decision-making body. WILLIAMS ET AL., *supra* note 2, at 12.

164. The Council can act only upon a proposal from the Commission. *See* Bellis, *supra* note 157, at 45.

165. Council Regulation 2423/88, art. 11, 12, 1988 O.J. (L 209) at 28-30; *see* Bellis, *supra* note 157, at 45.

166. *See* Stanbrook et al., *supra* note 34, at 342.

167. *See id.* at 342-43.

168. *See* 1 LAW OF THE EUROPEAN COMMUNITY, *supra* note 1, para. 4.71.

169. In particular, the Commission examines whether a significant increase, either in absolute terms or relative to production or consumption, has occurred within the Community. Often an actual increase in imports precipitates a complaint by a Community

dustry.[171] No single determinative factor exists.[172] To determine whether a threat of injury exists, the Commission evaluates a different set of factors that includes the rate of increase in dumped exports, the state of origin's existing and potential export capacity, and the likelihood of increase in future exports to the Community.[173]

If the Commission believes that an injury has occurred, it then examines whether the dumped goods caused the injury. Although injuries caused by contraction of demand or a drop in nondumped import prices may affect adversely a Community industry, the Commission cannot properly attribute these injuries to dumping.[174]

Finally, Community authorities consider whether measures to counteract the dumping should be taken.[175] The Commission will act only if it determines that action would serve the Community's interests.[176] Although the Community's interests remain undefined, the reference is to the interests of the Community as a whole, rather than to the interests of a particular Community industry.[177] The outcome depends upon a complex balancing of various interests.[178]

If the Commission believes action to be warranted, it nonetheless may conclude proceedings by accepting an undertaking, a promise by the exporter to implement acceptable prices, rather than recommending the imposition of a definitive duty.[179] Exporters generally prefer and usually offer undertakings because they result in a higher return per unit.[180]

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industry. *Id.* para. 4.71, at 543 & n.5.

170. In particular, the Commission considers whether significant price undercutting has occurred, as compared with the price of a like product in the Community. *Id.* para. 4.71.

171. Impact on industry may be reflected in trends in production, capacity, utilization, stocks, sales, market share, prices, profits, investment return, cash flow, or employment. *Id.*

172. *See id.*

173. *Id.* para. 4.72. To date, the Community never has taken action solely because of a threat of injury. *Id.*

174. *See id.* para. 4.71.

175. Even if the Commission completes its investigation and confirms the existence of dumping, it will not necessarily take measures to counteract the dumping. *Id.* para. 4.76.

176. *Id.*

177. *Id.*

178. Among the interests considered are those of the consumer, those of the complainant industries, and those of the Community processing industries who seek to obtain materials as cheaply as possible. *Id.*

179. *See id.* para. 4.84. To be acceptable, the undertaking must either eliminate the dumping margin or the resulting injurious effects. Le Lièvre & Houben, *supra* note 19, at 439.

180. Le Lièvre & Houben, *supra* note 19, at 439. Although an exporter may suffer

Undertakings can be reviewed periodically and normally lapse five years after their effective date.[181] Traditionally, the Commission concludes a high proportion of cases by undertakings.[182]

Alternatively, the Commission can act with the Council to impose a definitive duty, which may be ad valorem, specific, variable, or a combination of ad valorem and variable.[183] The amount of the duty must not exceed the dumping margin,[184] and it should not exceed any lesser duty that adequately would remove the injury.[185] The duty must be levied on a nondiscriminatory basis on all dumped imports, excluding imports from states from which undertakings have been accepted.[186] Like undertakings, anti-dumping duties normally lapse five years after their effective date.[187]

The anti-dumping regulation also addresses the problem of circumvention of anti-dumping duties via screwdriver assembly plants in the Community.[188] If a product has been the subject of an anti-dumping duty, and exporters subsequently have set up assembly plants to produce the same product within the Community from components exported from the state subject to the duty, the Council may extend the duty to the assembled products.[189] At present, the Council declines to impose a duty unless more than sixty percent of the components come from outside the Community.[190] At least one commentator has suggested,

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a market-share loss when forced to charge a higher price, the imposition of a duty leads to both an increase in price and the loss of part of the increase to customs authorities. *Id.*

181. 1 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 1, para. 4.84. Before an undertaking expires, the Commission publishes a notice of the expiration in the Official Journal. Additionally, the Commission notifies the affected Community industry. If an interested party can demonstrate that the expiration will cause injury or threat of injury, the Commission again reviews the measure. *Id.* paras. 4.84, 4.90.

182. Bellis, *supra* note 157, at 52.

183. Ad valorem duties are duties based on the value of the goods. Specific duties, on the other hand, are duties set at a fixed amount per unit, weight, or measure. Variable duties are duties based on a minimum price. Bellis, *supra* note 157, at 55-56.

184. *See supra* note 156 and accompanying text.

185. 1 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 1, para. 4.85.

186. *Id.*

187. *See supra* note 181 and accompanying text.

188. In many instances, manufacturers build these plants simply to avoid anti-dumping duties. *See* CHANCE, *supra* note 6, ¶712; COLCHESTER & BUCHAN, *supra* note 4, at 200.

189. The anti-dumping regulation specifies proportions of components from the exporting state that cannot be exceeded if products assembled from the components within the Community are to avoid the anti-dumping duty. CHANCE, *supra* note 6, ¶712.

190. *See* COLCHESTER & BUCHAN, *supra* note 4, at 200.

however, that requirements may become more stringent in the future.[191]

B. *Anti-dumping Proceedings Against Japan*

Since 1987, the Community has used anti-dumping legislation to crack down on Asian companies.[192] Although the total number of anti-dumping actions launched by the Commission has declined slightly in the last few years,[193] these actions increasingly have targeted Japan.[194] The Commission has investigated Japanese exporters of electronic scales,[195] ball bearings,[196] electronic typewriters,[197] hydraulic excavators,[198] photocopying machines,[199] and printers.[200]

Japanese exporters are more disturbed, however, by the Commission's increasing reluctance to accept price undertakings[201] than by the increase in proceedings against them.[202] At least with respect to the Japanese, the Commission's longstanding policy of accepting undertakings[203] appears to be changing. In 1984, the Commission refused to accept an undertaking from a Japanese ball bearings manufacturer on the grounds that undertakings do not constitute a satisfactory solution, are likely to cause controversy, and are difficult and expensive to monitor.[204] Any doubt of anti-Japanese sentiment underlying this decision dissipated one year later when the Council acted against the Commission's recommendations and declined a price undertaking in a case involving hydraulic excavators, stating that "in the light of the present trade relations with Japan,"

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191. Ultimately, the Council even may require that 100% of the component parts originate within the Community. CHANCE, *supra* note 6, ¶712.

192. *See* COLCHESTER & BUCHAN, *supra* note 4, at 200.

193. *See id.* (based on data from the 1981-88).

194. *See id.*

195. *See* Commission Regulation 2865/85, 1985 O.J. (L 275) 5; Council Regulation 1058/86, 1989 O.J. (L 97) 1.

196. *See* Case 113/77, NTN Toyo Bearing Co. v. Council, 1979 E.C.R. 1185.

197. Commission Regulation 2812/85 of 7 October 1985 Imposing a Provisional Anti-Dumping Duty on Imports of Electronic Typewriters, 1985 O.J. (L 266) 5.

198. Council Regulation 1877/85, 1985 O.J. (L 176) 1.

199. *See* Le Lièvre & Houben, *supra* note 19, at 434.

200. *Id.*

201. *See supra* notes 179-82 and accompanying text.

202. *See* Le Lièvre & Houben, *supra* note 19, at 439-40.

203. *See supra* note 194 and accompanying text.

204. Council Regulation 2089/84, 1984 O.J. (L 193) 1, 4 (1984) ("past experience with price undertakings in the ball bearings sector has shown that undertakings, even if generally respected, do not constitute a satisfactory solution, seem likely to cause controversy and are difficult to monitor, thereby requiring a considerable amount of time and expense").

offering recourse to price undertakings is not in the Community's interest.[205] The Council has since refused to accept undertakings from Japanese exporters in at least two other proceedings.[206] The issue of whether the Commission and Council can be bound legally to accept undertakings that eliminate dumping or remove an injury remains unresolved,[207] but undoubtedly can and should be raised by the Japanese in the future.

The recent anticircumvention legislation also appears to be generating concern among Japanese manufacturers. Most anticircumvention proceedings to date have involved Japanese plants.[208] These proceedings undermine Japanese plans to establish a market presence in Europe by producing within the Community certain products that otherwise would be subject to anti-dumping duties.[209] Japan has challenged the anticircumvention legislation as violative of GATT Anti-dumping Code article 8, which stipulates that anti-dumping duties can be imposed only when "all requirements for the imposition have been fulfilled."[210] The Japanese presumably are relying on the arguments that because the Commission cannot demonstrate that the component parts have been dumped,[211] the Council cannot impose a duty on them,[212] and that parts and materials cannot be considered to be "like products."[213] The Commission

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205. *See* Council Regulation 1877/85, 1985 O.J. (L 176) at 4.

206. *See* Council Regulation 2322/85, 1985 O.J. (L 218) 1; Council Regulation 1058/86, 1986 O.J. (L 97) 1.

207. *See* Le Lièvre & Houben, *supra* note 19, at 440. The anti-dumping regulation states only that the Commission can exercise its discretion in determining whether to accept a proposed undertaking. *See id.* In at least one instance, the Court of Justice held that no legal obligation to accept these understakings exists. *See* Case 113/77, NTN Toyo Bearing Co. v. Council, 1979 E.C.R. 1185.

208. *See* COLCHESTER & BUCHAN, *supra* note 4, at 197, 200.

209. *See* Le Lièvre & Houben, *supra* note 19, at 441; *see also supra* note 20 and accompanying text. Anticircumvention proceedings ultimately may deprive the Community of jobs. *See supra* note 23 and accompanying text.

210. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT Anti-dumping Code), art. 8, *reprinted in* J.F. BESELER & A.N. WILLIAMS, ANTI-DUMPING AND ANTI-SUBSIDY LAW: THE EUROPEAN COMMUNITIES 319, 325-26 (1986).

211. The Commission is arguably unable to prove that the component parts have been dumped because the parts themselves have never been the subject of a dumping investigation.

212. *See generally* Le Lièvre & Houben, *supra* note 19, at 442 (noting that only assembled products, not component parts, have been the subject of anti-dumping proceedings).

213. *See id.* A like product must be "alike in all respects to the product under consideration or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consider-

counterargues that it imposes the anti-dumping duties on the assembled product, which has been the subject of a dumping investigation.[214] This counterargument collides, however, with the Community's rules of origin, which provide that a product originates in the state where the last substantial process or operation is performed.[215]

V. COMMUNITY RULES OF ORIGIN

The Community rules of origin range between complicated and unfathomable.[216] Nonetheless, the Community's nonpreferential rules of origin determine the applicability of measures restricting free movement within the Community,[217] of anti-dumping duties,[218] of quantitative restrictions,[219] and of voluntary export restraint undertakings[220] by non-Community manufacturers.[221] The rules of origin also determine whether anti-dumping duties imposed on products originating outside the Community extend to products manufactured within the Community.[222] In short, rules of origin determine the manufacturing conditions

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ation." GATT Anti-dumping Code, *supra* note 210, art. 2(2), *reprinted in* BESELER & WILLIAMS at 319-20.

214. Le Lièvre & Houben, *supra* note 19, at 442.

215. *See infra* notes 216-48 and accompanying text. If one accepts this argument, the assembly should be deemed a substantial process or operation. Accordingly, the assembled product originates in the Community. Anti-dumping duties, however, cannot be assessed on products originating in the Community. *See* Le Lièvre & Houben, *supra* note 19, at 442-43.

216. More than six international agreements and autonomous measures outline special rules for determining whether imports should benefit from any of various preferential arrangements maintained by the Community with individual states. Because the Community generally does not enter into these agreements with Japan, preferential rules of origin receive no further consideration in this Note. For all other purposes, including those discussed in this Note, Council Regulation 802/68 (rules of origin regulation), 1968 O.J. SPEC. ED. (L 148) 165, sets forth a general scheme. EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY § 4.43 (1986).

217. *See supra* notes 27-61 and accompanying text.

218. *See supra* notes 156-215 and accompanying text.

219. *See supra* notes 62-127 and accompanying text.

220. *See infra* notes 248-74 and accompanying text.

221. Stephen O. Spinks, EEC Rules of Origin 1 (1990 Session, Brussels Seminar on the Law and Institutions of the European Communities, July 3-20, 1990) (unpublished paper, on file with the *Vanderbilt Journal of Transnational Law*); Edwin Vermulst & Paul Waer, *European Community Rules of Origin as Commercial Policy Instruments?*, J. WORLD TRADE, June 1990, at 55, 58.

222. *See supra* notes 188-91 and accompanying text.

that confer a specific national origin on the goods in question.[223]

Council Regulation 802/68[224] contains the current Community rules of origin. This regulation, which closely resembles the Kyoto Convention of the General Agreement on Tariffs and Trade,[225] provides that goods wholly obtained or produced in one state shall be considered as originating there.[226] Goods wholly produced in a state include: (i) mineral products extracted from the soil, the territorial waters, or the sea-bed of that state; (ii) vegetable products harvested or gathered in that state; (iii) live animals born and raised in that state; (iv) products obtained from live animals in that state; (v) products obtained from hunting or fishing conducted in that state; (vi) products obtained by maritime fishing and other products taken from the sea by a vessel of that state; (vii) products obtained aboard a factory ship of that state solely from products of the kind listed in (vi); (viii) products extracted from maritime soil or subsoil outside that state's territorial waters provided that the state has sole rights to work that soil or subsoil; (ix) scrap and waste from manufacturing and processing operations, and used articles, collected in that state and fit only for the recovery of raw materials; and (x) goods produced in that state solely from the products referred to in paragraphs (i) through (ix) above.[227]

Article 5 of the rules of origin regulation addresses the more problematic origin determination for products produced in two or more states.[228] Article 5 defines the origin state of a product produced in two or more states as the state in which the last substantial process or operation[229] is

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223. *See* Spinks, *supra* note 221, at 2.

224. Council Regulation 802/68, 168 O.J. SPEC. ED. (L 148) 165.

225. In 1975, the Community accepted the Kyoto Convention of the General Agreement on Tariffs and Trade, which aims at a low level of harmonization of national rules of origin. *See* COMPENDIUM OF COMMUNITY CUSTOMS LEGISLATION, ch. X.C. (1989); MCGOVERN, *supra* note 216, § 1.22.

226. Council Regulation 802/68, art. 4(1), 1968 O.J. SPEC. ED. (L 148) at 166.

227. Council Regulation 802/68, art. 4(2), 1968 O.J. SPEC. ED. (L 148) at 166. *See also* MCGOVERN, *supra* note 216, § 4.411 (definition of goods wholly produced in a state).

228. Council Regulation 802/68, art. 5, 1968 O.J. SPEC. ED. (L 148) at 166.

229. For the meaning of "last substantial process or operation," see Case 49/76 Gesellschaft für Überseehandel mbH v. Handelskammer Hamburg, 1977 E.C.R. 41, 53 ("substantial" requires a significant qualitative change in properties); Case 34/78, Yoshida Nederland B.V. v. Kamer van Koophandel en Fabrieken voor Friesland, 1979 E.C.R. 115, 136 (difference must be "real and objective"); Case 114/78, Yoshida GmbH v. Industrie- und Handelskammer Kassel, 1979 E.C.R. 151, 168 (difference must be based on the "specific material qualities" of the raw materials or components and the processed product); Case 93/83, Zentralgenossenschaft des Fleischergewerbes e.G. v.

performed.[230] Accessories, spare parts, and tools delivered as standard equipment with any equipment, machine, apparatus, or vehicle have the same origin as that equipment, machine, apparatus, or vehicle.[231] A process solely designed to circumvent the rules applicable to goods of a particular state in no case shall confer origin on the goods thus produced.[232] Generally, the importer bears the burden of proving the origin of goods.[233]

When the Commission finds the rules of origin regulation unclear in a particular case, it may issue product-specific rules of origin to clarify the regulation's substantive rules.[234] To date, these product-specific rules of origin have favored the use of a technical test, as opposed to a value-added test.[235] Under a technical test, a product originates where some

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Hauptzollamt Bochum, 1984 E.C.R. 1095, 1107 (boning, trimming, and cutting of meat insufficient to effect a substantial change).

230. The last substantial process or operation must be economically justified, be carried out in an undertaking equipped for the purpose, and result in the manufacture of a new product or represent an important stage of manufacture. *See* Council Regulation 802/68, art. 5, 1968 O.J. SPEC. ED. (L 148) at 166.

231. *Id.* art. 7, 168 O.J. SPEC. ED. (L 148) at 166.

232. *Id.*

233. The person claiming the entitlement to benefits bears the responsibility of demonstrating the entitlement. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.10, at 33, 34 & n.1. The Commission normally expects the importer to produce a certificate of origin endorsed by the authorities in the exporting state. LASOK & CAIRNS, *supra* note 27, at 179. The rules-of-origin regulation lays down rules for the form to be used in certificate of origin. MCGOVERN, *supra* note 216, § 4.43.

234. *See* Vermulst & Waer, *supra* note 221, at 64.

235. *See id.* at 65; Commission Regulation 37/70, 1970 O.J. SPEC. ED. (L 7) 3, 3 (manufacturing process confers origin on "essential" spare parts for products previously dispatched); Commission Regulation 315/71, 1971 O.J. SPEC. ED. (L 36) 67, 67 (manufacturing process confers origin on vermouth); Commission Regulation 964/71, 1971 O.J. SPEC. ED. (L 104) 253, 253-54 (place of fattening and slaughtering of animal confers origin on chilled or frozen meat); Commission Regulation 1039/71, 1971 O.J. SPEC. ED. (L 113) 274, 275 (manufacturing process confers origin on woven textiles); Commission Regulation 1480/77, 1977 O.J. (L 164) 16, 17-18 (manufacturing process confers origin on leather apparel and footwear); Commission Regulation 1836/78, 1978 O.J. (L 210) 49, 49 (manufacturing process confers origin on ballbearings); Commission Regulation 288/89, 1989 O.J. (L 33) 23 (manufacturing process confers origin on integrated circuits). *But see* Commission Regulation 2632/70, 1970 O.J. SPEC. ED. (L 279) 911, 912 (45% value-added test employed to determine origin of radios and television receivers); Commission Regulation 861/71, 1971 O.J. SPEC. ED. (L 95) 243, 244 (45% value-added test employed to determine origin of tape recorders). The Commission allegedly is considering a similar value-added test for videocassette recorders. *See* COLCHESTER & BUCHAN, *supra* note 4, at 202.

specific working or processing operation occurs.[236] Many more product-specific rules of origin apparently will be adopted in the future.[237]

Japan has expressed two concerns about the Community's rules of origin. First, Japan fears that the Community may bring more products produced outside the Community within existing trade regulatory measures by setting more stringent origin criteria.[238] Several recent decisions fuel these fears. In a Commission Decision terminating the anti-dumping proceeding concerning imports of electronic typewriters originating in Taiwan,[239] the Commission found that the assembly of typewriters in Taiwan by a Japanese exporter did not confer origin because "the operation carried out in Taiwan [was] not sufficient to confer Taiwanese origin."[240] In a Commission Decision terminating the anti-dumping proceeding concerning imports of certain ballbearings originating in Thailand,[241] the Commission found that ballbearings shipped to the Community from Thailand retained Japanese origin because the Thailand operations were insufficient to confer origin.[242] Increasingly, the Commission deems products assembled outside of Japan to be of Japanese origin and de facto subject to trade restrictions.[243] Japanese officials also note that some product-specific rules of origin encourage shifting of manufacturing facilities toward Europe.[244] Japan's second concern is that if the Community tightens local content rules further, products al-

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236. *See generally* COLCHESTER & BUCHAN, *supra* note 4, at 202-03 (discusing the technical test, although not labelling it as such); 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.09 (discusing three methods for determining the origin of goods, two of which are types of technical tests). A value-added test, by comparison, utilizes a value-added percentage requirement to determine origin. 2 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 27, para. 12.09, at 32, 33 n.17.

237. Specific regulations concerning plain paper copiers and semiconductors, in particular, are expected in the near future. *See* CHANCE, *supra* note 6, ¶713(1).

238. *See, e.g.*, CHANCE, *supra* note 6, ¶713(2) (Community set more stringent criteria for origin of products exported to the Community, to bring more products within existing measures). Existing regulatory measures include anti-dumping duties, quantitative restrictions, or voluntary export restraints. *Id.*

239. 1986 O.J. (L 140) 52.

240. *Id.*

241. 1985 O.J. (L 59) 30.

242. *Id.*

243. For example, less than two weeks after the termination of the electric typewriters case, the Commission sent a memorandum to all member states advising them to apply the Japanese anti-dumping duty to Brother's typewriters from Taiwan. Vermulst & Waer, *supra* note 221, at 76 n.108.

244. *See id.* at 66. Japanese manufacturers, like those in Europe and the United States, recently have shifted some processing operations to allow labor-intensive assembly and testing operations to be carried out in "cheap labour" states. *Id.* at 66 n.63.

ready produced by Japanese companies in Europe will lose their rights to free circulation.[245] Final determinations about what will constitute a European-produced product, especially in industries such as the automobile industry,[246] threaten to distort severely the foreign investment plane, to which Japan has already committed tremendous resources.[247]

VI. VOLUNTARY EXPORT RESTRAINTS

Voluntary export restraints (VERs), or agreements to limit exports of a certain product from a third state to the Community, have become important international trade instruments.[248] VERs take a number of forms, including binding agreements, nonbinding gentlemen's agreements, unilateral undertakings, or forecasts of expected exports from one state to another.[249] They usually involve specific quantitative limits on exports, but may also include minimum or target export prices.[250]

The first VER negotiated between the Community and Japan targeted videocassette recorder (VCR) exports from Japan to the Community.[251] Although the VER officially lapsed on January 1, 1986, its success set a precedent for the future.[252] Some members of the Commis-

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245. *See generally* CHANCE, *supra* note 6, ¶713(3) (discussing origin of products rules for goods assembled within the Community).

246. *See supra* notes 128-55 and accompanying text. The Commission is expected to settle eventually for an 80% local content requirement in the automobile industry, but this percentage will be only a vague guideline. *Local Discontent*, ECONOMIST, Oct. 24, 1987, at 96.

247. *See id.*

248. *See* Le Lièvre & Houben, *supra* note 19, at 451.

249. VERs between the Community and Japan usually involve unilateral commitments by Japanese producers to limit export quantities. *See id.*

250. *See id.*

251. The VCR VER took effect in February 1983. Numerous VERs between Japan and the governments of member states have existed for years, particularly in the automobile industry. *See* Brian Hindley, *EC Imports of VCRs from Japan: A Costly Precedent*, J. WORLD TRADE L., March: April 1986, at 168, n.1. The Community also has negotiated VERs with a number of other states. For example, agreements covering textiles, iron, steel, and agricultural products exist between the Community and Eastern European states, including Romania, Poland, Hungary, Czechoslovakia, and Bulgaria. Marc Maresceau, *A General Survey of the Current Legal Framework of Trade Relations Between the European Community and Eastern Europe*, *in* THE POLITICAL AND LEGAL FRAMEWORK OF TRADE RELATIONS BETWEEN THE EUROPEAN COMMUNITY AND EASTERN EUROPE 3, 10 (Marc Maresceau ed., 1989).

252. In late 1985, the Community announced its intention to increase the tariff on VCRs from 8% to 14%, arguably as a substitute for the lapsed VER. Furthermore, the *Financial Times* reported that Japan's Ministry of International Trade and Industry (MITI) will continue to restrain VCR sales to the Community. Hindley, *supra* note

sion even assert that the Community can solve all trade problems with Japan by extensively using VERs.[253]

Despite their increasing popularity, however, VERs arguably violate the rules of the GATT.[254] The quantitative import restrictions usually found in VERs conflict with article XI of the GATT,[255] which outlaws all "prohibitions or restrictions [relating to imports or exports] other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures."[256] VERs also may violate GATT article I, which mandates equal treatment for all contracting states, by granting some contracting states unlimited access to the Community market while limiting Japanese access.[257] Finally, VERs appear to violate the principle of nondiscrimination set forth in GATT article XIII(1), which prohibits any contracting state from prohibiting or restricting importation of any product originating in the territory of any other contracting state.[258] Nonetheless, the European Court of Justice seems to consider the Commission's resort to discriminatory VERs as justified by the principle of proportionality.[259]

VERs may also infringe on Community competition rules.[260] EEC Treaty article 85(1) prohibits agreements and concerted practices that prevent, restrict, or distort competition within the Common Market, particularly those that limit or control production or marketing.[261] Japanese government and the involvement of Community authorities, however,

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251, at 168.

253. *See* Hindley, *supra note* 251, at 169.

254. Le Lièvre & Houben, *supra* note 19, at 451-52. *See infra* notes 275-320 and accompanying text for a more complete discussion of the interaction between the GATT and Community legislation.

255. Le Lièvre & Houben, *supra* note 19, at 452.

256. The General Agreement on Tariffs and Trade (GATT), art. XI, *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT 251, 267 (Meinhard Hilf et al. eds., 1986).

257. *See* GATT, *supra* note 256, art. I, *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 252-53; Lochmann, *supra* note 155, at 117; *infra* notes 296-97 and accompanying text. This argument, however, is tenuous. A narrow interpretation of article I would indicate no violation.

258. *See* GATT, *supra* note 256, art. XIII(1), *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 271; Le Lièvre & Houben, *supra* note 19, at 452.

259. *See* Ernst-Ulrich Petersmann, *The EEC as a GATT Member—Legal Conflicts Between GATT Law and European Community Law, in* 4 THE EUROPEAN COMMUNITY AND GATT 23, 64 (Meinhard Hilf et al. eds., 1986). The European Court of Justice upheld discriminatory VERs in at least two cases. *See* Case 52/81, Offene Handelsgesell Schaft in Firma Werner Faust v. Commission, 1982 E.C.R. 3745; Case 245/81, Edeka Zentrale AG v. Federal Republic of Germany, 1982 E.C.R. 2745.

260. Le Lièvre & Houben, *supra* note 19, at 452.

261. *Id.*; *see* EEC Treaty, *supra* note 1, art. 85(1)(b), 298 U.N.T.S. at 47-48.

significantly affects applicability of article 85(1) to VERs. VERs taken in pursuit of trade agreements between the Community and Japan, or imposed on Japanese enterprises by Japanese authorities, lie outside the scope of article 85.[262] A government's mere acquiescence and support, however, do not prevent application of article 85(1) absent some governmental requirement or order.[263] Japanese companies, therefore, have an interest in working with the Japanese government via MITI[264] to structure VERs as arrangements imposed by the Japanese governments on the companies.[265] Furthermore, although article 85(3) authorizes the Commission to grant an exemption for certain prohibited activities,[266] the Commission can act only if given formal notification of an agreement.[267] Notification also prevents the imposition of fines for article 85(1) violations with respect to acts that take place after notification, but before a decision is rendered on the exemption application.[268]

Economists have criticized VERs because of their costliness.[269] They argue that VERs only serve to increase consumer prices. To support their position, they cite the fact that VCR retail prices rose an estimated fifteen percent in the Community between March 1983 and March 1984,[270] following the imposition of the videocassette recorder VER.[271] A

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262. *See* Commission Decision 74/634 on Franco-Japanese Ballbearings Agreement, 1974 O.J. (L 343) 19, 23; Le Lièvre & Houben, *supra* note 19, at 453.

263. *See* Commission Decision 85/206 on Aluminum Imports from Eastern Europe, 1985 O.J. (L 92) 1, 37-39; Le Lièvre & Houben, *supra* note 19, at 453.

264. *See, e.g., supra* note 251.

265. Le Lièvre & Houben, *supra* note 19, at 454.

266. An exception may be granted for any agreement or class of agreements between enterprises, any decision or class of decisions by associations of enterprises, or any concerted practice or class of concerted practices, that contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress while reserving for consumers an equitable fair share of the resulting profits; and that does not impose on the enterprises concerned restrictions that are not indispensable to the attainment of these objectives or afford such enterprises the possibility of eliminating competition in respect of a substantial part of the products in question. *See* EEC Treaty, *supra* note 1, art. 85(3), 298 U.N.T.S. at 48. Arguably, VERs "improve production and promote technical and economic progress in the Community by strengthening the position of Community industries," and by making Community consumers less dependent on products of non-Community origin. Le Lièvre & Houben, *supra* note 19, at 454.

267. *See* Le Lièvre & Houben, *supra* note 19, at 453.

268. Council Regulation 17, 1952-1967 [1962] O.J. SPEC. ED. 87, 92. This immunity does not apply if the Commission notifies, after a preliminary investigation, the undertaking concerned that, in its opinion, article 85(1) applies and article 85(3) does not. *Id.* at 88-89.

269. *See, e.g.*, Hindley, *supra* note 251.

270. *See id.* at 177; *supra* note 251 and accompanying text.

United States-Japan automobile VER instituted in May 1981[272] allegedly had similar effects, raising new automobile prices by an estimated four hundred dollars per automobile and pricing two million United States residents out of the market.[273]

Because these economic costs fall almost exclusively on consumers in the importing state, and because a VER allows an exporter to capture fully the scarcity rent,[274] VERs may be more attractive to the Japanese than other trade restrictions. Therefore, one should not be surprised if Japan increasingly proposes the use of VERs to correct trade imbalances.

VII. THE GENERAL AGREEMENT ON TARIFFS AND TRADE

A. *The GATT as a Constraint on Community Actions*

The Community's competition law does not exist in a vacuum, but rather coexists with the Community's other international trade policies.[275] EEC Treaty article 234 provides that rights and obligations arising from agreements concluded between one or more member states and one or more third states before the effective date of the EEC Treaty are not affected by the Treaty.[276] Article 229 charges the Commission specifically with ensuring maintenance of the GATT.[277] Although the Community itself has never acceded formally to the GATT,[278] it has assumed member states' rights in areas traditionally within GATT's purview,[279] thus suggesting that the Community cannot simply disregard GATT ob-

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271. *Id.*

272. *See* Lochmann, *supra* note 155, at 65.

273. *Id.* at 112.

274. *Id.* at 113. This situation arising with VERs differs from the one that arises with a tariff or an import quota, both of which result in some capture of the scarcity rent by the importing state. *Id.*

275. *See* D.G. GOYDER, EEC COMPETITION LAW 392 (1988).

276. EEC Treaty, *supra* note 1, art. 234, 298 U.N.T.S. at 91.

277. *Id.* The GATT, negotiated after World War II to promote world trade and investment, currently has over 100 adherents. *See* MCGOVERN, *supra* note 216, § 1.11, app. I at 536.

278. The Community never has acceded formally to the powers of member states in this arena. *See* 1 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 1, para. 4.12.

279. All 12 member states were GATT members when they concluded or acceded to the EEC Treaty. They have maintained their legal status as individual GATT contracting parties. Since the 1960-61 Dillon Round of multilateral trade negotiations, the Commission has participated like a GATT contracting party *sui generis* in all GATT bodies except the Budget Committee. The Commission also exercises all rights and obligations of member states in its own right on behalf of the Community. *See* Petersmann, *supra* note 259, at 32-36.

ligations.[280] Furthermore, the Community has stated that it fully intends to meet GATT obligations.[281] Theoretically, this intention should pose no problem because GATT law and Community law both pursue non-discriminatory liberal trade and undistorted market competition objectives through comprehensive legal principles, rules, and procedures.[282]

GATT article I, the Most Favored Nation (MFN) rule, requires that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[283] Under this provision, "a tariff reduction granted to one nation has to be granted to all other MFN countires as well."[284]

Article XXIV of the GATT, however, allows states in certain regional trading blocs to grant preferential treatment to each other, exempting them from MFN obligations under certain conditions.[285] Article XXIV(5) provides that GATT provisions do not prohibit formation of a customs union, provided that duties and other regulations of commerce imposed upon creation of the union in respect of trade with contracting parties that are not parties to the union do not exceed or appear more restrictive than applicable duties and regulations prior to the formation of the union.[286] The Community cites this provision as justification for existing Community treaties with third states that create some preference

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280. *See* Le Lièvre & Houben, *supra* note 19, at 430; Pierre Pescatore, *Introduction* to THE EUROPEAN COMMUNITY AND GATT at xvi (Meinhard Hilf et al. eds., 1986).

281. CHANCE, *supra* note 6, ¶711. The European Court of Justice held, however, that the relevant GATT rule neither bound nor conferred any directly enforceable rights upon the importer. Joined Cases 21 to 24/72, International Fruit Co. NV, Kooy Rotterdam NV, Velleman en tas NV and Jan Van den Brink's Im- en Exporthandel NV v. Produktschap voor Groenten en Fruit, 1972 E.C.R. 1219, 1228; LASOK & CAIRNS, *supra* note 27, at 233.

282. *See* Petersmann, *supra* note 259, at 53.

283. GATT, *supra* note 256, art I(1), *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 252. This obligation covers:

> 1. customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports;
> 2. the method of levying such duties and charges;
> 3. all rules and formalities in connection with importation and exportation; and
> 4. internal taxes and rules affecting internal sale, purchase, and transport, etc.

1 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 1, para. 4.16.

284. WILLIAMS ET AL., *supra* note 2, at 176.

285. *Id.* at 177.

286. GATT, *supra* note 256, art. XXIV(5), *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 292.

over standard MFN treatment.[287] Because only the European Coal and Steel Community[288] has been accepted as satisfying the article XXIV test,[289] Japan may challenge Community preferential arrangements in the future.[290]

Article XI of the GATT provides that "no prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product" from any other contracting party's territory.[291] Member state quotas on products such as automobiles[292] violate this article.[293] VERs[294] represent one possible way of circumventing this article.[295]

Some wide-ranging exceptions to this prohibition on quantitative restrictions, however, can be found in the GATT.[296] Article XI contains an exception for agricultural products.[297] Article XII permits a state to use quotas and other restraints to safeguard its external financial position and its balance of payments.[298] Article XXI creates an exception for actions taken by a contracting party to protect essential national security

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287. A majority of the Community's trading partners enjoy some measure of preference. *See* 1 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 1, para. 4.16.

288. *See supra* note 1.

289. *See* 1 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 1, para. 4.16.

290. Japan became a party to the GATT in 1955. *See* Petersmann, *supra* note 259, at 44. Dispute resolution under the GATT involves the utilization of panels, which make findings of fact and law and report to the GATT Council of Representatives. Defaulting members can be sanctioned, although this action is "virtually unknown" and compliance usually occurs through the application of political pressure. *See* 1 LAW OF THE EUROPEAN COMMUNITIES, *supra* note 1, para. 4.12. To date, no GATT member has pursued this type of claim against the Community to a final determination by a panel. *Id.* para. 4.16.

291. GATT, *supra* note 256, art. XI, *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 267.

292. *See supra* notes 129-33 and accompanying text.

293. WILLIAMS ET AL., *supra* note 2, at 176. Other GATT contracting states, including the United States, have violated this article as well. Ongoing GATT negotiations attempt to reduce infractions. *Id.*

294. *See supra* notes 248-74 and accompanying text.

295. Because the Community never formally enacts a quota, VERs are technically voluntary and do not violate article XI of the GATT. WILLIAMS ET AL., *supra* note 2, at 176-77. *But see* notes 254-59 and accompanying text.

296. *See* WYATT & DASHWOOD, *supra* note 1, at 19.

297. GATT, *supra* note 256, art. XI(c), *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 267-68.

298. *Id.* art. XII, *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 268-71.

interests.[299] Article XIX, an escape clause, allows states to utilize temporary import restraints to protect domestic producers from a threat of serious injury from like or directly competitive products.[300] Five conditions, however, must be met before this escape clause can be invoked: (i) an unusual increase in the quantity of imports of a specific product must occur; (ii) the injured domestic industry must produce like kind or directly competitive products; (iii) the injury, whether actual or threatened, must be serious; (iv) the increase in imports must result from unforeseen developments; and (v) the increase in imports must result from GATT obligations incurred and cause or threaten the injury.[301] Other provisions of the GATT restrict the Community's ability to impose internal taxation at a higher rate on imports than on a like domestic product[302] and to charge fees in excess of cost for customs services[303] on the basis that these measures effectively function as tariffs.[304]

Because the GATT imposes these restrictions on Community action, Japanese officials can be expected increasingly to invoke its provisions to invalidate Community retaliatory measures aimed at them.[305] In short, the Japan that was once reluctant to play the GATT card[306] now views it as a good defense to use when singled out for particularly tough treat-

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299. *Id.* art. XXI, *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 288-89.

300. *Id.* art. XIX, *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 286-87.

301. *See* MCGOVERN, *supra* note 216, § 10.221 (discussing the United States use of the escape clause).

302. *See* GATT, *supra* note 256, art. III, *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 256-57. The Community has used article III to challenge Japanese tax policies. In November 1986, the Commission submitted a complaint to the GATT Secretariat alleging that the Japanese system of taxation resulted in the imposition of disproportionate taxes on imported alcohol. Le Lièvre & Houben, *supra* note 19, at 431-32. A GATT panel concluded that whiskies, brandies, other distilled spirits, liqueurs, and sparkling wines imported into Japan were in fact subject to discriminatory taxes contrary to article III. Gillian White, *GATT Law and Community Law: Some Comparisons Illustrated by Recent Trade Disputes, in* CURRENT ISSUES IN EUROPEAN AND INTERNATIONAL LAW 85, 92 (Robin White & Bernard Smythe eds., 1990). The panel recommended that Japan bring its taxes into compliance with GATT obligations. *Id.* At present, full implementation of that recommendation remains incomplete. *Id.*

303. *See* GATT, *supra* note 256, art. VIII, *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 264.

304. *See* WYATT & DASHWOOD, *supra* note 1, at 19.

305. COLCHESTER & BUCHAN, *supra* note 4, at 198.

306. This reluctance developed because of Japan's own questionable trade practices. *Id.*

ment within the Community.[307]

B. *The GATT as an EC Tool*

The Community selectively focuses on GATT provisions to justify its bilateral trade activities. In addition to the exceptions cited previously,[308] the Community cites article XXIII of the GATT to argue that the trade imbalance with Japan[309] constitutes an infringement of GATT rules entitling the Community to impose retaliatory measures.[310] Article XXIII(l) of the GATT provides that a contracting state may object if it perceives that any benefit accruing to it directly or indirectly under the GATT is being nullified or impaired, or the attainment of any objective of the GATT is impeded, as a result of: (1) another contracting party's failure to carry out its obligations; (2) another contracting party's application of any measure; or (3) any other situation.[311] If the offending party effects no satisfactory adjustment within a reasonable time, the matter may be referred to the GATT contracting parties, who are empowered to authorize the objecting state to suspend the application of concessions or obligations to the offending party, as appropriate under the circumstances.[312] The Community argues that this GATT "balance of benefits" provision justifies any retaliatory measures directed at Japan.[313]

Japanese officials have expressed their disagreement with the balance of benefits concept.[314] In their opinion, the text of article XXIII does not support the Community's interpretation.[315] Because the Community's theory has not yet advanced beyond the development stage, Japan's non-

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307. *Id.*

308. *See supra* notes 210, 285-90, 296-304 and accompanying texts.

309. *See supra* note 17.

310. At an April 10, 1987 meeting, the Council's Special Committee for Trade Negotiations raised this issue by recommending that "the Commission should explore all possible actions available to [the Community], including general examination under GATT Article XXIII, of existing trade imbalances with Japan." *See* Le Lièvre & Houben, *supra* note 19, at 430-31 (citation omitted).

311. GATT, *supra* note 256, art. XXIII(1), *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 289-90.

312. GATT, *supra* note 256, art. XXIII(2), *reprinted in* 4 THE EUROPEAN COMMUNITY AND GATT at 290; *see* Le Lièvre & Houben, *supra* note 19, at 431.

313. *See* Le Lièvre & Houben, *supra* note 19, at 430-31.

314. At a March 23, 1987 press conference in Brussels, Yoji Sugiyama, the Minister of the Mission of Japan to the European Communities, expressed this disagreement and said that this concept would lead to a managed trading system. *Id.* at 431.

315. *Id.*

recognition position remains the best means of attack.[316]

C. *The Decline of GATT*

Some legal scholars express concern that European integration and the Community's rise forebodes GATT's decline.[317] The tension between the recognition of the transfer of member states' rights and duties under the GATT to the Community and the Community's reluctance to be bound directly by many GATT provisions weakens the GATT system.[318] Additionally, the December 1990 collapse of the Uruguay Round GATT talks suggests a struggling system.[319] Nevertheless, the GATT remains a factor likely to keep in check European retaliation against the Japanese.[320]

VIII. CONCLUSION

Japan is well-positioned to take advantage of the economic opportunities presented by the 1992 integration of the European Community. Since rising from World War II devastation, the Japanese have demonstrated a determination to endure any sacrifice necessary to obtain economic supremacy, both at home and abroad.[321] Throughout modern history, no state has undertaken more foreign investment than Japan.[322] No state has carried out investments with the same strategic mandate that motivates Japan.[323] To think that the European measures designed to stop the Japanese from taking advantage of Europe 1992, the hottest selling investment ticket today, will succeed is overly optimistic.

If Japanese officials play their cards right, they can use the changing European investment platform as a springboard to future domination of the world economy. Both the CCT and the loosening of national quantitative restrictions in Europe will allow Japanese companies to improve

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316. *Id.* at 429.

317. A former Deputy Director-General of the GATT described the Community as "a threat to the GATT system." The Commission's former Director-General for Agriculture similarly stated "GATT is already dead and the bilateralism is king." Petersmann, *supra* note 259, at 41 & n.50 (citation omitted).

318. *See* Pescatore, *supra* note 280, at xvii.

319. *See* Philip Revzin, *EC Leaders Adopt 2-Year Plan to Forge Political, Monetary Unity in Europe*, WALL ST. J., Dec. 17, 1990, at A8.

320. Professor Julian L. Lonbay, Professor of Comparative Law, University of Birmingham, England, *Opportunities for U.S. Lawyers in Europe*, Address at Vanderbilt University School of Law (Jan. 31, 1991).

321. FRANTZ & COLLINS, *supra* note 25, at 20.

322. *Id.* at 7.

323. *Id.*

trade terms with currently restricted markets. Although the Community is likely to continue experimenting with rules of origin legislation and anti-dumping proceedings as a means of regulating Japanese activities, its efforts, as presently designed, are likely to prove unsuccessful.

To make the most of what 1992 has to offer, Japan likely will continue to challenge any legislation that clearly targets the Japanese as violative of the GATT. To the extent that Japan is unable to invalidate protective legislation, Japanese officials and companies likely will negotiate VERs with Community officials because VERs allow the Japanese to shift some of the trade regulation costs back to the Community. The favorable climate that currently exists for VERs in Europe will make this task easier.

This Note does not imply that European attempts to inhibit Japanese investment in the Community are unwarranted. It only suggests that a few semideveloped, semilegal, semireasoned measures and the development of anti-Japanese sentiment are not enough to keep Europe in the hands of Europeans as a "Europe without frontiers" becomes reality. Japanese officials are aware that the time has come for Japan to show the world its flexibility, and they are prepared to do so.

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