

Italian Law 639. Although the opinion of the Court did not accept the ECC Commission's argument that the flat-rate refund was violative *per se*, which argument had been accepted and recommended by the Advocate General at the hearing of the case, the Court did hold as follows:

"Since the Republic of Italy freely chose a flat-rate method, it must prove that in all cases this method remains within the limits of Article 96 [Countervailing Duties provision of the EEC Treaty]."

Thus, the Italian Government was ordered to furnish the necessary information, supported by figures, regarding the products in question.

A second approach to the position that the imposition of countervailing duties in this instance would not be inconsistent with the GATT exception would be to argue that the taxes forming the basis of the refunds under Italian Laws 570 and 639 are not, at least in the greater part, the type of "indirect taxes" envisioned by the GATT exception. These taxes, it will be recalled, include custom duties on the importation of zinc into Italy, transaction (IGE) taxes on product transfers at every stage of production beginning with the raw materials, and transaction taxes on the furnishing of heat, light and power which can be directly traced to the manufacturing process. It can readily be seen that most of these taxes cannot be traced any more directly into the finished product than can a "direct" tax such as an income tax. It can be said that such taxes find their way into the cost of the end product by virtue of being part of the total cost of manufacturing the goods finally produced, but the same can be said of an income tax which is concededly a "direct tax." The situation envisioned by the GATT exception is that where a transaction or sales tax is levied on the transfer of a *finished* product from one entity to another before being exported and that tax is refunded or where a transfer of a finished product is made f.o.b. the exporting country and all such export sales are exempted from the exporting country's normally imposed sales tax. Such a position is given considerable support by the language of the GATT exception which provides:

"No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of *such product* from duties or taxes borne by the *like product* when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes." Emphasis added.)

The terms "such product" and "like product" are meaningful only as a reference to the phrase "product . . . imported into the territory of any other contracting party" at the beginning of the sentence. The taxes imposed upon raw materials or semi-finished stages of production, to say nothing of taxes on heat, power and light, can hardly be said to be imposed on a product "like" the product which arrives in the importing country. In essence, not every tax that is "indirect" in the sense that it is imposed upon some form of property as opposed to being imposed upon an economic entity, is "borne" directly by the finished product. It would be formalistic indeed to except from the imposition of countervailing duties, the exemption or refund of certain taxes, simply because of their denomination, which can be no more directly traced into a finished product than an income tax. As we understand the facts, the type of taxes which formed the basis for the refund under Italian Laws 570 and 639 are too remote to be traced directly into the products being imported into the United States.

If relief cannot be obtained from the Secretary of the Treasury, or his delegate, we would suggest asking him to request the Attorney General's Opinion as to the applicability of Section 303. Section 306 of Title 5 of the United States Code requires the Department of Justice to render all legal opinions requested by certain specified persons in the Executive Branch of the government, including the head of the Treasury Department. Section 304 of Title 5 of the United States Code authorizes the head of any Executive Department to require the opinion of the Attorney General on any questions of law arising in the administration of his Department. Of course, it is within the discretion of the Secretary of the Treasury whether he makes such a request of the Attorney General. Consequently, it is difficult to assess the probability of his so doing in the present situation. The Attorney General has on three prior occasions given opinions relating to countervailing duties and, as mentioned earlier in this opinion, has indicated both that the application of such duties is mandatory and not discretionary and that Section 303 has a "very broad" application. See 38 Op. Atty. Gen. 489 (1936) : 39 Op. Atty. Gen. 261 (1939) : 39 Op. Atty. Gen. 282 (1939).